

ARTICLES

HIERARCHY AND LEGAL PRACTICE IN PROVISIONS OF
PROHIBITING THE ABUSE OF COMMERCIAL RIGHTS*Guan Xinrong*

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HIERARCHY AND LEGAL PRACTICE IN PROVISIONS OF PROHIBITING THE ABUSE OF COMMERCIAL RIGHTS

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Under China's unique legislative system of civil and commercial integration, articles 83 and 132 of the Civil Code, together with article 21 of the Company Law, have formed a hierarchical structure of provisions of prohibiting the abuse of commercial rights (PPACRS), which has led to challenges to the coordinated application. Furthermore, the methodology for forbidding the escape into general provisions has remained largely at a theoretical level, under which general provisions can only be applied in the absence of specific rules or in case of rule conflicts. The issue of the order of application of general provisions embedded in civil and commercial relations has not been fully resolved. First, this paper reviews the hierarchical legal structure of the PPACRS. Second, it summarizes three models in judicial practice, namely the priority application of the Company Law, the coordinated application of tort law, and the bottom-line application of articles 83 and 132, and discusses the main issues involved. Third, it explores the development of the PPACRS from judicial application to legislative design and proposes the PPACRS should be introduced in fundamental commercial law. Within the context of building an independent discourse power in commercial law, a hierarchy of PPACRS application will be formed in order. This is intended to reduce the opportunities for mistakes such as escaping into the general provisions of the Civil Code, and avoid improperly handling commercial cases with civil law thinking, or conversely applying commercial law thinking to civil cases.

I. INTRODUCTION

The Civil Code of the People's Republic of China (hereinafter referred to as the Civil Code) adopts a unique integrated legislative system for civil and commercial law. It achieves a reasonable configuration of three types of civil and commercial relationship norms: alternative, supplementary, and conflicting. In terms of abuse of rights provisions in private law, it stipulates the principle of prohibiting the abuse of private rights

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(article 132) and also addresses the issue of abuse of rights by a capital contributor of a for-profit legal person (article 83). Additionally, the *Company Law of the People's Republic of China* (hereinafter referred to as the Company Law) in 2023 splits the former single provision into three parts (articles 21, 22, and 23), expanding the scope of subjects who may abuse rights, thus forming a unique Chinese hierarchical legal structure governing the abuse of commercial rights from general to specific, which also brings challenges in the coordinated application. Moreover, for a long time, scholarly discussion of the methodology for forbidding the escape into general provisions has remained largely at the theoretical level, under which general provisions can only be applied in absence of a specific rule or in case of rule conflicts. The issue of the order of application of general provisions embedded in civil and commercial relations has not been fully resolved. This paper proceeds in four parts: (1) the theoretical justifications for the hierarchical structure of the PPACRS; (2) an examination of judicial practice; (3) proposals for improving the PPACRS; and (4) a conclusion.

II. THE THEORETICAL JUSTIFICATIONS AND LEGISLATIVE INTERPRETATION OF PPACRS

The abuse of rights as a legal concept is well known in continental law, which dates back to ancient Roman law.¹ The principle of prohibiting the abuse of rights requires civil subjects to exercise their rights properly and not to harm the interests of others or the public interest. Civil rights, as private rights, are conceptually defined in contrast to obligations under private law.

A. Theoretical Justifications

In the course of social transformation in modern China, the exercise of rights has come to affect not only the personal interests of the right-holders but also the interests of creditors, third parties, and society as a whole. This broader impact forms the ideological foundation of the principle of

¹ Zhana Koleva, *Bulgarian Perspectives on the Abuse of Rights in Lights of the Directive 2011/7/EU on Combating Late Payment in Commercial Transactions*, 3 *Juridical Tribune* 599, 600 (2019).

prohibiting the abuse of rights. In this process, the prohibition of the abuse of rights evolved from an abstract concept into concrete judicial rules. Given the distinction between civil law and commercial law, the principle of prohibiting the abuse of rights encompasses both the abuse of civil rights and the abuse of commercial rights. The former applies to civil activities, whereas the latter applies to commercial activities. An article further argues that the principle can be divided into three types: the abuse of individual rights in violation of the principle of good faith, the abuse of institutional rights in violation of their normative purposes, and the abuse of institutional rights in violation of fairness and justice.² Moreover, ‘abuse of rights’ has become an official legal term in legislative instruments such as the Civil Code and the Company Law. Article 3 of the *Interpretation by the Supreme People’s Court of Several Issues Concerning the Application of Book One General Provisions of the Civil Code of the People’s Republic of China* further sets out factors for identifying an abuse of civil rights, including the object, purpose, and timing of the exercise of the right, as well as whether the actor intended to cause harm or acted contrary to the purpose for which the right was granted. However, the regulation of the various manifestations of commercial abuse of rights needs to be improved. With the continuous deepening of China’s reform and opening-up, the category of ‘commercial rights’ in the capital market has increasingly attracted academic attention, and the following classification has been proposed for the commercial rights system.³ (Table 1)

Table 1: Commercial Right Types

Commercial Right Types	Content of Rights	Applicable Objects	Applicable Branches of Law
Investor rights	Equity, partnership share rights, and cooperative member rights	Civil and commercial subjects	Commercial law

2 Institutional rights refer to statutory rights that arise from the legal system and have specific social functions. See Li Xiaxu, *From Monism to Tripartism: The Theoretical Reconstruction of the Principle of Prohibiting Abuse of Rights*, 2 Law and Social Development 102, 113 (2025).

3 See XIAO HAIJUN, *THEORY OF COMMERCIAL RIGHTS: FROM THE PERSPECTIVE OF BUSINESS FREEDOM AND EQUAL OPPORTUNITIES*, at 215 (Law Press · China, 2022).

Commercial Right Types	Content of Rights	Applicable Objects	Applicable Branches of Law
Original acquisition rights	Business operation rights, trade name rights, commercial credit rights, commercial opportunity protection rights, trade secret rights, and fair transaction rights	Commercial entity	Commercial law, intellectual property, and competition law
Rights acquired through business activities	Enterprise floating charge, commercial lien, accounts receivable pledge, commercial debt claims, and commercial right of reply ⁴	Commercial entities and transaction counterparts	Commercial law, property rights section of the Civil Code, and contract or personality rights section of the Civil Code

In view of the distinction between civil rights and commercial rights, the principle of prohibiting the abuse of rights in private law also requires a distinction between the general provisions on the prohibition of abuse of civil rights and those of commercial rights. However, academic circles currently pay little attention to the PPACRS. The abuse of rights in private laws essentially refers to the violation of the purpose of the right or exercising the right beyond the legitimate boundaries of the right, causing unreasonable actual damage or creating risks of damage to public interests or legitimate rights and interests of others. The *General Principles of the Civil Law of China* once stipulated the general clause of good faith, but the principle of prohibiting the abuse of rights was not introduced. Article 132 of the Civil Code followed the tradition of private law civilization of separately legislating the principle of good faith and the principle of prohibiting the abuse of rights, and specially stipulated the latter in the General Part of the Civil Code. Moreover, through article 83 as a supplementary general clause of commercial law, it further stipulates that ‘A capital contributor of a for-profit legal person may not abuse his rights as such to harm the interests of the legal person or any other capital contributor’. Subsequently, the Company Law of 2023 split article 20 of the Company Law of 2018 into three articles (articles 21, 22, and 23), which, together with article 83 of the Civil Code, formed the evolutionary

4 Commercial right of reply grants commercial entities the ability to reasonably respond to external comments in a timely manner, safeguarding their own business reputation. See Hou Yufei, *Commercial Right of Reply: The Path Optimization About Remedy of Goodwill Infringement*, 1 Xiamen University Law Review 138, 163 (2025).

institution framework of prohibiting the abuse of commercial rights. The combination of articles 83 and 132 of the Civil Code, and the provisions of the Company Law of 2023 have formed a hierarchical structure of the PPACRS, with the order of application successively: articles 21 and 22 of the Company Law of 2023, article 23 of the Company Law of 2023, paragraph 1 of article 83 of the Civil Code, paragraph 2 of article 83 of the Civil Code, and articles 125 and 132 of the Civil Code, which are arranged in ascending order of normative abstraction, with the provisions higher in the hierarchy serving a supplementary function. If commercial rights are exercised in accordance with commercial purposes, they are properly exercised, then articles 125 and 132 of the Civil Code shall apply for fallback protection.

B. Further Legislative Interpretation

The following three features are particularly noteworthy. The design of the PPACRS is implemented under the Chinese civil and commercial integration system by combining ‘substitutive’ and ‘supplementary’ general commercial-law clauses in the Civil Code and other laws. Firstly, article 132 of the Civil Code stipulates the rule of prohibiting the abuse of rights. Subsequently, it establishes a general provision of prohibiting the abuse of rights by a capital contributor of a for-profit legal person (article 83), replacing the legislative term ‘company shareholder’ with ‘a capital contributor of a for-profit legal person’, thereby providing an authoritative basis under codified law for the legitimate exercise of rights by such contributors. Secondly, article 83 of the Civil Code evolved from paragraphs 1, 2, and 3 of article 20 of the Company Law of 2018 by factoring out the common factor method and elevated the prohibition of the abuse of shareholders’ rights (on piercing the corporate veil) from a special provision of the Company Law to a general provision of prohibiting the abuse of contributors’ rights, thus being refined into the distinctive PPACRS. Article 83 of the Civil Code sets out a general rule governing the exercise of rights by capital contributors, specifying both the obligations and joint liability. These provisions clarify both the prohibition on the abuse of rights by capital contributors of a for-profit legal person and the legal consequences of such abuse. They also elevate the doctrine of piercing the corporate veil from a

specific rule of the Company Law to a general rule in the Civil Code, thereby marking a second leap from judicial practice to codified law. In addition, article 83 expands the range of persons to include capital contributors of for-profit legal persons, thus remedying the previous insufficiency of rules governing the abuse of rights by contributors of other enterprise legal persons, such as state-owned enterprises and shareholding cooperative enterprises. As for the Company Law of 2023, it divided the former rule on the exercise of shareholders' rights into three separate articles. In substantive terms, it expands the category of persons prohibited from abusing rights to controlling shareholders and actual controllers. Furthermore, beyond vertical veil piercing, it also introduces horizontal veil piercing, which means liability can pierce through between related companies to protect the interests of creditors.

First, article 83 creates a new system to disregard the legal personality. However, a gap persists between special commercial laws and the Civil Code because of the absence of a fundamental commercial law. The General Part of the Civil Code includes legal provisions that embody value orientation and contain highly indeterminate content. They may be divided into principled general provisions and adjudicative general clauses. Article 132 of the Civil Code belongs to the former category, whereas article 83 belongs to the latter. In other words, the Civil Code not only follows the common practice of integrated civil-commercial codification by establishing a substitutive general provision of the abuse of rights applicable to both civil and commercial matters, but also supplements and refines the PPACRS through an adjudicative commercial general clause. Article 83 provides that a serious abuse of rights by a capital contributor of a for-profit legal person may generate the disregard of legal personality, and the key terms used in this provision, such as 'abuse' and 'serious harm', are legally indeterminate concepts with an abstract normative structure. Therefore, article 83 clearly has the character of a justiciable general clause. At the same time, paragraph 2 of article 83 of the Civil Code is relatively specific to serve as a generally applicable rule across other commercial fields, whereas article 132 is relatively abstract to fully provide sufficiently targeted guidance. This generates a methodological and doctrinal gap between the Civil Code and special commercial laws.

Second, the prohibition of the abuse of investment rights is an inherent

part of the PPACRS, which should be analyzed by civil and commercial law thinking that gives priority to commercial law norms. Such shareholder rights are regarded by some scholars as ‘capital rights’.⁵ Article 125 clarifies that civil subjects lawfully enjoy investment rights. In practice, some courts have invoked article 125 to confirm the existence of investment rights. In one dispute concerning investment rights in market stalls, the court held that the investment arrangement by employees did not violate the law and should not be treated, under a civil-law approach, as a loan relationship. The termination of employment did not affect the contributors’ right to receive profit distributions.⁶ These cases indicate that judges have used a civil and commercial differentiated approach to protect emerging forms of commercial rights. With new types of commercial rights having become increasingly diverse, some of these rights may be classified as commercial rights of the kinds and regulated by special commercial laws, while others are covered by article 125. Therefore, article 125 should be further specified and updated in judicial application as necessary so that it can function in a complementary way with the PPACRS.

III. THREE MODELS OF APPLICATION AND EXISTING PROBLEMS

The vitality of a code lies in its implementation. To identify the proper approach to applying the PPACRS, it is both necessary and useful to analyze and synthesize the experience of three application models of the PPACRS.

A. Three Models of Application of the PPACRS

1. Priority Application of the Company Law. — Based on the rule of legal application established in article 103 of the *Legislation Law of the People’s Republic of China of 2023*, when both the Company Law and the Civil Code have clear provisions, the relevant provisions of the Company Law shall prevail. When there are no provisions in the Company Law, the general rules of the Civil Code shall apply to play its role in protecting rights

5 Xiao Haijun, *On Capital Rights: Symbolic Significance About Article 125 of the Civil Code of China*, 4 Huxiang Law Review 64, 65 (2023).

6 No. 912 Civil Final Judgment of the Longyan Intermediate People’s Court of Fujian Province (2023).

and empowering as a general, universal, and catch-all law. Article 11 of the Civil Code also emphasizes that other laws shall be applied first if they have special provisions on civil relations. Accordingly, in cases involving the abuse of shareholder rights that causes damage to other disadvantaged shareholders and company creditors, the court first reviews the shareholder behavior under the Company Law and interprets it in accordance with the rule of priority application of special laws.⁷ The specific forms of abuse of shareholder rights can be divided into proactive abuse, passive abuse, and exercising rights in a wrong manner that does not comply with procedural requirements. (Table 2)

Table 2: Typical Cases of Abuse of Shareholder Rights

Classification	Main Manifestations of Shareholder Rights Abuse	Cases
Proactive abuse type	Excessive capital control ⁸	Under the circumstance where Xinda Company's liabilities are increasing year by year, its shareholder Jinxiang Company still injects a large amount of funds into its own account. ⁹
	Withdrawal of capital contributions	Actual controller transfers capital from the company by claiming repayment of fictitious debts, which constitutes the withdrawal of capital contribution. ¹⁰
	Abuse of shareholder litigation rights	The court held that the defendant first filed a lawsuit for cancellation and then withdrew it, and such behavior constituted an abuse of shareholder litigation rights. Therefore, the defendant should bear the liability for damages. ¹¹
Passive abuse type	Abuse of capital majority voting rights	Happy Blue Sea Company as a controlling shareholder directly controlled the disposal of the TV drama involved in the case by its subsidiary affiliate company without passing the equity voting rights. ¹²

7 See Liu Junhai, *The Positive Interactions Between Corporate Law and Civil Code*, 2 Legal Forum 76, 82 (2021).

8 See article 11 of the *Minutes of the National Courts' Civil and Commercial Trial Work Reference*.

9 No. 752020 Civil Final Judgment of Changsha Intermediate People's Court, Hunan Province (2022).

10 No. 340 Civil Retrial Judgment of the Supreme People's Court (2023).

11 No. 960 Civil Judgment of the Intermediate People's Court of Foshan, Guangdong Province (2008).

12 No. 6234 Civil Final Judgment of the Third Intermediate People's Court of Beijing (2020).

Classification	Main Manifestations of Shareholder Rights Abuse	Cases
Failure to follow legal procedures in exercising rights	Abuse of the right to convene a shareholders' meeting	The court pointed out that in the absence of a lawful amendment to the company's articles of association, the board of directors of a foreign-invested enterprise remains the highest authority. Convening a shareholders' meeting bypassing the board of directors lacks the authorization basis in the articles of association and has significant flaws. ¹³

Firstly, proactive behavior constitutes the abuse of shareholder rights, including excessive capital control, withdrawal of capital contributions, abuse of capital majority voting rights, etc. For instance, apart from the shareholders abusing the corporate personality and limited liability by excessively controlling the company, commingling personal and company assets, and contributing significantly insufficient capital to the company, shareholders may violate their obligations by withdrawing their capital contributions. Once shareholders withdraw capital, they violate the company's capital maintenance principle, causing a reduction in the company's assets, and reducing its performance and debt repayment capacity. Usually, the court may assume shareholders' liability for external creditors.

Secondly, passive conduct may also constitute the abuse of shareholder rights. Shareholders may fail to exercise their voting rights honestly. Some controlling shareholders without violating the company's formal statutory procedures may still abuse majority rule to pursue their own interests or the interests of third parties, adopt unfair resolutions, and harm the rights and interests of the company or its minority shareholders. Such abusive shareholders should bear the liability to compensate the minority shareholders or the company's creditors for the losses they cause.

Thirdly, shareholders fail to follow the legal procedures when exercising their rights. When determining the abuse of shareholder rights, many courts judge whether shareholders exercise their shareholder rights through legal

¹³ No. 20413 Civil Final Judgment of Chengdu Intermediate People's Court, Sichuan Province (2025).

procedures. When a shareholder's behavior violates the procedural provisions of the Company Law or the company's articles of association, the court will determine that the shareholder has exceeded the limit of the shareholder's exercise of rights, thereby constituting an abuse of shareholder rights.

But two points should be noted. First, a shareholder's failure to follow corporate procedures does not necessarily amount to an abuse of rights. Even if it can be proven that there are related party transactions and defects in the way meetings are convened, these facts alone are insufficient to determine that the controlling shareholder has abused the right.¹⁴ Second, even where shareholders comply with formal procedures, their conduct may still be found to constitute an abuse of rights if it violates the basic principles of company law. Additionally, the Company Law of 2023 stipulates two new types of the abuse of rights on taking corporate opportunities and unfair related party transactions, which belong to the model of priority application of the PPACRS.

2. *Coordinated Application with the Tort Law.* — The abuse of rights differs from tortious acts in that the former presupposes the enjoyment of rights, while the latter does not. However, the two overlap in terms of causing harm to others' interests and the public interest. So in practice, disputes are often resolved by applying tort litigation rules in a complementary manner.¹⁵ Paragraph 3 of article 3 of the *Interpretation by the Supreme People's Court of Several Issues Concerning the Application of Book One General Provisions of the Civil Code of the People's Republic of China* stipulates that, 'If there is any abuse of civil rights, the people's court shall determine that the abuse does not produce the corresponding legal effect. If the abuse of civil rights causes any damage, the relevant provisions of Book Seven of the Civil Code, among others, shall apply.' In the Supreme People's Court's view,¹⁶ a lawsuit in which a company shareholder abuses its rights to damage the interests of the company is essentially a tort lawsuit. The plaintiff should bear the burden of proof for the controlling shareholder's tortious behavior, the consequences of the tortious damage, and the proximate causation between them. In practice, there is a tendency

14 No. 1707 Civil Final Judgment of Kunming Intermediate People's Court, Yunnan Province (2025).

15 No. 4536 Civil Final Judgment of Jiangmen Intermediate People's Court, Guangdong Province (2021).

16 No. 4691 Civil Retrial Judgment of the Supreme People's Court (2019).

for the plaintiff to provide evidence to prove that the reduction in the value of the shares is attributable to the accused shareholder's abuse of equity rights. With regard to cases involving the disregard of corporate personality caused by the abuse of rights, the Supreme People's Court has also classified them as tort cases. The shareholders of the company who abuse the company's independent legal person status and the shareholders' limited liability to infringe the interests of the company's creditors shall bear the corresponding tort liability.

3. *Bottom-Line Application of Articles 83 and 132 of the Civil Code.* — Article 83 of the Civil Code not only sets out the constituent elements of the abuse of rights, but also provides for the extreme consequence of disregarding the legal personality of for-profit legal person investors, including registered shareholders and actual investors. A further question arises: Could the system of disregarding the legal personality apply to 'other enterprises that have the legal person status' in accordance with article 76? In other words, when applying article 83 of the Civil Code to prohibit the abuse of rights, the issue of the expanded application of the disregard of corporate personality should be seriously treated.

From the perspective of legal theory, the academic circle argued that the principle prohibiting the abuse of rights under article 132 should be understood as a principle capable of affecting the validity of contracts.¹⁷ In judicial practice, there are cases where article 132 is directly invoked (without invoking paragraph 2 of article 153 of the Civil Code) to indicate that commercial bank equity nominee holding agreements could harm social public interests.¹⁸ However, overall, article 132 is rarely used as an independent basis for judicial decisions, and it is often invoked together with principles of good faith and good morals or public order to provide supplementary reasoning.

17 See LIANG HUIXING, *LECTURES ON GENERAL PRINCIPLES OF CIVIL LAW (REVISED EDITION)*, at 265-266 (Law Press · China, 2021). In the *Case of the Education and Training Contract Dispute Between Zhang and Lianshui New Dream Education Consulting Co., Ltd.*, the principle of preventing the abuse of rights is also used as the sole basis for declaring the contract invalid. See No.7983 Civil Judgment of Lianshui County People's Court, Jiangsu Province (2021).

18 See *The Case of the Lawsuit for Objection to Execution by a Non-Party Executor in the Case of Weng Moujie, Ni Mouluan, et al.*, No.1821 Civil Final Judgment of Ningde Intermediate People's Court, Fujian Province (2021).

B. Existing Problems

1. The Standards for Determining the Abuse of Commercial Rights Need to Be Refined. — Although the abuse of rights has become a legal term in both the Civil Code and the Company Law, article 3 of the *Interpretation by the Supreme People's Court of Several Issues Concerning the Application of Book One General Provisions of the Civil Code of the People's Republic of China* merely sets out factors such as the object, purpose, and timing of the exercise of rights. In judicial practice, courts may substitute a standard of harm for a standard of abuse of rights under article 132. The criteria for identifying the abuse of commercial rights therefore need to be articulated more clearly. Given the distinctive forms and characteristics of commercial rights, article 132 does not provide sufficiently targeted guidance for the adjudication of commercial disputes or for the regulation of abusive exercises of commercial rights.

2. The Mechanism for Evaluating Legal Consequences Urgently Needs Perfection. — Unlike the general principle in the Civil Code, which does not specify the legal consequences of an abuse of rights, the PPACRS consist of rule-based, justiciable general provisions that regulate improper exercises of commercial rights and may even deny legal effect of the resulting acts. Usually, the legal consequences of an abuse of civil rights take the form of the non-occurrence of the intended legal effect of the act. This generally includes two situations: prohibiting the civil subject from engaging in abusive conduct, and denying the legal effect of conduct that constitutes an abuse of rights. Under special circumstances, it may also involve the invalidation or deprivation of rights, including the disregard of legal personality.

First, the lack of applicable conditions of the disregard of for-profit legal personality. The Company Law of 2023 expands the scope of actors who may abuse rights from ordinary shareholders to 'dual controllers', namely controlling shareholders and actual controllers. Whether the horizontally expanded doctrine of disregarding separate legal personality may also be extended to other types of legal persons recognized under the Civil Code should be considered with caution. The first reason is that for-profit legal persons are institutionally diverse, and the Civil Code contains no explicit provision on this issue. Some scholars have warned that an overexpansive

application of the doctrine of piercing the corporate veil may trigger a crisis of unlimited shareholder liability and thereby undermine the corporate form. This concern is especially salient in a context marked by managerial centralization and the tradition of family business, where internal support among affiliated companies is common, and unified management within corporate groups is often the norm.¹⁹ The boundaries of horizontal veil piercing among affiliated enterprises therefore need to be clearly defined. The second reason is that, in judicial practice, the disregard of legal personality has at times been applied by analogy to disputes involving specialized farmers cooperatives, as mutual economic organizations belong to special legal persons.

Second, procedural defect also exists in the available remedies, particularly with respect to whether other contributors may bring a derivative action when a contributor or manager of a for-profit legal person abuses their rights. A controlling shareholder's conduct may directly harm the company, yet the company remains an independent legal entity whose interests cannot be simply equated with those of its shareholders. In such cases, the plaintiff shareholder ordinarily suffers only indirect loss. An unresolved issue in the judicial application of article 83 of the Civil Code is as follows: if an investor unlawfully abuses his or her rights and harms the interests of a legal person, but does not serve as a director, supervisor, or senior manager, and the legal person does not sue, may other investors bring a derivative action?

3. *The Methodology for Patching Vulnerabilities Needs to Be Further Studied.* — Against the backdrop of today's wave of financial technology, the scope of commercial rights continues to expand, and new forms of capital market activity continue to emerge. The traditional structure of civil and commercial rights has fragmented. A large number of new rights and interests have emerged, bringing new challenges and questions for the market economy. Although the Company Law has established some specific systems to prohibit the abuse of shareholder rights, the *Securities Law* and the *Futures and Derivatives Law* have established provisions of prohibiting discretionary and guarantee provisions on securities and futures investment, and the regulatory authorities have also issued relevant documents to

19 See Jiang Daxing, *Cultural Restraint of Company Law Reform*, 2 China Legal Science 84, 105 (2021).

regulate practices such as the pre-IPO special dividends, circumventing share reduction bans of listed companies through divorce and other means, and the long-term disorderly competition for control of the company. However, three aspects remain to be stipulated in the special commercial law: (1) the system of ‘squeeze-out’ in the privatization transactions of listed companies; (2) the exercise boundaries of drag-along rights and liquidation preferences on valuation adjustment mechanisms in private equity (PE) investment or venture capital (VC); (3) how to exercise the right of equity trust. Although the first pilot program for equity trust property registration has officially launched, the mechanism to ensure the public credibility and enforceability of equity trust registration is still under development.

In short, articles 125 and 132 do not fully regulate the abuse of commercial rights in a differentiated, precise, and commercially sensitive manner, while article 83 is more specific to encompass new commercial right types. If they were directly applied, it will inevitably and correspondingly increase the burden of legal reasoning and proof in commercial adjudication. To prevent the regret of ‘insufficient commercialization’ left by the inclusion of general commercial law clauses in the Civil Code, or to avoid civil system violations caused by over-commercialization, we should leverage the PPACRS in fundamental commercial laws (superior laws) to fill corresponding gaps in the exercise of squeeze-out, liquidation preference or drag-along right, and trust registration of special commercial laws.

IV. OPTIMIZATION OF THE APPLICATION OF THE PPACRS

The theoretical essence of the PPACRS is that the actor shall not deviate from the original purpose of right or exceed the limits of right when exercising rights. Exploring its application methodology, being different from article 132, is of great practical significance.

A. Reconstructing Supporting Rules of the PPACRS Applicability

1. Introducing Fiduciary Duty Clauses to Narrow the Boundaries of Rights, and Optimizing the Determination of the Constitutive Elements of the PPACRS. — This is mainly discussed on the issue of applicable requirements

of the PPACRS, where priority is given to the company law. In identifying abusive conduct, the analysis should begin from the premise that the actor in fact enjoys and exercises the relevant right, and it should combine subjective and objective criteria. On the subjective side, the exercise of the right must involve the fault on the part of the actor. On the objective side, the exercise of the right must have caused, or have been sufficient to cause harm to the public interest or to the legitimate rights and interests of others. This framework, however, is too broad to determine the constituent elements of the PPACRS with sufficient precision. To avoid treating harm alone as the test for abuse of rights, article 3 of the *Interpretation by the Supreme People's Court of Several Issues Concerning the Application of Book One General Provisions of the Civil Code of the People's Republic of China* sets out factors for determining the abuse of civil rights. In the commercial context, fiduciary duties should be introduced.

Based on current judicial practice in China, and in light of article 83 of the Civil Code, the rules governing investors' fiduciary duties should be further developed so as to provide a firmer basis for substantive fairness review. In the author's view, fiduciary duty should be treated as a foundational principle governing the exercise of rights by participants in commercial organizations. Most fiduciary rules operate as default rules unless the parties agree otherwise.²⁰ In addition to the fiduciary duties borne by controlling shareholders and actual controllers, investors generally should also be subject to duties of loyalty, honesty, and good faith when exercising their rights. This means that shareholders, actual controllers, and investors in for-profit legal persons must comply with the principle of good faith in the exercise of their rights. In turn, the prohibition of abuse of rights would no longer function merely as a negative restraint, but would also serve as a positive standard guiding judicial review of substantive fairness. Moreover, the sequential criteria of appropriateness, necessity, and balance should be used to review the exercise of rights in a more structured way.

2. *Improving the Procedural Rules Related to the PPACRS.* — First, special tort rules apply to the allocation of the burden of proof. The mainstream view in the academic circle is that all torts applying the principle

20 ANDREW S. GOLD & PAUL B. MILLER, PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, at 234 (Lin Shaowei & Zhao Yin trans., Law Press • China, 2020).

of fault liability are general torts, while those applying no-fault liability or presumed fault liability must be specifically provided for by law and are special torts.²¹ The basis of the disadvantaged shareholders' claim for compensation against the tortious shareholders lies in article 83(1) of the Civil Code. This claim may be understood as a specific extension of the tort regime into the corporate context. In cases involving the abuse of control rights that harm the interests of the company or its creditors, the wrongful conduct is often uncertain in form and concealed in operation. One major reason why disadvantaged shareholders lose in judicial proceedings is their inability to produce sufficient evidence. It is therefore necessary to reconsider the allocation of the burden of proof between the parties. The Supreme People's Court has characterized cases involving the disregard of corporate personality as tort cases. Where shareholders abuse the company's status as an independent legal person or the principle of limited liability so as to infringe the interests of the company's creditors, they should bear corresponding tort liability in accordance with the constituent elements of tort law.²² Combined with the review standards for the fiduciary obligations of the controlling shareholders and actual controllers, the disadvantaged shareholders are excluded from the management and it is difficult for them to obtain company information. The burden of proof should be reversed. It should suffice for disadvantaged shareholders to prove that the controlling shareholders' exercise of rights has caused the failure of their reasonable expectations. If the controlling shareholder cannot prove the existence of a reasonable business purpose and the proportionality between the means and the purpose, it constitutes oppression or abuse of rights.²³

As for the allocation of the burden of proof of the company's creditors in the lawsuit for the disregard of corporate personality, it is also appropriate to adopt the principle of presumption of fault and apply special tort rules to render judgments. As long as the objective behavior type requirements are met, the subjective fault is presumed. This approach not only guarantees the creditors' ability to provide evidence, but also ensures that the controlling

21 CHENG XIAO, *TORT LIABILITY LAW*, at 69-70 (Law Press • China, 2021).

22 UNDERSTANDING AND APPLICATION OF MINUTES OF THE NATIONAL COURTS' CIVIL AND COMMERCIAL TRIAL WORK REFERENCE, at 146-147 (People's Court Press, 2019).

23 Lou Qiuran, *Theory and Practice of the Provisions on Abuse of Shareholder Rights in Article 20 of the Company Law*, 3 Western Law Review 10, 19 (2016).

shareholder or actual controller can use the right of defense to prove that their actions are for commercial purposes.

Second, granting the right of action to investors (including former shareholders) for indirect losses by analogous application of the rules for shareholders' derivative lawsuits. When a controlling shareholder or actual controller acquires, at a depressed price, the shares held by an injured shareholder after having infringed the company's property, the former shareholder loses standing to bring a derivative action. Because the controlling shareholder then occupies the dual positions of debtor and tortfeasor, the tort claim may be extinguished through merger, since the relevant rights and obligations vest in the same person. This places the former shareholder at a disadvantage. Minority shareholders and former shareholders should therefore be allowed to bring direct actions for indirect losses and seek corresponding procedural relief. Such claims should not be confined to persons who still hold shareholder status at the time of suit. Only in this way can the law protect the former shareholder's right to pursue a claim after being forced out.²⁴ Moreover, in the case of a capital contributor of a for-profit legal person abusing their rights to harm the interests of the legal person, it should also be carefully considered to grant other contributors the standing and right to file a derivative lawsuit. The catch-all application function and the comparative law interpretation method can also make up for the relevant inadequacy in other commercial laws.

3. *Perfecting Corresponding Rules on Legal Consequences of the PPACRS.* — The first is carefully delimiting the disregard of for-profit legal person personality. The principle of limited liability is the soul and one of the core rules of commercial organization law.²⁵ It is not only the most effective means to raise social funds and establish large enterprises, but also meets the needs of the production method of separation of ownership and management rights.²⁶ Article 83 of the Civil Code belongs to the statutory restrictions on article 60. The doctrine of disregarding corporate personality is a double-edged sword. In the course of applying rules on the disregard

24 See Liu Junhai, *On the Compensation Liability of Controlling Shareholders and Actual Controllers to Disadvantaged Shareholders When They Abuse Corporate Control*, 2 *Legal Forum* 81, 93 (2022).

25 See WANG WENYU, *THEORY OF CORPORATE LAW*, at 9 (China University of Political Science and Law Press, 2004).

26 See Zhao Xudong, *The Limited Liability System in Company Law and Its Evaluation*, 1 *Journal of Comparative Law* 20, 22 (1987).

of the personality of for-profit legal persons in specific cases, courts should gradually accumulate, refine, and organize recurring categories of such cases, so that these categories can be properly typified and their conditions of application are strictly defined. By relying on standards such as the fiduciary duties of controlling shareholders, commercial reasonableness, and the business judgment rule, the law can protect the interests of creditors more fairly, create a more balanced mechanism for reconciling competing corporate interests, and sustain the orderly prosperity of the market.

As for article 83 of the Civil Code, we should make careful and proper use of it. On the basis of respecting the corporate personality, the constituent elements of abusing commercial rights and disregarding the corporate personality must be strictly grasped to clearly avoid the abuse of discretion. Firstly, the realities of corporate groups in China show a tendency toward the generalized application of horizontal disregard of corporate personality. This is not in line with the essential requirement for unified management of the corporate groups, nor is it conducive to achieving the goal of building world-class enterprises in China.²⁷ Secondly, although specialized farmers cooperatives are included in the registration of market entities, according to the provisions of the *Law of the People's Republic of China on Specialized Farmers Cooperatives*, they are clearly defined as 'mutual-help economic organizations' legally registered as legal persons, possessing both profit-making and public welfare characteristics. The disregard of legal personality for specialized farmers cooperatives should be appropriately limited, because their legal characterization differs from that of a for-profit legal person. Moreover, the protection of creditors' interests ought not to be purchased at the cost of undermining the corporate personality. A preferable alternative exists: applying article 62 of the Civil Code, which provides that the cooperative assumes liability first and may then seek reimbursement from its negligent members; or applying article 191 of the Company Law of 2023 regarding directors' or executives' liability for damages caused to third parties by analogy. This approach aligns with the principle that specific

27 The specific situations of different corporate groups should be taken into account in determining the confusion of personality. In terms of subjective elements, different purposes of debt evasion and unified management should be distinguished. See Lei Xinghu & Shen Youping, *On the Prudent Application of the Horizontal Legal Personality Denial Rule from the Perspective of Corporate Group*, 4 Academic Forum 43, 49 (2025).

provisions prevail over general ones in analogous application,²⁸ which can reduce the cost of judicial operation.

The second is improving the legal effect evaluation mechanism of commercial transactions. The principle of prohibiting the abuse of rights in private law is often closely tied to the application of the principle of public order and good morals, while the PPACRS are often closely linked to the application of the principle of public interest. For example, in the agency dispute between Shanghai Qingu Industrial Co., Ltd. and Beijing Yuner Computing Technology Co., Ltd., the parties agreed to engage jointly in Bitcoin mining. The agreement further provided that, if accidents such as network failures or power outages occurred, Yuner Company was required to make timely repairs and compensate Qingu Company for the resulting losses. The court held that the mining activities contravened the spirit of article 9 of the Civil Code and were inconsistent with national policies on energy conservation and emissions reduction. It therefore concluded, pursuant to article 153(2) of the Civil Code, that the entrustment contract between the parties was void for violating public order and good morals.

The application of paragraph 2 of article 153 of the Civil Code regarding ‘public order and good morals’ presents difficulties in argumentation and inconsistencies in the standards of determination, thereby imposing a significant burden of reasoning on judges. Moreover, the application of the general clause of public order and good morals is restrained: it is a socially recognized baseline standard, a ‘minimum ethical requirement’.²⁹ Judges need to demonstrate in practice that the ethical factors involved in the case constitute this baseline, which protects third parties and public interests.

To avoid the escape into general civil law provisions and logical leaps in judicial discretion, some scholars have proposed that administrative regulations issued by ministries (departmental regulations) may also serve as a basis for declaring contracts invalid.³⁰ In the author’s view, administrative regulations have a positive emergency function, but there

28 See TAN ZUOCAI, THE THEORY OF INTERPRETATION OF THE PRINCIPLE OF PROHIBITION OF ABUSE OF RIGHTS, at 83 (Law Press · China, 2025); CAO LEI, A STUDY OF LEGAL LOOPHOLES AND THE METHODS OF THEIR FILLING, at 143 (Law Press · China, 2024).

29 SHA SHIRUI, HOW TO APPLY THE ‘INVALIDITY FOR VIOLATION OF PUBLIC ORDER AND GOOD MORALS’ CLAUSE, at https://www.cssn.cn/fx/xr/202402/t20240229_5735831.shtml (Last visited on May 26, 2026).

30 Liang Shangshang, *The Relationship Between Department and Local Government Rules and Contract Validity*, 3 Social Sciences in China 79, 96 (2025).

are some shortcomings: firstly, some frequent amendments of departmental regulations or rules are not conducive to the stability of transactional expectations. Secondly, departmental regulations have a legal status lower than laws and administrative regulations, and they may conflict with each other due to departmental interests. Thirdly, at the theoretical level, both the monist and dualist accounts of how administrative assessments affect private-law relationships tend to be overly rigid. Administrative bodies exercise public power on behalf of the state, and civil acts undertaken in the course of administrative action may carry implications of administrative illegality. Even so, private-law review retains its own independent value and internal logic.³¹ For example, some actions, such as shareholder resolutions, although not illegal or in violation of regulations, are unfair and harm the interests of the company or its shareholders, and still constitute an abuse of rights. The court reasoned that a finding of abuse of shareholder rights did not depend on a prior showing of illegality or procedural irregularity. Whether the conduct causes unfair harm may itself justify such a finding. This is of considerable importance for the preservation of substantive fairness. In the present case, the disputed corporate resolution complied, in formal terms, with the legal requirements governing convocation, voting procedure, and content, thus bearing the outward appearance of a valid corporate act. In a suit challenging its validity, however, if the rule prohibiting the abuse of shareholder rights is not applied, the parties' legitimate rights and interests may lose effective judicial protection.

To overcome the foregoing deficiency, the optimal approach is to introduce the PPACRS into fundamental commercial law and provide a new mechanism for assessing contract validity; that is to say, when commercial transactions violate the PPACRS, they are invalid. So that it could reduce the likelihood of inappropriately handling commercial cases by applying general provisions of civil law.

B. Legislative Expectations for Optimization of the PPACRS

The principle of prohibiting the abuse of rights is a secondary principle derived from the principle of good faith. The principle of good faith and the

31 TAN ZUOCAI, *supra* note 28, 128.

principle of prohibiting the abuse of rights are both criteria for the exercise of rights and obligations. *Laz* pointed out that the coordination of the internal relationships among different types or forms of legal systems in a legal framework is mainly influenced by two factors: the theoretical choice of the principle of legal particularism and the complexity and diversity that the legal system often exhibits in practice.³²

Due to the distinction between civil rights and commercial rights, the prohibition of abuse of rights in private law encompasses both the abuse of civil rights and the abuse of commercial rights. The former applies to purely civil activities, whereas the latter applies to commercial activities. Article 132 of the Civil Code expressly establishes, for the first time, a general principle prohibiting the abuse of rights. Article 83, moreover, serves as the principal supplementary general provision underlying the PPACRS. It should be understood both as an innovation and a specific extension and embodiment of the prohibition of abuse of rights in the commercial sphere. Nevertheless, given the structural limits of article 132 and the absence of an integrated system of commercial rights, the establishment of the PPACRS within a foundational body of commercial law has its own legitimacy, necessity, and practical value.

First, it would help establish the value orientation that commercial rights should be exercised in accordance with laws and regulations, while also transforming the policy discourse on preventing the disorderly expansion of capital into legal guidance. As the German scholar *Bauer* pointed out, legislation in any given field must first clarify the basic ideas and principles that guide the construction of legal materials within that field. These ideas and principles constitute fundamental decisions of legal policy and may derive from multiple sources, including worldview and political convictions, historical experience, rational reflection, social and economic considerations, and purely legislative techniques. Different sources carry different weights. For example, family law is shaped primarily by worldview and political ideas, whereas commercial law and labor law are more deeply grounded in social and economic considerations.³³ The legitimate exercise of commercial rights is governed by efficiency values, economic ethics, and market justice

32 See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM*, at 57 (Wu Yuzhang trans., The Commercial Press, 2017).

33 STIERNER BAUER, *GERMAN PROPERTY LAW (VOLUME I)*, at 57 (Zhang Shuanggen trans., Law Press · China, 2004).

concepts. In the era of economic capitalization, the PPACRS are the criteria for guiding and evaluating the legitimate exercise of rights, and have the function of preventing the arbitrary and disorderly expansion of capital and providing a safety valve for capital investment rights and interests. Moreover, the PPACRS have precisely a unique regulatory advantage in that they can introduce value standards such as business ethics, social responsibility, and public interest into legal judgments.³⁴ Just as infrastructure construction is emphasized in the high-quality development of China's market economy, the foundational institutional projects (codification of law) in the construction of China's new-era legal system are also highly valued. This represents one of the extremely valuable experiences for the success of Chinese modernization. Currently, the academic circle has basically formed an axiomatic understanding of escaping into general principles, which means that when both specific legal rules and legal principles (general clauses) can achieve the same adjudicative effect, priority should be given to applying the specific legal rules. Legal principles can only be used to construct new rules for adjudication when specific legal rules are lacking in the exercise of new commercial rights.

Second, it is conducive to completing the commercial law, clearly defining the boundaries of the exercise of rights and guiding the weighing of interests. When system inadequacy appears in the the field of commercial law, the PPACRS shall apply rather than article 132 of the Civil Code. As Professor *Qian Yulin* argued, inadequacy belongs to commercial norms. Professor *Cui Wenyu* also pointed out that, judging from the problems in China's current commercial legislation, the general principles of commercial law can play a fundamental role in remedying the deficiencies.³⁵ Since commercial rights involve diverse profit subjects, the determination of abuse of rights is more complicated. The interest balancing methodology and dynamic system theory can be adopted, and the PPACRS adhere to the strict and free spirit of commercial law and the principle of commercial good faith. It is more prominent in 'strictness and tolerance' than the principle of abuse of civil rights: in terms of 'autonomy and tolerance', the PPACRS are based on

34 Lu Junxiao, *Research on Competition Law Regulation of Disorderly Expansion of Capital in the Platform Economy*, 7 Price Theory and Practice 58, 64 (2021).

35 Cui Wenyu, *Construction of China's Commercial Law System Under the Deconstruction of the Commercial Code*, 4 China Legal Science 3, 24 (2019).

the efficiency-oriented need to ensure and promote capital liquidity, making the interest balancing more flexible than the application of the principle of abuse of civil rights. For example, in the privatization transaction of listed companies, most jurisdictions have set up ‘squeeze-out’ clauses by optimizing resource combinations, reducing listing costs, and lowering agency costs,³⁶ because from the perspective of commercial law thinking, the squeeze-out of minority shareholders by controlling shareholders can improve the efficiency of corporate control and reduce transaction costs, thereby improving economic benefits.³⁷ In addition, German legislators have made a constitutional justification for the squeeze-out system.³⁸ They argue that, within the interest structure of delisted companies, the interests of the remaining shareholders may be understood as purely proprietary in nature. If those shareholders are provided with adequate economic compensation in the course of the squeeze-out, the squeeze-out system may be regarded as not infringing their rights.

Third, it is conducive to guiding investment and financing behaviors to properly balance the interests under the principle of commercial rationality and public interest priority. Given the broader connotation and extension of commercial rights, taking the scenario application in the capital market as an example, the regulatory authorities strengthen reasonable restrictions on the abuse of commercial rights.

The *State Council's Several Opinions on Strengthening Supervision, Preventing Risks, and Promoting the High-Quality Development of the Capital Market* expressly regulate pre-IPO dividend distributions in order to prevent prospective listed companies from engaging in pre-IPO special dividend. They also target tactics designed to circumvent restrictions on share reduction, including divorce arrangements, and listed companies' prolonged and disorderly contests for corporate control, and provide that controlling shareholders, actual controllers, directors, and senior executives who are responsible for major illegal delisting shall compensate investors

36 LIU YUNHONG & ZHOU KAI, THE RESEARCH OF JUSTICE AND EFFICIENCY IN THE MARKET-DRIVEN ACQUISITION OF LISTED COMPANY: IN THE VIEW OF SECURITIES LAW MODIFICATION, at 119 (China Legal Publishing House, 2014).

37 See FAN JIAN, STUDY ON LEGAL ISSUES OF INTERPRETATION AND APPLICATION OF COMMERCIAL LAW NORMS, in INTERPRETATION AND APPLICATION OF COMMERCIAL LAW NORMS, at 40 (Chen Jie ed., Social Sciences Academic Press, 2013).

38 See Zhang Yan, *The Construction of the System of Compulsory Squeezing Out of Remaining Shares in the Context of Voluntary Delisting*, 4 Political Science and Law 148, 149 (2024).

for losses in accordance with the law. Nevertheless, regulatory inadequacy remains. Consistent with the principle of maintaining an appropriate distance from statutory law and observing the vertical hierarchy of gap-filling tools,³⁹ to prevent PE and VC investors from abusing drag-along rights and liquidation preferences under VAM arrangements in ways that may improperly deprive founders of control, intervention through anti-abuse clauses in commercial transactions is necessary. At the same time, the applicable standards must be developed in conjunction with the principle of commercial reasonableness. In this respect, the PPACRS legislation should articulate the principle of commercial reasonableness as a guiding standard for regulating capital behavior and safeguarding national interests, social public interests, and lawful rights and interests of others, especially those of small and medium-sized investors.

Finally, this approach helps advance the concept of sustainable development and strengthen the theoretical awareness that commercial actors should bear ecological and social responsibilities. Sustainable development refers to the capacity of ecological systems to sustain reproduction, renewal, and long-term development. While promoting economic growth, society must also protect the natural resources and the environment, including the lithosphere, hydrosphere, and atmosphere, on which human survival depends, so as to safeguard the well-being of future generations and enable people to live and work in peace and stability. Scholars have discussed the green principle of the Civil Code mainly from the perspective of traditional civil law, but have paid less attention to it from the perspective of commercial law. As commercial actors are often major emitters in the context of greenhouse gas reduction, it is imperative to embed principles of green investment into prudent capital governance rather than permitting the pursuit of profit to dominate commercial activity. In this sense, the PPACRS are beneficial to the realization of sustainable development and the implementation of the *Ecological and Environmental Code of the People's Republic of China*.

In summary, if the basic commercial law instruments advocated by scholars, such as the general principles of commercial law or a commercial code, are adopted in the future, it would be advisable to include a provision

39 CAO LEI, *supra* note 28, 145.

on the prohibition of the abuse of commercial rights. Such a provision that would provide guidance for commercial adjudication and commercial transactions of market entities could read as follows: The state guarantees that commercial actors may exercise their commercial rights independently in accordance with the law, but only within reasonable limits. Any exercise of commercial rights beyond those limits or without a rational business purpose shall have no legal effect, and shall not be protected by law. Where such conduct causes serious harm, the actor shall bear civil liability.

V. CONCLUSION

The PPACRS are important for fostering a stable, transparent, predictable, and fair business environment. Compared with the principle of abuse of civil rights, the PPACRS present greater complexity in many specific aspects, which require judges to have modern civil-commercial segmented law thinking. That is to say, we should not only avoid improperly handling commercial cases with civil law thinking, but also prevent applying commercial law thinking to civil cases. This paper hereby mainly draws three main conclusions.

First, the applicable order of the PPACRS should follow a hierarchical structure of the PPACRS. In cases where special commercial laws are given priority, such as those involving the disregard of corporate personality (as one consequence of the abuse of shareholder or contributor rights in accordance with the Company Law or article 83 of the Civil Code), the scope of application should be defined. Analogous application shall be restricted to specialized farmers cooperatives and group enterprises to avoid applying commercial law thinking to civil cases.

Second, the distinction and connection between the legal effects of abuse of rights and the constituent elements of tort should be clarified. A standard of harm cannot substitute for a standard of abuse of rights. The abuse of rights focuses on unlawful conduct, but sanctions shall be imposed only when the action is motivated by malice. Courts should consider introducing fiduciary duties, the reasonableness of commercial purposes, and standards of substantive fairness into the judicial review of the PPACRS.

Third, independent discourse power should be accorded to foundational commercial law instruments. If fundamental commercial legislation

(commercial code) were to incorporate the PPACRS, those provisions should be applied prior to article 132 of the Civil Code. The effective implementation of the PPACRS should therefore focus on classifying the relevant types of cases, specifying the proper scope of general clauses, and distilling workable adjudicative rules from business judicial practice. This would help establish a new hierarchy of application in order: general provisions of special commercial law, general provisions of fundamental commercial law, supplementary general provisions of the Civil Code, and uniform general provisions of the Civil Code. Accordingly, the hierarchical structure model and applicable order of the PPACRS can be revised and optimized: articles 21 and 22 of the Company Law of 2023, article 23 of the Company Law of 2023, PPACRS of general commercial law/commercial code, paragraph 1 of article 83 of the Civil Code, paragraph 2 of article 83 of the Civil Code, and articles 125 and 132 of the General Part of the Civil Code. Such a hierarchy would reduce the risk of mechanically applying general civil law provisions or analyzing commercial disputes through an exclusively civil law framework, and would in turn provide a new adjudicative structure for evaluating the validity of commercial transactions.

(Edited by Gong Li)

禁止商事权利滥用一般条款的层级构造与法律实践

内容提要 基于独特的民商合一立法体例,《民法典》在规定私法禁止私权滥用原则基础上,对营利法人出资人权利滥用问题作了规定,并通过《公司法》对权利滥用主体范围作了拓展。由此,中国的禁止商事权利滥用条款层级结构初具雏形,同时带来《民法典》内外条款协调适用难题。另一方面,长期以来“防止向一般条款逃逸”的认知止于法律具体规定不足或冲突情形下才予适用的一般法理层面,对于嵌入民商关系的一般条款适用次序问题,没有得到充分解决。为此,本文对《民法典》第83条、第132条,以及《公司法》第21条、第23条的层级构造作了考察,归纳出禁止商事权利滥用条款三种适用模式和存在的问题,并从司法适用到立法设计方面作出探讨并建议写入禁止商事权利滥用条款。在构建商法学自主知识体系的语境下形成从商事特别法一般条款、商事基本法一般条款、《民法典》内补充型一般条款至《民法典》内替代型一般条款的适用位序结构,从而减少以民法思维不当处理商事案件或误用商法思维处理民事案件的机会,为完善现行商事行为效力评价机制提供更优方案,以持续优化法治化营商环境。