General Provisions of the Civil Law and Commercial Legislation: Consensus, Problems and Options

—Taking Commercial Agency as an Example

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Abstract: In the context of the codification of China's Civil Code, the academic consensus has been to make commercial legislation systematic and establish commercial norms with proper legislative expression. Many direct and indirect commercial norms in *General Provisions of the Civil Law* provide evidence that civil law has been turned into commercial law. However, a general overview shows that the absence of related norms, including agency in duty, reveals that *General Provisions of the Civil Law* is lacking commercial law's characteristics. In addition to the *Civil Code*, using *General Rules of Commercial Law* is a relatively reasonable choice for commercial legislative arrangements, such as norms in relation to agency in duty. Taking commercial agency as an example, legislators should adopt problem-oriented and limited systematic patterns of "residue law" instead of unified patterns of codification.

Keywords: General Provisions of the Civil Law; General Rules of Commercial Law; agency in duty; commercial agency

There has been a major controversy regarding whether civil law and commercial law shall be codified together or separately. Countries and regions vary in legislative arrangements by formulating them separately or combining them.① Accordingly, China's civil and commercial law circles are also in dispute over the unification or dualization of private law.② Most scholars from the

① The countries or regions formulating commercial code separately from civil code include Germany, France, Japan and Macao (China). The countries or regions formulating only civil code without commercial code include Italy, Switzerland and Taiwan (China).

② Dong & Li, 2017.

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civil law circle believe that civil law is the general law for the private system and commercial law is an integral part of the civil law system. Most scholars from the commercial law circle believe that commercial law and civil law are interrelated yet different in substance. A few years ago, along with the heated discussion on the formulation of *General Rules of Commerce*, the commercial law circle invested great energy into the research of commercial legislation, and many scholars drafted relevant expert proposals.[①] When civil law codification (instead of commercial codification) became the national legislative decision, it seemed like relevant disputes would end. However, the official decision of "civil law codification" has not ended this dispute, but again "provoked the commercial legislation nerve and created a trend of commercial legislation research in academia."[②]

Against the historical background of civil law codification, the civil law circle and commercial law circle are still diligently seeking the answer to the question of how to understand the relationship between civil law and commercial law, especially how to evaluate the position of commercial law and select a proper legislative arrangement. Civil law and commercial law are closely related and although they are collectively known as civil-commercial law by convention, scholars clearly disagree with each other both in disciplinary study and legislative study. These disagreements may perplex legislators and lawyers in understanding the civil-commercial relationship, weakening the scientific and reasonable layout of civil-commercial legislation. Resolving this deadlock is the core issue of this paper.

1. The civil-commercial relationship as well as the disputes and consensus over civil-commercial legislation

The dispute over civil-commercial legislation arises from the different cognitions regarding the civil-commercial relationship. To study the layout and specific path of civil-commercial legislation, we shall first make sure what the bone of contention is. Many scholars have proposed different opinions towards the civil-commercial relationship based on their individual understandings of the relationship between civil affairs and commerce. The main theories are: (1) Theory of general law and special law. This theory acknowledges the particularity that distinguishes commercial norms from civil norms but argues that civil law is the general law of private law, while commercial law is the special law of private law.[③] (2) Theory of mutual fusion. This theory argues that civil law and commercial law are not totally different legal sectors but trending to mutual fusion in the contemporary era.[④] (3) Theory of dual independence in form and substance. This view is that modern civil law and commercial law have been totally differentiated in content and form (source of law). Civil law is to regulate family relations and the commercial law to regulate the transactional relationships in the market.[⑤] (4) Theory of independence in substance. This theory does not pursue the independent form of commercial law (e.g. commercial code), but holds that commercial law is essentially different from civil law, so it is better to define commercial law as the special law of private law rather than to define it as that of civil law. (5)

① Fan, 2008.
② Zhao, 2016.
③ Wang, 2015; Wang & Guan, 2016; Wang, 2005.
④ Jiang, 1998.
⑤ Xu, 2003.

Theory of unique but not independent commercial law. Such theory does not negate the commercial norms' own independence but negates the independence of commercial law from civil law because commercial law can hardly be independent from civil norms in respect to subject systems, behavior subjects, system of rights and that of legal protections.①

From the view of the scholars' discussions, it is difficult to simply classify relevant disputes into "unification of civil laws and commercial laws" or "separation of civil laws and commercial laws." The "separation" or "unification" of civil laws and commercial laws is considered not only at the subject level but also at the legislative level. As far as legislation is concerned, each legislation example has its own advantages and disadvantages.② At this level, even the scholars standing firmest for "unification of civil laws and commercial laws" also argue that best efforts shall be made to incorporate the common rules of special commercial law into the general provisions of the civil code, while it is debatable whether the remaining common rules of commerce should be codified into the *general rules of commerce*.③ The scholars tending to support the independence of commercial law also propose that the possibility of incorporating commercial norms into civil law as general principles shall be studied seriously.④ Moreover, even though commercial norms are independent in substance, the fundamental spirit of the civil code lies in practicality and conciseness and shall not be blended with complicated commercial norms.⑤ In the context of civil law codification, commercial norms shall also be expressed in the proper form of "codification."⑥

Academia does not negate the necessity of systematizing civil norms and commercial norms. The major issue to be considered for the moment is the specific expression of civil-commercial legislation. On this issue, relevant discussions have already resulted in partial consensus. A separate formulation of *General Rules of Commerce* to cover the parts difficult to be covered by the civil code have been a unanimously selected form of legislation in dealing with the relationship between civil laws and commercial law.⑦ However, the normative functions, legislative objectives and normative content of the *general rules of commerce* remain inconclusive. Following the tendency of civil-commercial integration, civil law and commercial law scholars jointly put forward slogans such as "mutual transformation between civil law and commercial law,"⑧ "formulating a civil code with commercial characteristics"⑨ and others. According to such legislative targets, civil law codification shall maximally satisfy the legislative requirements characterized by commercial law, and enable relevant norms to display some features of commercial law.

How shall we turn the civil norms into commercial law through civil law codification? As assumed by civil law scholars, the following main points need to be emphasized in legislation: At the value level, "introduce basic ideas and principles of commercial law, and reserve enough space for commercial system development;"⑩ at the technical level, "extract the common factors from the rules of commercial law and

① Xu & Yan, 2016.
② Liu, 2016.
③ Wang, 2015.
④ Fan, 2009.
⑤ Wang, 2015.
⑥ Xia, 2016.
⑦ Yan & Dong, 2013.
⑧ Zhao, 2005.
⑨ Liu, 2016.
⑩ Meng, 2015.

incorporate them into the general and *specific provisions of the civil code*;"[①] in terms of specific content, moderately regulate the legal persons (or juridical persons) system, juridical acts and contracts as well as agency systems to meet the demands for development of merchant and commercial act systems and the diversification of commercial agencies.[②]

2. General Provisions of the Civil Law: Latest examples of legislative interactions between civil laws and commercial laws

The extent to which civil norms reflect the requirements for transformation into commercial laws can in a way be used as an important criterion to judge whether civil law codification is successful. In March 2017, the National People's Congress approved the *General Provisions of the Civil Law of P.R.C.* (hereinafter referred to as *General Provisions of the Civil Law*). Now we need to clarify how many of the expectations held by academia have been achieved.

From the perspective of legal texts, we endorse some scholars' total evaluations, i.e., *General Provisions of the Civil Law* has not yet completed the mission of extracting the common factors from both civil law and commercial law.[③] This is attributed to various reasons (detailed below). If judging from a value concept, legislative techniques and normative contents, *General Provisions of the Civil Law* does respond to the legislative demands for transforming civil law into commercial law in many aspects. We not attempt to categorize these clauses in terms of legislative techniques.

2.1 General clauses

The so-called general clauses refer to the civil clauses in the civil code which can reflect the commonality between civil norms and commercial norms and apply to all civil-commercial legal relations. General clauses reflect the basic positions of the legislative style for the "unification of civil and commercial laws." The generality of general clauses, of course, only reflects the greatest common factor of civil law and commercial law, but the particularity of commercial norms shall not be negated or replaced for this reason. In the specific application of law, commercial norms are in most cases an alteration, supplement or exclusion to the general provisions.[④] *General Provisions of the Civil Law* contain a mass of general clauses regarding civil law and commercial law, from which several examples are discussed here for illustration.

2.1.1 The role of customs as a source of law

Article 10 of *General Provisions of the Civil Law* stipulates that, "Civil disputes shall be resolved in accordance with the law; or if the law is silent, customs may apply, but not contrary to public order and good morals." From the view of nature, this is a rule for making judgments, and the object of this rule shall be the person or authority in charge of making such judgments.[⑤] This implies that the judge can only consult statutes and customs in judging civil cases, forming a "law-customs" two-rank hierarchy system of law origin.[⑥] From

① Peng, 2017.
② Liu, 2016.
③ Zhao, 2017.
④ Karl, 2003.
⑤ Huang, 2001.
⑥ Chen, 2017.

the view of content, the customs mentioned in this article do not refer to customary law but a supplement being applicable only when there are no applicable legal provisions, because customary law shall be included into law.[①] From the view of applicable scope, scholars, whether an advocator of "unification of civil laws and commercial laws" or "separation of civil laws and commercial laws," all argue that commercial customs shall be stipulated as a source of law.[②] As this article does not clearly distinguish civil customs from commercial customs, according to the basic concepts of "unification of civil laws and commercial laws," this article shall also apply to commercial customs, and therefore can be seen as a general clause.

2.1.2 Resolution forming

According to the common theory of science of civil law, resolution is a special juridical act of regulating the internal relations of a social organization.[③] Besides corporate resolutions, owner management regulations and villagers' collective decisions, the resolutions of a board of shareholders or directors under commercial law can also be categorized as resolutions under civil law. Article 134 of *General Provisions of the Civil Law* divides juridical acts into unilateral, bilateral and multilateral acts. Article 134(2) provides: "Where a legal person or an unincorporated organization makes a resolution according to the mode of deliberation and voting procedures prescribed by law or bylaws, the act of resolution is formed." Resolution is thereby separately listed as an independent juridical act. The shareholders' voting, and other commercial organizational behaviors, as well as the resolutions of an owner's committee or a villagers' committee and other civil organizational behaviors can all be governed by Article 134 of *General Provisions of the Civil Law*.

2.1.3 Agency in duty

Article 170 of *General Provisions of the Civil Law* was added with a general rule regarding agency in duty, "Where a person who performs tasks for a legal person or an unincorporated organization conducts juridical acts related to matters within his or her scope of powers in the name of the legal person or the unincorporated organization, such acts shall have binding force on the legal person or unincorporated organization. Any restrictions imposed by a legal person or an unincorporated organization on the scope of powers of the person performing tasks for the legal person or unincorporated organization shall not act against *bona fide* counterparties." According to regulations and relevant principles, agency in duty is the agency authority obtained under contracted labor or employment.[④] Agency in duty is an existing concept in the traditional civil law, and Article 43 of General Principles of the Civil Law is its historical origin.[⑤] Agency in duty is also an important part of traditional commercial law. According to the legislative style of "separation of civil and commercial laws" in continental legal systems, commercial agency is closely related to the concept "commercial assistants." In a narrow sense, commercial assistants mainly refer to managers, clerks and apprentices hired by merchants for assistance in the operation.[⑥] Manager power and other commercial agency authorities are in essence the special forms of general agency authorities under civil law, which are designed to protect commercial transactions in particular.[⑦] The "person who performs tasks for an organization" provided for in

① Mei, 1998.
② Wang, 2015; Fan, 2009.
③ Karl, 2003.
④ Zhang, 1997.
⑤ Some civil law scholars believe that Article 43 of General Principles of the Civil Law is stipulated for agency in duty. See: Tong,1996.
⑥ Zhong, 2010.
⑦ Canaris, 2006.

General Provisions of the Civil Law can be construed as including the commercial assistants under traditional commercial law in a narrow sense. When there are no special provisions, the agency-in-duty rules of *General Provisions of the Civil Law* can apply to relevant commercial agencies.

2.1.4 Equity and other rights in investment

Article 125 of *General Provisions of the Civil Law* lists equity and other investment project rights as the object of civil rights. The civil code implementing separation of civil and commercial laws usually does not regulate equity. The legislative idea of *General Provisions of the Civil Law* is "unification of civil and commercial laws," so equity is listed as one of the civil rights.[①] The "rights in investment" is a concept created by *General Provisions of the Civil Law*, with its coverage including not only interest in shares based on individual partnerships under traditional civil law, but also rights in investment based on non-corporate enterprises under traditional commercial law, such as partnership enterprises and sole proprietorship enterprises, as well as new investments beyond the coverage of equity, real rights and claims, such as financial products, trust products and fund shares. The concept "rights in investment" is the latest abstract achievement of legislation contributed by *General Provisions of the Civil Law* based on unifying the property systems in civil law and commercial rules.

2.2 Integrative clauses

In terms of legislative technique, the general mode with emphasis on extracting the common factors of civil law and commercial law is not the only way to transform civil law into commercial law. Civil legislation can also directly draw upon the basic content of commercial norms, and integrate, graft and optimize the original content according to the normative purpose and system arrangement, to make civil norms an aggregation of civil and commercial characteristics. If general clauses can be seen as an innovation, integrative clauses then shall be of "Bringism," manifesting the cooperation between civil norms and commercial norms.[②] *General Provisions of the Civil Law* does not set out general clauses on all norms but draws some norms from separate commercial regulations. Integrative clauses are concentrated in the section "Legal Persons," particularly the section "For-Profit Legal Persons." Here are some examples:

2.2.1 Credibility of registration of legal persons

According to the common theory of commercial law, commercial registration has the following two major effects: One is to create rights through registration and publicity; the other is to endow the registered facts with presumptive validity of correctness through registration,[③] and the legal relationship established by a third party with the legal person according to the presumption has a definite corresponding legal effect. *General Principles of the Civil Law* does not specify the effect of legal persons' registration, while *Company Law* only stipulates individual matters regarding corporate registration. For instance, Article 32(3) of *Company Law* stipulates that a shareholder's name that has not been registered or altered via registration shall not act against a third party. Based on the principles of commercial law, Article 65 of *General Provisions of the Civil Law* states, "The inconsistency between the actual circumstances of a legal person and the registered information on the legal person shall not act against *bona fide* opposite parties." This article not only confirms the presumptive

① Chen, 2017.
② Zhang, 2006.
③ Canaris, 2006.

authenticity of the legal person's registration, but partially changes the previous judicial practice of negating the factual presumption effect of residence registration. According to Article 3 of *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*, the domicile of a legal person shall be the actual place where its principal office is located; only if the actual place cannot be determined, the legal person's registered domicile shall prevail.①

2.2.2 Legal person personality denial and compensation for damages of connected transactions

Article 83 and Article 84 of *General Provisions of the Civil Law* respectively stipulate that investors of a for-profit legal person shall be liable for abusing the rights of an investor and legal person personality denial; the controlling investors, directors, supervisors, and senior executives of a for-profit legal person shall assume liability for damaging the interests of a for-profit legal person through affiliations. Their theoretical origin is based on the duty of good faith undertaken by shareholders towards each other as well as the controlling shareholders toward the company.② These two norms originally came from the special commercial law and only applied to commercial subjects like company.③ To reduce and suppress the abuse of rights by the investors and controlling shareholders as well and other corporate shareholders, *General Provisions of the Civil Law* changes almost nothing but transforms them directly into the general rules of the civil subject system, creates the civil norms with commercial characteristics, and expands the applicable scope of special commercial law to cover all for-profit legal entities.

2.2.3 For-profit legal persons' internal resolutions and external legal relations

According to the science of civil law, a resolution can only regulate participants' joint rights or the rights of the legal person they stand for and does not regulate the relationship between an organization or legal person and a third party, nor regulate the personal relationships of the participants.④ According to this principle, in a discussion about Article 16 of the *Company Law* regarding the resolution rules, some civil law scholars propose to cut off the effect-implication of internal corporate resolutions with external behavior.⑤ Commercial law scholars, however, do agree with the distinction between internal and external behaviors, argue that a certain system of review shall be established with commercial organization law as its fundamental basis and a third party shall bear a certain responsibility of attention to the defects in internal behavior.⑥ According to Article 85 of *General Provisions of the Civil Law*, when the resolution of a for-profit legal person is confirmed to be invalid or revoked, the civil legal relationship formed by the legal person with a *bona fide* counterparty pursuant to that resolution shall not be affected. This stipulation abides by the consensus reached by civil and commercial law circles that a resolution behavior shall not affect external relationships and draws upon the achievements of commercial law studies. Whether an external legal relationship created by a for-profit legal person pursuant to a flawed resolution "is binding upon the for-profit legal person depends on whether the third party is in good faith."⑦

① Although Article 63 of General Provisions of the Civil Law inherits the provision that domicile is the place where a legal person's principal office is located, the latter half of the sentence also states that the legal person to be registered shall have the place where its office is located consistent with its registered domicile.
② Zhong, 2015.
③ These two articles are respectively derived from Article 21 and Article 21 of the Company Law.
④ Karl, 2003, p. 433.
⑤ Cui & Liu, 2008.
⑥ For relevant opinions, see: Luo, 2012; Liang, 2013; Qian, 2011.
⑦ Shen, 2017.

Moreover, the dissolution of a legal person prescribed in Article 69 and a responsible person for organizing liquidation prescribed in Article 70 of *General Provisions of the Civil Law* all result from refining, absorbing or transforming Article 180 and Article 183 of *Company Law*, when General Principles of the Civil Law is either silent or vague on the matter.①

2.3 Quoted clauses

In terms of legislative technique, in order to formulate a simple and pragmatic code and prevent tedious and repetitive statements, legislators often use restrictive, referential or referral terms to refer the applicable issue in question to elements prescribed under other legal provisions. Such clauses are mainly designed to reserve interfaces to different legal orders to jointly construct a new legal order. These interfaces are vividly known as "quoted clauses" which are incomplete legal clauses in terms of normative quality, providing only the basic elements or parts of the legal effects. They can only play a role in the joint creation of a legal effect when combined with other legal clauses.② In *General Provisions of the Civil Law*, many commercial norms can be included in the order of civil law via quoted clauses, which restricts or transforms the normative functions of civil clauses and updates the commercial order and endows it with commercial characteristics. Some examples.

2.3.1 Restrictive legal clauses

The civil norms set up as general provisions in *General Provisions of the Civil Law* can apply to civil and commercial fields. But in some special commercial fields, due to the logic specific to commercial norms, it shall not be able to give play to the expected role of norms by completely applying civil norms. The typical example is Article 11 of *General Provisions of the Civil Law*: "Where there are any special provisions on civil relations in any other law, such special provisions shall apply." From the view of the legislative goal, some special commercial rules involving the field of private law shall not be incorporated into the civil code, so this rule clearly defines the relationship between *General Provisions of the Civil Law* and special civil and commercial laws.③ This provision, as a restrictive legal clause, excludes the general clauses of civil law from being applied to a special commercial law. Furthermore, this provision also shows the relative completeness of legal clauses.④ Partial clauses of *General Provisions of the Civil Law* might be complete legal clauses relative to civil life, but incomplete relative to commercial life. Only quoted legal clauses can strengthen their normative effects.

2.3.2 Referential legal clauses

The elements of referential legal clauses are also incomplete and need to be supplemented by other legal clauses. They are provided mainly to prevent repeated provisions in legislation.⑤ Article 62(2) of *General Provisions of the Civil Law* stipulates that the legal person may, after assuming such civil liability, claim

① General Principles of the Civil Law does not provide for the dissolution of a legal person nor the grounds thereof. The Article 47 thereof only stipulates the grounds for liquidation of an enterprise legal person but does not stipulate the responsible person for organizing liquidation and the legal consequences should he violate this duty.
② Karl, 2005.
③ See: Interpretation of Standing Committee of the National People's Congress on General Provisions of the Civil Law of People's Republic of China (draft), made by Li Jianguo, vice chairman of Standing Committee of the National People's Congress, at the Fifth Session of the Twelfth National People's Congress on March 8, 2017.
④ Huang, 2001.
⑤ Karl, 2005, pp. 141–142.

reimbursement from the legal representative at fault in accordance with the laws or its bylaws. The "in accordance with the laws" mentioned above means that any legal clause of which the elements can be used to claim reimbursement from the legal representative may be applied. The laws that can be used to claim reimbursement from a legal representative now mainly refer to special commercial law. For example, Article 147 of *Company Law* stipulates that directors, supervisors and senior executives are obliged to be loyal to and work diligently for the company and shall assume compensatory liability for the company according to Article 149 thereof if they violate this legal obligation.

2.3.3 Referral clauses

Referral clauses, also known as citation clauses or citation norms, refer to legal clauses that do not have independent normative connotations or rule-interpreting significance, but simply quote a specific norm from whose purpose a judge can then determine their effect.[①] They are the explanatory concept proposed by civil law scholars in studying the interactive relations between different legal fields (e.g. public law and private law). Article 71 and Article 127 of *General Provisions of the Civil Law* are both referral clauses. It is believed that such provisions shall not be included in *General Provisions of the Civil Law*, because they do not provide any norms but only state that where there are provisions in any other law, such provisions shall apply, which is nothing else but repetition.[②] We acknowledge that excessive referral clauses may bring some negative effects, e.g. weakening the role of *General Provisions of the Civil Law* in codification, but their unique value shall not be ignored. They at least provide the normative premise for elements. Article 71 of *General Provisions of the Civil Law* stipulates that, "The liquidation procedures and the powers of the liquidation group of a legal person shall be governed by the provisions of relevant laws; and if there are no such provisions, the relevant provisions of the *Company Law* shall apply mutatis mutandis." It is not hard to see that Article 183 and Article 189 of the *Company Law* quoted here are not dispensable repetitive explanations, but restrict the legal basis invoked by a non-corporate juridical person for liquidation. For instance, the current Interim Regulations on Registration Administration of Private Non-enterprise Units includes some provisions regarding the liquidation of private non-enterprise units, but Article 71 of *General Provisions of the Civil Law* makes the preceding provisions on the liquidation of private non-enterprise units no longer applicable and the liquidation procedures shall be directly based on the provisions of *Company Law*. Thus the citations in such clauses can help civil norms change to commercial norms.

3. Unfinished work of civil-commercial unification: Taking the agency in duty of a commercial agency as an example

To maintain its position as a general law, *General Provisions of the Civil Law* needs to govern all civil and commercial rules in an abstract way. The role of abstract legislation in application of law is mainly manifested in such a way that when no directly applicable basis can be found in the field of special law, it is suggested to "trace back to the original legal principle basis in civil law for interpretation."[③] *General Provisions of the Civil*

① Su, 2004.
② Xue, 2017.
③ Peng, 2017.

Law unifies norms in a limited fashion. Many commercial norms are quite different from civil norms, and each volume of civil law is also distinctive in content so one can imagine how difficult it is to establish general clauses. If it is intended to reduce the degree of abstraction, then providing detailed norms in the general provisions for a specific system goes against the principle of abstraction, i.e., extracting "one-fits-all" common factors;[①] on the contrary, the more abstract and universal the general provisions are, the weaker they will become in guiding commercial law. The mechanical application of civil provisions will definitely lead to the inadequate consideration of commercial law's own principles and rules, making it difficult to truly manifest the exception of the normative purpose.

Positioning *General Provisions of the Civil Law* as a general law will seriously constrain it in absorbing commercial norms. "If incorporated into a code, the special legislation at great length will expand the code into an uncontrollable voluminous work,"[②] and "a wide variety of rules and values may also affect or deprive the code of its guidance as the general rules and value provider."[③] The legislative "ceiling" constructed by relevant factors determines that the civil code can only sustain a "low-level legislative model."[④] The large quantities of quoted clauses borrowed by *General Provisions of the Civil Law* clearly prove such legislative positioning. The result arising therefrom is that we can hardly rest all hopes on the governing, integration and technical synergy of *General Provisions of the Civil Law* but must find another way for the legislative expression of commercial norms. This is not only decided by the relationship between civil law and commercial law, but also inevitably required for good interactions between them. Below is a detailed explanation on the rules of agency in duty added to Article 170 of *General Provisions of the Civil Law*.

3.1 Unclear scope of agency in duty

Agency in duty is prescribed in the section "Agency by Mandate" in *General Provisions of the Civil Law* as the special rules of agency by mandate and falls under voluntary agency. According to the science of civil law, voluntary agency is a necessary tool for the principal of expanding the autonomy of will, supplementing and extending its "hands and feet"[⑤] and reflecting the principal's rights of autonomy and self-government under private law.[⑥] But the origins of the right for agency in duty remain controversial in academia. In general, the theories about the origins of the right include principal's authorization, duty-based origins of the right and multiple origins of the right.[⑦]

Literally, the origins of the right for agency in duty in *General Provisions of the Civil Law* are positioned on "terms of reference." This legislative approach makes sense in a way. It is difficult to make theoretical logic self-consistent by treating laws and customs as the multiple origins of rights for voluntary or commercial agency. The origins of the right for voluntary agency can only come from the principal's mandate. Based on the demands of special norms, laws and customs are better seen as a categorized scope of authority than as a symbol of multiple origins for the rights of agency. However, according to the common theory of science

① Li, 2016.
② Merryman, 2004.
③ Mao, 2013.
④ Wang, 2015.
⑤ Chen, 2017.
⑥ Medicus, 2000.
⑦ Yin, 2016 (for voluntary agency's different origins of right); Xiao, 2006 (for commercial agency's different origins of right).

regarding civil law, agent authorization is a single act[①] and the scope of the right of voluntary agency still hinges on the representation conveyed by the act of authorization, not what is contained in basic behavior.[②] The representation made by a legal person or an unincorporated organization based on which terms of reference are set up can be manifested in provisions of a labor contract, an assignment and assumption agreement, or an appointment through articles of association or resolutions. Relevant provisions directly describe the origins of the right for agency in duty as "terms of reference," which seems to be in conflict with the civil principle of distinction between basic relations and an act of authorization.

This can be interpreted in a rather reasonable way, that the will of granting authority is distinguished from the basic relations resulting in authority, and the former is directly seen as an agent authorization. In this way, the origins of the right for agency in duty are reset to the principal's authorization. However, differing from the unicity of common agency by mandate, authorization of agency in duty is characterized by the organization as well as the sustainability, repeatability and independence resulting therefrom.[③] There is no need for the will of granting authority to determine the scope of authority for each transaction. It is the general authorization, of which the matter and scope of agency are extendable depending on position and rank. For instance, clerks are clearly not authorized but shall still be considered to have the right of sales agency as per their duty.[④]

General Provisions of the Civil Law generally prescribes that agency in duty is determined by terms of reference, but does not state clearly the principles of determining the scope of agency, which is exactly the key difference between commercial and civil agency. In this sense, the major differences between them are: According to civil law, the scope of voluntary agency is in principle generated by the principal's will; the scope of commercial agency (manager power) does not completely hinge on the principal's will but also on legal provisions. It does not matter whether the manager's specific act of agency is the principal's will.[⑤] The absence of a definition in clauses of agency in duty will give rise to various problems in judicial practices. The "terms of reference" are in nature nothing else but the internal affairs of an organization and the scope of agency is determined only through internal authorization. The external relations must be managed in combination with the rules related to *bona fide* counterparty in Clause 2, to construct a complicated set of elements regarding "*bona fide*" counterparty. But without legal provisions there would likely by "more unnecessary disputes over defined terms of reference in theory and in practice, and many more disputes involving the agency of a legal person and unincorporated organizations in judicial practices."[⑥]

3.2 No proper subdivision of different terms of reference and agency authorities

The biggest difference between Article 170 and Article 43 of *General Provisions of the Civil Law* is that Article 170 changes the practice of juxtaposing "legal representative with other employees," and only stipulates "a person who performs tasks for a legal person or an unincorporated organization." According to the system arrangement, legal representative is governed by the representative system in Article 61 of *General Provisions of the Civil Law*, while other employees of a legal person or an unincorporated organization are governed by the

① Chen, 2017.
② Chen, 2006.
③ Jiang & Wang, 2016.
④ Chen, 2017, p. 120.
⑤ Chen, 2006, p. 118.
⑥ Yin, 2016.

agency-in-duty system in Article 170.[①] Whether it is a legal person or an unincorporated organization, there are many people performing tasks and holding various posts, but *General Provisions of the Civil Law* does not further divide their functions and powers. No answer has been provided to whether different task performers have the authority of agency in duty externally, or how to divide their agency types and effective scope.

When we review relevant legislation from the continental legal system, under the governing of "mercantile employees," "commercial assistants," "commercial employees" and other concepts, the authorities of agency in duty are usually divided into three categories: One is manager power, with the widest scope of agency, which is capable of agency for all juridical acts in and out of litigation; another is right of agency within a specific scope, with its scope of agency narrower than the manager's, and named variously from country to country, such as power of attorney, partial right of agency and corporate auxiliary power; the last is clerks' right of agency with which the clerks do not need the owner's authorization and are deemed having the sales authority as long as they are employed by the store.[②] On the whole, all types of agency in duty are confined in legal scope. The above forms of agency in duty are categorized through legislative techniques in different countries so that they can constitute a logically rigorous rights system focused on manager power.

In searching our current legislation, we found similar names in laws not contained in *General Provisions of the Civil Law*. Besides the "personnel" of an enterprise legal person prescribed in General Principles of the Civil Law, there are "senior managers" prescribed in Article 216 of *Company Law* and "manager" prescribed in Article 35 of *Law of the People's Republic of China on Partnerships*. In addition, there are also concepts such as "workers," "staff," "hire labors" and "employees" in the enterprise legislation in China. Those position titles expressed not by legislation but by articles of association, internal agreements or commercial ideas vary greatly, such as president, director, department manager, business manager, store manager, chief officer and many others. By brief analysis, these concepts can hardly correspond to the agent in duty of foreign countries. For example, "personnel" shall literally refer to all staff members of an enterprise except the legal representative, of which the denotation covers too wide a range as compared with agent in duty. "Senior managers" only refers to the managers in charge of a company, of which the denotation is too narrow as compared with the agent in duty. If these concepts are grafted on the agency in duty in *General Provisions of the Civil Law*, then the denotation mismatch mentioned above will probably occur.

More crucially, relevant concepts related to commercial separate regulations are not designed because of commercial agency power. For example, it can be seen clearly from Article 50 of the *Company Law* that the general manager's functions and powers in a company, though with legal attributes, are basically confined within the company's internal management, and do not necessarily result in external relations between the company and a third party. Furthermore, the concepts of China's enterprise legislations such as "workers," "staff," "hire labors" and "employees" are all defined with a view to the labor relations between them and the enterprise, and have different value considerations, e.g. SOEs correspond to "workers," while the employees of private enterprises are often called "hire labors."

Article 8 of *Measures for the Administration of Construction Enterprise Project Manager Certificate* is one of the rare cases, because it directly stipulates that a project manager is entitled to "handle the external relations

① For the distinction between representative and agent, see: Huang, 2002.
② Zhong, 2010.

related to the undertaken of construction projects and sign relevant contracts with authorization." However, this regulation only serves as one of the departmental rules to solve individual problems. In the broader commercial field, only with the simple concepts prescribed in Article 170 of *General Provisions of the Civil Law* and the provisions on division of organizational authorities in other single laws, it is impossible to construct a system of agency in duty as well-structured as those in foreign civil codes or commercial codes.

3.3 Insufficient implementation of the *Rechtsschein Theorie* in the commercial field

The *Rechtsschein Theorie* refers to the determination of legal effects arising from the behavior of trading parties by their behavioral Rechtsschein.[①] The objective trustworthiness demonstrated by commercial registration is the typical feature of the *Rechtsschein Theorie*. Through registration, a correct means of public announcement can be presumed for creating or altering the rights of private law on one hand, and on the other hand opposite facts can be endowed with "implied" trust so that the unregistered shall not act against a *bona fide* third party.[②] Since agency in duty is rendered to carry out organized and persistent transactions, particular attention is paid to transaction security. Based on the legal and objective structure of agency, the trading counterparties just need to confirm a managers' identity through registration or other easily accessible means, "and then can securely have managers carry out transactions, without investigating the availability of the manager's power one by one."[③]

According to comparative law, manager power and other authorities of agency in duty shall be acquired in principle by means of express authorization and must be registered, e.g. Article 53(1) of the *German Commercial Code*, Article 2206(1) of the Italian Civil Code, and similar provisions by Japan, South Korea, Switzerland and Macao (China).[④] To ensure transaction security, the clauses on agency in duty of *General Provisions of the Civil Law* in China also admit that "the restrictions on terms of reference shall not act against *bona fide* counterparties," but the finding on "*bona fide*" has perplexed civil trials in practice.[⑤] The counterparty can have difficultly proving its "*bona fide*" due to unavailable mandatory standards related to the terms of reference and relevant means of public announcements for authorization.

It is noteworthy that the constituents of "*bona fide*" from *bona fide* acquisition as mentioned in Article 106 of Property Law shall be examined and determined through registration and presumption, which is an established judicial practice.[⑥] In our opinion, the formalized standard of *bona fide* acquisition does not belong to the commercial *Rechtsschein Theorie* in an absolute sense. In the determination of "*bona fide*" under civil law, it is common to see that the reliance on registration is negated according to the subjective attitude of a counterparty who "knows or should know" some facts.[⑦] By contrast, the registration reliance of commercial *Rechtsschein Theorie* is more powerful in objective effect. To ensure the consistency and certainty of legal

① Wang, 2001.
② Canaris, 2006, pp. 74–75, 80–81.
③ Huang, 2003.
④ Zhong, 2010.
⑤ Someone from practice circles believes that bona fide is a kind of mental activity inside and not exposed to the outside, which therefore cannot be measured. See: Civil Adjudication Tribunal No.1 of the Supreme People's Court, 2016.
⑥ See: Article 16(1) of the Interpretation (I) of the Supreme People's Court on Several Issues concerning the Application.
⑦ Article 16(2) of the Interpretation (I) of the Supreme People's Court on Several Issues concerning the Application of the Property Law of the People's Republic of China states: "If the true right holder can prove by evidence that the transferee of an immovable shall know that transferor has no right of disposition, the transferor shall be determined as having gross negligence." This provision accepts the rules of disproval relying on the counterparty's awareness, and virtually undermines the objective reliance of registration.

relations, once registration has been filed by an authorized manager, it shall not act against any third party, whether *bona fide* or *mala fide*.[①] Even if the legal meaning of "*bona fide*" is taken into account, we shall determine it in strict accordance with objective interpretation, instead of seeking the actor's subjective attitude at every turn. Pursuant to this requirement, whether the counterparty knows about internal defects will not affect the effect of agency acts, unless the counterparty abuses its "informed understanding," in which case it shall be determined as *mala fide*.[②]

The failure to legalize and objectify the terms of reference of agency in duty may in practice cause confusion between authorized agency and apparent agency. It is held that if the agent in duty acts beyond its terms of reference, i.e., beyond the principal's scope of authority, which shall constitute unauthorized agency, then the rules of apparent agency stipulated in Article 172 of *General Provisions of the Civil Law* shall apply.[③] According to the principle of distinction between agent authorization and basic relations, the internal agreement of a legal person or an unincorporated organization shall not be naturally seen as a restriction on agent authorization; if there are external authorizations (e.g. announcements, registrations) or other presumably implied authorization forms, the agency in duty is still an authorized agency.[④] If the terms of reference are confined within the scope of apparent agency, the quality of commercial Rechtsschein trust protection as the objective basis will be sacrificed significantly. Similar to *bona fide* acquisition, apparent agency is also more demanding for the counterparty's duty of care, which is often unfavorable to the guarantee of transaction security in relevant fields. From the perspective of the discussion among civil law scholars, the applicability of apparent agency hinges on whether the principal is "accountable," "the risks are controllable by the principal" and other fair factors, or at least on the premise that the principal's accountability is incorporated into the counterparty's "reasonable reliance" factors.[⑤]

According to this analysis, only if the public announcement system of authority of agency in duty is established according to the value requirements of commercial agency, can it be consistent with the principles of the commercial *Rechtsschein Theorie* pursued by the continental legal system, and effectively solve the problem of an unclear scope of authority resulting from a general authorization.[⑥]

3.4 Absence of substantive norms for internal relationships of agency in duty

According to the continental legal system, the agency system is designed to regulate the attribution of legal effects concerning the juridical acts between principal and counterparty; the relationship between agent and principal is not included in the scope of the agency system.[⑦] Agency in duty as a special type of voluntary agency under private law shall naturally follow this main thread of civil law. Just like *General Principles of the Civil Law*, the agency system of *General Provisions of the Civil Law* is also centered on agency authority, with emphasis on regulating the attribution of legal consequences from agent performance, shedding little light on the basic relations between agent and principal. Judging from relevant provisions, only the provision on abuse of agency authority in Article 165 thereof can apply to the internal relationship between agent in duty

① Ke, 2002.
② Zhong, 2015, p. 214.
③ Shen, 2017.
④ Most scholars believe that linked business in practice is of unauthorized agency, which can be governed by the rules of apparent agency. See: Zhou, 2011.
⑤ Chen, 2017, pp. 1228–1229.
⑥ Jiang & Wang, 2016.
⑦ Chen, 2017.

and organization. No doubt such a design is logical in theory but may not satisfy the practice requirements of commercial law. The reasons are as follows:

3.4.1 The internal norms of agency in duty are not optional

For various task performers inside a legal person or an unincorporated organization, external agency authority is just one of their rights generated based on their positions. Depending on different positions or basic relations, relevant personnel enjoy a different legal status inside the organization. Taking a company manager (general manager) as an example, its internal relationship with the company includes appointment relationship and labor or employment relationship under civil law.① A company manager can also take charge of day-to-day operations, and therefore establish a special fiduciary relationship with the company.② If allowed by articles of association, the manager can also become the company's legal representative. Therefore, the internal relationship between agent in duty and a legal person or an unincorporated organization is diversified in attribute. And the internal relationship may not necessarily correspond to the external relationship, so norms, other than agency rules, shall be established.

3.4.2 It is the mainstream of foreign legislation to set up a system of rules to regulate the internal relationship of agency in duty.

From the view of foreign legislation, mercantile employees, commercial assistants and other concepts not only point to commercial agency power, but also have in mind the internal relationships between merchants and assistants,③ with emphasis on the main obligation of commercial assistants, i.e., non-competition. Specifically, the competition trade norms of commercial legislation examples vary to some degree from country to country. First, from the subject of obligation, except *Handelsgesetzbuch (German Commercial Code)* in which uniform provisions are made regarding commercial assistants' non-competition,④ the legislators of many countries/regions only make such provisions against managers, which is mainly attributed to the managers' position and the duty of loyalty they undertake for merchants.⑤ Next, from the angle of prohibition scope, the legislation examples of some countries/regions stipulate that the scope of competition trade is not limited to simple competition trade, but extended to all operating activities,⑥ or to the shareholders, directors and other commercial employees of a company who bear unlimited joint and several liabilities⑦. The thinking behind this is that most scholars believe that if a manager carries out operations for others, or becomes an employee of other commercial enterprises, he often must expend much effort on that and inevitably fail to attend to all things at the same time, which therefore goes against the duty of loyalty. Furthermore, the

① Wang, 2004.

② According to the structure of fiduciary relationship, the management of a company must act with no efforts spared and in good faith in the interest of trust beneficiaries, i.e., shareholders. See: Zhong, 2015.

③ A relatively special model is Handelsgesetzbuch, in which besides manager power and other commercial agency authorities, "commercial assistants and apprentices" is discussed in a special section to regulate the internal relationship between commercial assistants and merchants. See: Handelsgesetzbuch, 1999. (Unless otherwise specified, relevant provisions quoted below are all from this translation.)

④ Article 60(1) of Handelsgesetzbuch states: "A mercantile employee may not without the consent of his employer either carry on a mercantile trade or enter upon transactions in the same branch of trade as his employer either for his own or for a third party's account."

⑤ A special provision is usually made on duty of loyalty in Company Law. It is generally believed that non-competition is the embodiment of duty of loyalty. See: Gan & Liu, 2009.

⑥ See: The first half of Article 60(1) of Handelsgesetzbuch.

⑦ Article 41(1) of Commercial Code of Japan states: "A manager must not engage in any of the following conduct without the permission of the Merchant: (i) carrying on an independent business; (ii) conducting a transaction that is in the Merchant's line of business for the benefit of the manager or a third party; (iii) becoming the employee of another Merchant or of a company or foreign company; (iv) becoming the director, executive officer, or executive managing member of a company." (Relevant clauses are quoted from: Commercial Code of Japan, 2000.)

elements of competition trade across the world are "on one's or others' account;" in some legislation examples, "on one's account" includes the indirect engagement "through others."[①] Finally, if a manager acts against his non-competition obligation, the merchant can claim right of intervention or compensation for damage.[②] The right of intervention can be divided into two types. One is "right of intervening a legal relationship," with which the principal can consider the manager's behavior as transactions conducted by himself.[③] Such right of intervention is in fact an intervention to the overall legal relationship. The other is "right of intervention for taking profits," with which the principal can only request the transferee to return his trading gains, a right commonly known as disgorgement.[④]

3.4.3 There are not in the present legislation of China norms on the obligations of "managers" other than obligations of those of a company and of other agents in duty.

According to China's *Company Law*, only "senior managers" of a company now need to abide by the agents in duty non-competition and loyalty obligations, which do not govern other agents in duty of a company or other non-corporate legal persons or unincorporated organizations. Although the provisions on non-competition against employees are made in Labor *Contract Law*, they are voluntary norms and clearly in favor of workers.[⑤] Moreover, China's *Company Law* only provides for an intervention for taking profits (disgorgement) specific to the acts in violation of non-competition.[⑥] For the protection of commercial subjects, the right of intervention to the legal relationship is also necessary, which can enable a company to intervene in the legal relationships of acts in competition trade and turn them into the company's operating activities to effectively win back clients and protect the company's interests. Such a purpose cannot be achieved only by taking property interests or claiming compensation for damages. In some cases, agents in duty are only required to turn in the earnings obtained through competition trade, but such a practice does not accord with the principle of social and economic efficiency. For example, if a manager acts against his non-competition obligation and invests to establish a for-profit legal person by himself, the operating profit must be taken from each transaction of continuing operations, which is not only a waste of time and energy, but also unable to be implemented under supervision. If such a right of intervention is provided under relevant laws, a company can treat all incurred transactions as its own, by which time the manager's business establishment and operations will all be conducted on behalf of the company.

Due to the lack of commercial agency-related concepts, it is naturally impossible for legislators of *General Provisions of the Civil Law* to consciously design any system related to commercial agency power, leading to the absence of relevant norm groups on agency. Even though some norms are formulated in Article 170 of *General Provisions of the Civil Law* and the *Company Law*, a well-structured article on commercial agency has

① Article 71(1) of Commercial Code of Macao states: "A manager cannot, without express assent from the principal, exercise a commercial enterprise of the type for which he is engaged, either by himself or through, or for the account of, a third party."
② Article 71(3) of Commercial Code of Macao is the legislation example that clearly prescribes the compensation for damage. Among other legislation examples, Article 12(2) of Companies Act of Japan stipulates that the amount of the profit obtained as a result of acts in competition trade shall be presumed to be the amount of the damage suffered by the company and be treated as compensation for damage.
③ Article 41(2) of Commercial Code of Japan stipulates that if a manager conducts transactions in violation of non-competition provisions, the owner shall deem the transactions as those conducted by himself.
④ Article 563(1) of "Civil Law" of Taiwan (China) states that if a manager acts against his non-competition obligation, his firm may demand from him, on the grounds of his violating the appointment agreement, the profits resulting from his act.
⑤ See: Article 23 of Labor Contract Law.
⑥ See: Article 148(2) of Company Law.

yet to be formed.

4. Subsequent options for commercial agency and other commercial legislations

Based on the subsequent demands of commercial legislation, further discussions shall be conducted on whether *Specific Provisions of the Civil Code* can undertake the unfinished transformation into commercial law in *General Provisions of the Civil Law*, and which parts shall be left open for an overall arrangement in *General Rules of Commerce*. Along with the promulgation and implementation of *General Provisions of the Civil Law*, a staged achievement has been obtained in civil law codification. However, many commercial norms have yet to be legally affirmed through civil law codification. Some of them hide in separate, sporadic commercial laws, and some remain only as theory, far from practice and only with difficultly might they be systematically applied by adjudicating organs. Hence, what shall be considered next is the implementation of commercial norms after the appeal for legislation.

As far as commercial agency is concerned, there are three subsequent options in theory: One option is that the special commercial agency issue can be put aside for further consideration in *Specific Provisions of the Civil Code*, e.g. special provisions can be made for indirect agency in relevant parts of the specific provisions of obligation law.[①] The second option is to uniformly address indirect agency, apparent agency, manager power, power of attorney and other systems in *General Rules of Commerce*. The third option is to address commercial agency in separate commercial laws, e.g. adding manager power, power of attorney and other norms during the amendment of *Company Law*.[②] These options shall be demonstrated specifically and selected in combination with the present civil law codification and actual commercial legislation.

4.1 Different agency norms cannot be indiscriminately incorporated into *Specific Provisions of the Civil Code*.

In the legislation of commercial agency, due to different legal system backgrounds and legislative models adopted by countries around the world, the generalization and definition of commercial agency varies from country to country. Specifically, the continental legal system does not recognize undisclosed agency and indirect agency, and only stipulates disclosed agency, i.e., direct agency.[③] Besides manager power, power of attorney, clerk power and other forms of agency in duty, the agents engaged in media exchange or agency activities for merchants as an independent bailee are also considered a direct agency in the continental legal system.[④] Anglo-American law, though having no concept of "commercial agency," contains the form of undisclosed agency that caters to the agents' professional needs, and therefore better shows the advantages of commercial agency.[⑤] The approximate scope of commercial agency covers all the above-mentioned forms of agency in duty, agents and indirect agency.

① Li, 2016.
② See: Xie, Hongfei. (2016). Basic ideas and important system of agency–related legislation. Journal of East China University of Political Science and Law, 2016(5), 64–74; A similar opinion is also expressed in the discourses of commercial law scholars, see: Fan & Jiang, 1998.
③ Geng & Cui, 2016.
④ See: Article 84 of Handelsgesetzbuch.
⑤ Wu, 2009.

The agency in duty prescribed in *General Provisions of the Civil Law* is identical to that of the continental legal system, which is only limited to direct agency. So an undisclosed agency is different from the general agency rules and shall be incorporated into the system of specific provisions as special provisions. Since the rules of undisclosed agency have already been included in Articles 402 and 403 of *Contract Law*, and judging from the changes in historical draft versions of *General Provisions of the Civil Law*, relevant rules are more likely to have a place in the specific provisions in the future, but it is relatively difficult for the moment to make similar arrangements for agency in duty and agents at the same time.

First, no space has been reserved for agency in duty and agents in the present system of specific provisions in *General Provisions of the Civil Law*. In terms of system, the manager-agent relationship is the basis for the generation of special liability and can by all means be included in the *Specific Provisions of Civil Code* via the "Volume of Obligation Law." *The "Civil Law" of Taiwan (China)* is one of the representative examples. But mainland China's obligation law system, as deeply influenced by *Contract Law*, *Tort Liability Law* and other civil separate laws, has gradually been decentralized. Besides, Articles 121 and 122 of *General Provisions of the Civil Law* make provisions for spontaneous agency and unjust enrichment that are supposed to be part of *General Provisions of the Obligation Law*, which is nothing short of an order to deconstruct the traditional obligation law system.[①] Without the Obligation Law, an important channel for incorporating agency in duty into the specific provisions disappears. Judging from the compilation plan for a contract volume, a real rights volume, and a tort liability volume under *Specific Provisions of Civil Code*,[②] they can neither provide accommodation for agency in duty or the agent system.

Next, it is almost impossible to incorporate relevant norms by adding new sections. According to comparative law, various enterprise standards can be compiled independently so that the agency-in-duty system can be arranged in a systematic way via civil law codification. For instance, under the chapter dedicated to "Enterprise and Labor" in the "Labor Volume" of the *Italian Civil Code*, the section "Commercial Enterprises and Other Enterprises to be Registered" is concentrated on commercial enterprise agency, registration and other issues.[③] But to follow such a format of "great civil-commercial unification," it is necessary to extract the secondary common factors from relevant separate laws such as *Company Law*, *Partnership Enterprise Law*, *Sole Proprietorship Enterprise Law*, and *Labor Contract Law*. Such a huge amount of work makes it impossible to catch up with the compiling schedule of *Specific Provisions of the Civil Code*. Moreover, if the content blended in is too complex, the result is more likely to be a collection of codes than codification. Thus, such a way of thinking neither accords with the abstractness and simplification of civil code positioned as the general law of private law by academia, nor matches the "low-level legislation model" of *General Provisions of the Civil Law*.

Furthermore, academia has yet to reach a consensus on the specific arrangement of commercial agency in the civil code. Although most scholars are conscious of the uniqueness differentiating commercial agency from civil agency, civil law scholars often do not adequately understand the particularity of commercial

① Xue, 2017.
② See: Interpretation of the Standing Committee of the National People's Congress on General Provisions of the Civil Law of People's Republic of China (draft), made by Li Jianguo, vice chairman of the Standing Committee of the National People's Congress, at the Fifth Session of the Twelfth National People's Congress on March 8, 2017.
③ Italian Civil Code, 1997.

norms[①] under the direction of the "Great Civil Law" theory. For instance, with commercial agency under discussion, some scholars turn a blind eye to the abundant commercial rules contained in the direct agency of the continental legal systems, and arbitrarily support the dual division, i.e., direct agency shall apply to the civil field, while indirect agency in a narrow sense (undisclosed agency) shall apply to the commercial field.[②] Other scholars ignore the substantive difference between direct agency and indirect agency, and mistakenly propose to unify the standard governing commercial middlemen, commercial agents, commercial assistants and other different forms of agency.[③] According to the convergent thinking in the formulation of *General Provisions of the Civil Law*, i.e., "do not touch upon the fields under dispute,"[④] before a scientific consensus is reached on relevant issues, legislators may not take the risk and follow the example in legislation of indirect agency, and set clauses or sections for manager power, power of attorney and agents.

4.2 *General Rules of Commerce* shall be formulated as per the "residue law" model in subsequent legislation.

Restrained by its legislative model, the quality of *General Provisions of the Civil Law* as commercial law does not stand out. Although civil law scholars have exerted efforts to construct an uniform agency system featuring "unification of civil and commercial laws," and propose to cover manager power, power of attorney and other forms of commercial agency in the continental legal system with agency in duty and agency by mandate,[⑤] and even considered including indirect agency from Anglo-American law into the *General Provisions of the Civil Law*,[⑥] the final legislative texts, as mentioned above, are a far cry from the requirements for turning civil law into commercial law.

As it is difficult to formulate an all-inclusive civil code, then the decodification path in the opposite direction, i.e., making separate commercial laws as the main form of commercial norms, is an option. As for the relationship between codification and separate laws, if the "particularity" of separate laws makes them a far cry from the code, then they are not separate laws but are other laws, which shall be removed from the code.[⑦] In the history of commercial law, such phenomena are not rarely seen, e.g. *Companies Act of Japan* was made independent of their *Commercial Code in 2005*. Through concrete studies of *company law* and other commercial separate laws, it has been found that the company manager system in many countries or regions is increasingly integrated with the authority factors of internal governance, endowing managers with other legal authorities besides being a legal organ and a holder of agency authority.[⑧] Modern managers have diverse identities, detaching them from the role of business assistants defined by the traditional commercial law, and engaging them in a gradual transition to the core identity of operating management. As mentioned above, the manager in the present *Company Law of China* is not designed as a responsible person of an enterprise based on the commercial agency concept in the first place, but a concept mainly used for the internal management of an enterprise. To maintain the continuity and harmony of China's existing legal system, it is imperative to

① Che, 2014.
② Geng & Cui, 2016.
③ Peng, 2017.
④ Xue, 2017.
⑤ Chen, 2006.
⑥ Liang, 2017.
⑦ Che, 2014.
⑧ For the legal models and origins of right for setting of managers, see: Wang & Qian, 2002.

address the conflicts among concepts such as manager power, manager authority and legal representative right arising from the different connotations of traditional and modern managers in the design of the commercial agency system. Considering managers with different legal meanings as well as the constraints brought by the applicable scope of *Company Law*, such objective certainly cannot be achieved by separate commercial laws alone.

From the perspective of interactions between legislation and practice, amending *Company Law* and other separate commercial laws is definitely not the best choice to make up for the absence of an agency-in-duty commercial norm group centered on manager power. The preferable option is to formulate *General Rules of Commerce* and the civil code to form a commercial law system featuring the pattern "Civil Code + General Rules of Commerce + Separate Commercial Laws," because for the moment this is not only geared to the actual legislative circumstances in China but also more accessible to a common ground. From the view of legislative demands, the *General Rules of Commerce* shall play its role in the following three aspects, i.e., creating common norms between civil law and commercial law, governing the rules of separate commercial laws, and filling the gaps between civil law and separate commercial laws.[①]

It is worth emphasizing that the above legislative approach shall focus on the first and third aspects. This is because commercial law must open a new field rather than maintain its present state.[②] Its vitality and value lie in encouraging, guaranteeing and regulating for-profit commercial transactions, instead of being a legal logic and conceptual system.[③] The commercial code of the continental legal system, though boasting a systematic beauty, is ill suited to the current commercial environment and transaction demands in time and space. It is realistically impossible to respond to the tremendous changes of the past century by following the thinking of traditional codification. China's Civil Code, on the other hand, is being built on a comparable infrastructure for "governing" civil and commercial norms. It is necessary for *General Rules of Commerce* to actively and systematically connect with the civil law when rules are set for commercial agency, and not to discard the existing general, integrative and quoted clauses. Therefore, *General Rules of Commerce* shall in essence be positioned as residue law: What it provides is more of a residual collection of legislative norms, including the norm groups of particularity and independence in commonness as well as the unique systems that are neither concerned with the civil code, nor possible to be governed by separate commercial laws.[④]

4.3 Several issues on setting commercial agency rules in *General Rules of Commerce*

Judging from the proposals drafted by commercial law scholars, *General Rules of Commerce* shall mainly consist of merchants, commercial acts, firms, commercial registration, commercial agency, trade books and business transfers. Civil law scholars mainly oppose the necessity of treating merchant and commercial acts as independent concepts, and seldom touch upon the relative independence of commercial agency. The commercial law circle is also in dispute over the setting of commercial agency rules, involving such issues as whether it is necessary to formulate overriding rules for the commercial field, what is the concrete content of commercial agency, how to set up the legislative style, how to connect commercial agency with civil agency

① Wang, 2005.
② Zhou & Zhong, 2008.
③ Liu, 2016.
④ Li, 2016.

and so on. According to the above relevant analyses, we offer the following preliminary advice.

4.3.1 It is difficult for *General Rules of Commerce* to extract the common factor of commercial agency.

Like the civil law scholars' abstract of legislative thinking, partial commercial law scholars, based on the particularity and common features of commercial agency, propose to follow the governing thought of *General Provisions of the Civil Law*, and set up general rules for commercial agency of the same nature and place them in parallel with the general rules of civil agency. The unclear rules or new circumstances of commercial agency can be handled as per the general rules of commercial agency.① In our humble opinion, such legislative thinking for forming uniform commercial agency rules in the light of the civil agency concept may impair the independent value of existing commercial norms. The diverse and flexible forms of commercial agency are exactly the important reason for which it is differentiated from common civil agency.② After the adoption of indirect agency and apparent agency, civil law has narrowed the gap between commercial agency and civil agency. If commercial agency can be governed by general rules, why cannot the Pandekten civil system that advocates a more general and abstract style do the same job? In fact, the abstraction of commercial agency in *General Provisions of the Civil Law* is only limited to the disclosed agency in duty, and no arrangement is made for various forms of indirect agency implemented "in one's own name for others' interests" in the commercial field. Even though the *specific provisions of the civil code* may provide that the undisclosed principal can directly bear the behavioral effect as per agency rules, this is nothing but an exception of disclosed agency.③ Indirect agency can with difficultly be elevated to the level of general provisions, mainly due to the reasoning that "the commercial agency in the science of commercial law is more inclined to the characteristics of anti-induction."④ So, to keep the commercial law active, the correct path is to maintain the openness of agency forms on the basis of finite induction. In addition, agent does not differ from civil agency in terms of external relationship; its norms focus on the internal relationship with the corporate as the principal.⑤ This point is clearly different from the legislative demands of indirect agency, for which neither can be effectively governed under the same system.

4.3.2 How to stipulate indirect agency in *General Rules of Commerce*

Indirect agency is an agency of unnamed principal. Theoretically, named principal is not a necessary condition for commercial agency because commercial transactions are non-individual and a third party does not care about the counterparty's identity, or trading parties are not interested in each other's identity. The indiscriminate presumption that an agent can only act legally in the principal's name infringes the parties' autonomy of will.⑥ According to the same logic, an unnamed principal shall not be determined as a sufficient condition for commercial agency in legislation. Indirect agency can serve as a special agency form in the commercial field, and also apply to the traditional civil relations on some occasions. Taking private lending as an example, if the nominal borrower who borrows money in his own name has disclosed the actual borrower to the lender, the lender is only allowed to claim repayment from the actual borrower under

① Jiang & Wang, 2016.
② For example, some scholars classify the undisclosed agency into diverse forms of undisclosed agency, i.e., that with "principal's identity disclosed," that with "principal's existence known but its identity unknown," and that with "principal's existence undisclosed." (See: Yin, 2011.)
③ Ju, 2013.
④ Wu, 2009, p. 6.
⑤ Canaris, 2006, p. 415.
⑥ Xu, 2017.

certain conditions.[①] Moreover, if indirect agency is incorporated into the civil code via a chapter dedicated to *contract law* and forms a relationship with general law and special law in application with direct agency, and meanwhile indirect agency rules are still generally provided for in *General Rules of Commerce*, then it will certainly cause conflicts between the systems. Pursuant to the orientation of "residue law," the part of indirect agency rules that needs to be improved in *General Rules of Commerce* is that indirect agency, contract of commission and civil agency shall be defined as clearly as possible, i.e., in which case the relativity of contract shall be observed; clarify to the traditional civil trading counterparties "who is the bearer of rights and duties resulting from acts" lest they become innocent sufferers due to unfamiliarity with special commercial rules;[②] which are commercial acts worthy of encouragement and guarantee, with no need for considering the trading parties' identity where the rules for attribution of agents' acts may be applied in a categorized way.

4.3.3 Style arrangement of agency in duty in *General Rules of Commerce*

It is the common experience of civil-commercial legislation in the continental legal system to make some system arrangements for agency in duty. The creation of relatively independent commercial agency norms centered on agency in duty in *General Rules of Commerce* is not only eligible but also necessary. By consulting practices around the world, the commercial legislation of agency in duty mainly comprises two styles: One is to abide by the independence of external relationships, create the authority of agency in duty centered on manager power, and set another chapter for internal relationships; the other is not to clearly differentiate internal relationships from external agency authority, but set another special chapter to uniformly regulate agents in duty. In our opinion, the former style highlights the particularity of commercial agency power, with better organization in legal application, but without improperly importing the legality of commercial agency scope into internal governance. This is a reasonable style.[③] However, based on the previous analysis of mainland China's civil-commercial legislation, *General Rules of Commerce* is designed to remedy defects, while the rules of commercial law for agency in duty shall be oriented to problems, and do not need to excessively pursue logic exhaustiveness in style. The second legislative style, e.g. Title VI "Representation in the Exercise of an Enterprise" and its chapters "Managers" and "Entrepreneur's Assistants" of *China's Commercial Code of Macao*, is the one closest to mainland China's legislative demands. With reference to such thinking, it is necessary to reconsider the applied relationship of agency in duty between civil law and commercial law. The most important lesson therefrom is no doubt *Italian Civil Code* with "unification of civil and commercial laws" as its style in application. Its manager power and other forms of agency in duty are governed by registration effectiveness, without which the commercial agency cannot produce special effects and can only be treated as a general agency.[④] Under such a legislation system, agency in duty shall preferentially be governed by *General Rules of Commerce*, while Article 170 of *General Provisions of the Civil Law* can serve as a generally applicable supplementary provision.

① Similar adjudication rules have been clearly adopted in the judicial practices of some places, behind which the legal principle is the rules of undisclosed agency. See: Guiding Opinions of Sichuan Higher People's Court concerning Several Issues on Trial of Disputes over Private Lending (2016).
② Geng & Cui, 2016, p. 88.
③ Zhong, 2010.
④ According to Article 2206 (2) of Italian Civil Code, the unregistered manager power is deemed as general agency.

5. Tentative conclusions: The road ahead for civil-commercial legislation

It is predictable that no matter which layout is adopted by legislators for civil law and commercial law, the debates on the relationship between them may never come to an end. The direct or indirect examples of commercial norms contained in *General Provisions of the Civil Law* indicate that the civil and commercial laws inevitably trend to integration, and the interactions between them is one of the distinct characteristics of modern civil-commercial legislation. In the future, it is a well-reasoned legislative target for commercial norms to realize moderate systematism by virtue of Civil Code and other subsequent proper legislative arrangements.

Certainly, a good vision is not equal to scientific legislation. As pointed out by some scholars, when civil norms and commercial norms are influenced differently by Anglo-American law and the continental laws are integrated in a civil code, a "half-cooked rice" phenomenon may easily occur[①] if the level of legislation cannot be raised correspondingly. According to the previous analyses of Article 170 of *General Provisions of the Civil Law* and other legislative thinking and clauses related to commercial agency, the quality of *General Provisions of the Civil Law* as commercial law is inadequate.

In our opinion, the civil law and commercial law circles should not be obsessed with excessive disputes over big issues such as "unification of civil and commercial laws" and "separation of civil and commercial laws," "unification of private law" and "dualization of private law," which is negative for the benign interaction between civil and commercial law. After all, different legislative examples are often the realistic choice based on the different legislative demands of the various countries or regions, and are rooted in their own legislative traditions, instead of a completely theoretical mental game. That does not mean that the studies on the civil-commercial relationship are valueless, but that we should adhere to a realistic legislation idea in relevant legislative expressions, respect the reliance on the legislative approach adapted to our national conditions, and carefully listen to the voice of judicial practices to improve the civil and commercial norms in the midst of interaction.

In conclusion, the compilation of the Civil Code is an epoch-making event in China's civil-commercial legislation but cannot cater to all the needs thereof. As long as the historical "weakness" in systematization of China's commercial norms are acknowledged, *General Rules of Commerce* aiming to remedy defects and finite systematization is no doubt a reasonable choice for making up for the absence of relevant norm groups. It shall also be clarified that on the premise of the civil code as the "civil-commercial" general law (not just civil affairs), *General Rules of Commerce* can neither be "General Provisions of the Commercial Law," nor be a copy of *General Principles of the Civil Law* in the commercial field. *General Rules of Commerce* can be moderately abstract but shall not serve as guidance for the many separate commercial laws and norms which are complex and flexible in application. It is necessary for *General Rules of Commerce* to adopt the "residue law" model oriented to problems, i.e., agency in duty and other practical problems that cannot be solved by the Civil Code and separate laws; to guide the subsequent arrangements of commercial legislation, and together with the Civil Code and other separate laws to finally form a multi-level civil-commercial law system with Chinese characteristics, under uniform guidance but also with its own relative style.

① Ren, 2004.

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