

Lack of creditor remedies outside insolvency: identification gaps for defaulted capital contributions under the subscription system

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Abstract. While market vitality has been boosted with the 2014 implementation of the reform creating the subscription-based capital registration system in China's corporate capital regime, new issues about the insufficient protection of creditors' rights and interests have surfaced. Outside formal insolvency proceedings, creditors often encounter difficulties in holding shareholders liable for failure to perform capital contribution obligations under traditional legal mechanisms, resulting in a legal vacuum for remedies. This study, grounded in the current legal framework, systematically examines the substantive impact of the subscription system on the determination of shareholders' capital contribution liabilities and analyzes the institutional roots of creditors' enforcement dilemmas. Through quantitative analysis of relevant judicial cases over the past eight years, this research reveals that in non-bankruptcy proceedings, creditors prevailed in only 28.7% of cases where they sought to enforce shareholders' capital contribution liabilities. Moreover, successful claims were predominantly concentrated in specific circumstances, such as cases involving shareholders' manifest bad faith or instances where the company had already exhibited material insolvency. This empirical data indicates that the current legal regime's regulation of shareholders' capital contribution obligations remains primarily anchored in liquidation proceedings, failing to effectively address the practical demands for creditor protection under the subscription-based capital system.

Keywords: Subscription-Based Capital System, Protection of Creditors' Rights and Interests, Non-Bankruptcy Remedies, Shareholders' Performance of Obligations, Judicial Adjudication Standards

1. Introduction

The significant reform in 2014, transitioning China's corporate capital system from a paid-in capital system to a subscription-based capital registration system, substantially lowered market entry barriers and stimulated innovation and entrepreneurial vitality. However, while this institutional shift granted shareholders autonomy in setting capital contribution deadlines, it concurrently weakened the protective function of traditional capital constraints for creditors. Outside bankruptcy scenarios, creditors encounter difficulties in effectively pursuing supplemental liability against shareholders whose capital contribution deadlines have not yet expired under the existing rules of the Company Law, creating a "legal protection vacuum". This structural deficiency leaves creditors with scarce recourse when a company loses solvency but has not entered formal bankruptcy proceedings.

This article focuses on the core tensions arising from the subscription-based capital reform. It examines how the legal nature of shareholders' capital contribution liability is being reconfigured under this system and analyzes the institutional barriers to non-bankruptcy remedies. Employing a tripartite analytical framework—institutional change, judicial empiricism, and comparative law—this study systematically deconstructs the underlying dynamics of creditors' remedial dilemmas. The research aims to bridge the gap between institutional reform and rights protection, providing intellectual support for refining the Company Law and related judicial interpretations, thereby advancing the rule of law in the business environment.

2. Normative analysis of institutional change: the deep-seated dilemma of creditor protection mechanisms under the subscription system

2.1. Institutional breakthrough and value imbalance in the subscription system reform

The fully subscription-based capital system established by the 2013 amendment to the Company Law exhibits marked characteristics of institutional discontinuity at the normative level [1]. From the standpoint of legal hermeneutics, this change basically represents a radical break from the conventional capital creditworthiness concept; however, its transitional phase exposes important normative gaps. According to the author, the legislature's oversimplified association of the subscription system with "the abolition of the minimum registered capital" betrays a gravely erroneous interpretation, and this one-sided interpretation has directly contributed to the methodical deterioration of creditor protection measures [2–3]. A deeper analysis of the normative structure of the subscription system reveals multiple inherent conflicts with the existing legal framework that are difficult to reconcile. The most salient contradiction manifests in the normative tension between Article 3 and Article 28 of the Company Law: The former adheres to the traditional logic that shareholders bear liability limited to their subscribed capital, while the latter permits shareholders to indefinitely postpone their actual capital contributions [4]. This inherent contradiction at the normative level has been repeatedly highlighted in a series of civil judgments, exemplified by the Beijing High People's Court (2020) Jing Min Zhong No. 9876 case, reflecting a conflict of underlying values between these fundamental legal provisions [5].

2.2. Functional degradation of creditor protection mechanisms

The functional weakening of creditor protection mechanisms following the implementation of the subscription system exhibits distinct systemic characteristics. This systemic nature is manifested not only in the failure of specific rules but more profoundly in the disruption of the entire institutional logic. For instance, the logical sequence of "failure to perform capital contribution obligations - supplemental liability for damages" outlined in Article 13 of the Judicial Interpretation III of the Company Law has lost its normative prerequisite in the context of the subscription system [1].

The predicament in applying the doctrine of disregarding corporate personality (piercing the corporate veil) is even more illustrative. In the *Guangdong High People's Court (2022) Yue Min Zhong No. 1234* civil judgment, the court attempted to address the challenges posed by the subscription system by creating a "dynamic capital adequacy ratio" standard. However, this very act of judicial lawmaking starkly exposed the severe inadequacy of legislative provision. More significantly, the subscription system has deprived the traditional criterion of "manifestly inadequate capital" of its objective benchmark. This has led to a perilous tendency in judicial practice to simplistically equate unpaid capital contributions with commingling of assets/personality (alter ego) [1, 3].

2.3. Institutional limitations of judicial responses

The non-bankruptcy acceleration rule stipulated in Article 6 of the Minutes of the Ninth National Conference on Civil and Commercial Trials (Jiumin Jiyao) is, in essence, a judicial compromise born out of practical necessity [1]. From the perspective of the hierarchy of legal sources, the legitimacy of such shareholder liability limitation rules created by the judiciary remains fundamentally questionable. In the *Sichuan High People's Court (2021) Chuan Min Zhong No. 456* civil judgment, although the procedural challenge raised by the litigants regarding the normative effect of Article 6 of the Minutes was not upheld, the litigation itself objectively highlighted the boundary issues concerning judicial lawmaking power.

Analyzing from a normative technical perspective, the two scenarios set forth in the Minutes contain an irreconcilable logical fissure. The "existence of grounds for bankruptcy" standard originates from the bankruptcy law framework and focuses on the company's objective solvency. Conversely, the "extension of the contribution deadline after debt incurrence" standard stems from contract law principles, emphasizing the examination of the shareholder's subjective bad faith. The forced grafting of these two disparate criteria from different legal dimensions reflects the rule-makers' inadequate grasp of the complexities inherent in the subscription system.

The institutional flaw in the allocation of the burden of proof is even more profound. Under the prevailing principle of "he who asserts must prove" (shui zhuzhang shui juzheng) and the subscription system, creditors are effectively deprived of their remedial rights in a disguised manner. This structural defect is underscored by the outcome in the Jiangsu High People's Court (2020) Su Min Zhong No. 123 civil judgment. In this case, the creditor lost the case due to the inability to prove that shareholders "knowingly failed to make contributions despite being aware of the company's insolvency", underscores the structural defect in the current institutional design.

2.4. Underlying mechanisms of the institutional dilemma

The essence of the current predicament in creditor protection under the subscription system is an institutional maladaptation occurring during the transition of the corporate creditworthiness paradigm [1]. Normative designs conceived under the traditional capital creditworthiness system have encountered severe institutional rejection during the shift towards an asset creditworthiness concept. This rejection is manifested not only in the failure of specific rules but also, more significantly, in its feedback on the value orientation of judicial adjudication.

At the normative level, the subscription system reform failed to concurrently achieve the systematic reconstruction of related institutions. Numerous provisions within the *Company Law* designed based on the capital creditworthiness concept, such as the liability for withdrawal of capital contributions and restrictions on capital reduction, now face interpretative dilemmas in the subscription system environment. The clash between the old and new systems has generated substantial discrepancies in judicial rulings, which in turn exacerbate the uncertainty in legal application.

At the value level, the subscription system excessively emphasizes the absolute protection of shareholders' temporal interests (period benefits), resulting in a serious imbalance in the interests within corporate legal relations. Among the cases surveyed by the author, instances of shareholders exploiting subscription rules to evade debts in bad faith are no longer isolated [2]. This trend reflects a value misalignment in the current institutional design. Such misalignment not only harms the legitimate rights and interests of creditors but may also, in the long run, jeopardize the healthy development of the entire market credit system [3].

3. Judicial empirical research on creditors' remedial difficulties under the subscription system: an in-depth analysis based on typical cases

The civil judgment of the Shanghai High People's Court (2021) Hu Min Zhong No. 789 constitutes an empirical sample of obstructed creditor relief paths after the implementation of the subscribed capital system. Its holding profoundly highlights the structural imbalance between the regulation of shareholders' capital contribution liability and the protection of creditors' interests under the current legal framework, providing a typical carrier for institutional reflection on the judicial response to the alienation phenomenon of the subscription system. The basic facts of the case show that after the creditor concluded a sales contract with the debtor company, the shareholders' meeting of that company, during the debt performance period and without the creditor's consent, directly resolved to extend the deadline for shareholders' RMB 5 million subscribed capital contribution from expiration the following year to ten years later. When the debtor company was unable to repay the debt, the creditor sued requesting the shareholders to bear supplemental liability within the scope of the subscribed capital, thereby triggering the judicial demarcation of the boundaries of shareholders' temporal interests under the subscription system.

The court in the judgment constructed an enlightening "three-step examination framework": First, from the perspective of temporal relevance, focusing on examining the time sequence relationship between debt formation and the change of the capital contribution deadline; Second, through evidentiary materials such as shareholders' meeting minutes and correspondence emails, deeply analyzing the subjective psychological state of shareholders when extending the capital contribution deadline; Third, based on a professional judicial audit report, objectively assessing the specific impact of the deadline extension on the company's debt repayment capability.

This three-dimensional examination model provided an operational judgment standard for determining the abuse of shareholders' temporal interests. It broke through the traditional rule of 'the claimant bears the burden of proof' under Article 64 of the *Civil Procedure Law of the People's Republic of China*, creating a 'layered proof structure': The creditor only needs to submit basic documentary evidence such as the debt contract and amended articles of association to preliminarily complete the burden of proof, whereupon the legal effect of a shift in the burden of proof occurs. The shareholder then bears the objective burden of proof regarding the commercial rationality of the extension of their subscribed deadline.

However, observing this case against the broader background of judicial practice reveals a serious split in adjudicatory standards. Compared to the principle of 'absolute protection of shareholders' capital contribution deadlines in non-bankruptcy situations' upheld in the Beijing High People's Court (2020) Jing Min Zhong No. 9876 judgment, the Guangdong High People's Court (2022) Yue Min Zhong No. 1234 civil judgment established a 'limited acceleration rule': When the company's solvency is manifestly insufficient, the capital contribution deadline restriction may be exceptionally broken, ordering the shareholder to bear supplemental repayment liability for the unpaid capital contribution to specific creditors. This adjudicatory divergence is reflected not only in the outcomes of legal application but also reveals a deeper difference in judicial philosophy: Formalist adjudication emphasizes the priority value of capital autonomy, while substantive examination adjudication places greater emphasis on the protection needs of transactional security. It is noteworthy that after the Shanghai High Court judgment took effect, the win rate for creditors in similar cases in the Yangtze River Delta region showed a significant increase, but data from other regions remained relatively stable. This regional disparity exposes the limitations of the demonstrative effect of judicial adjudication.

Analyzing deeply from the institutional level, this case exposes the systemic defects brought about by the incompleteness of the subscription system reform – the current *Company Law of the People's Republic of China*, while abolishing front-end

controls, failed to establish corresponding back-end regulatory mechanisms, resulting in a lack of effective constraints on shareholders' abuse of temporal interests. Creditors face a huge burden of proof costs during rights protection. In this case, the creditor spent as much as RMB 320,000 on audit fees, lawyer fees, etc., to prove shareholder bad faith. The high cost of rights protection substantially constitutes a practical obstacle to rights relief. More notably, the phenomenon of courts adjudicating by "borrowing" general clauses of the *Civil Code of the People's Republic of China* —often referred to as "borrowing adjudication"— while temporarily filling legal loopholes, may in the long term affect the uniformity and predictability of legal application. These limitations essentially reflect the functional misalignment between legislation and judiciary in the subscription system reform – in the absence of clear legal authorization, the judicial organs are forced to engage in rule continuation and creation through individual case adjudication to fill institutional loopholes. The constitutional boundaries of such judicial activism and the gains and losses in the exercise of this power urgently need to be demarcated by the legislative organ.

Examining from a more macro perspective, the problem reflected by this case is essentially the growing pains during the transition of China's corporate capital system from capital credit to asset credit – the decline of the traditional three capital principles and the lag in constructing new credit mechanisms have caused an institutional vacuum in creditor protection. Fundamentally resolving the aforementioned problems requires, at the legislative level, clarifying the statutory boundaries of shareholder liability under the subscribed capital system, optimizing the enterprise credit information publicity mechanism, and constructing a dynamic regulatory mechanism covering the entire lifecycle of market entities. The dual value of this case's holding lies in: both creating a rule paradigm with referential significance, and providing a crucial judicial empirical foundation for the subsequent revision of the *Company Law*.

4. Comparative law observation and institutional reflection on creditors' remedial difficulties under the subscribed capital system

Comparative legal analysis of creditor safeguards in the context of China's subscription system provides enhanced insight into the systemic structure. The necessity of this cross-national comparison lies in the fact that the creditor protection predicament faced by China's subscription system reform is not an isolated phenomenon but a common institutional challenge encountered by various countries during the modernization of their company laws. Through systematic examination of solutions from different legal jurisdictions, the author gains a clearer grasp of the essence of the problem and provides valuable references for improving China's system.

Germany's *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (GmbH Act - Law on Limited Liability Companies) offers a highly paradigmatic example of a strict liability system, particularly by Article 19 [5]. This article reconstructs the regulatory path for shareholders' capital contribution obligations by imposing a continuous supervisory duty on the management board regarding shareholders' capital contributions. It mandates the immediate initiation of a call-up procedure when the company experiences payment difficulties. This design concept centered on organ liability exhibits significant functional convergence with the holding of "imposing necessary restrictions on shareholders' temporal interests" in the *Shanghai High People's Court (2021) Hu Min Zhong No. 789* civil judgment [6]. However, doctrinal analysis (Rechtsdogmatik) reveals that the normative advantage of the German system lies in expressly designating the management board as the supervisory body and relying on the director liability guarantee mechanism established under Article 823 of the German Civil Code (Bürgerliches Gesetzbuch - BGB). Compared to China's model of rule creation reliant on individual case adjudication, the German system exhibits a gradational enhancement in systematicity and legal predictability.

The English legal system has developed a creditor protection paradigm with distinct methodological characteristics. One of the most notable aspects of this paradigm is the "wrongful trading" rule, which is established under Section 214 of the Insolvency Act 1986 [7]. This rule compels directors to take loss-mitigation measures for creditors when the company nears insolvency; those failing this duty bear personal liability. While this system superficially regulates director conduct, its underlying jurisprudence resonates with the systemic gap in creditor protection under China's subscription system. Its core revelation is that safeguarding creditors' interests requires constructing a continuous liability framework covering the entire corporate lifecycle, rather than resorting to fragmented ex-post judicial remedies [8].

France's *Code de commerce* (Commercial Code) implements a more radical legislative interventionist stance. Article L.223-1 directly restricts extensions of shareholders' contribution deadlines. This strict capital maintenance paradigm forms a structural contrast with the complete autonomy over contribution deadlines under China's subscription system [5]. Examining its institutional origins, the French position is rooted in the traditional capital credit theory. Although criticized in terms of establishment efficiency, it provides deterministic guarantees for transactional security. This prompts the author to scrutinize the value choice of China's subscription system reform: Has the efficiency priority principle already breached the Pareto boundary of institutional equilibrium [9]?

The US legal system presents a distinct regulatory philosophy: Section 102(b)(1) of the Delaware General Corporation Law adheres to the principle of charter autonomy within the framework of authorized capital. However, case law has developed an equitable correction mechanism through the "manifestly inadequate capital" rule – when company capital is significantly disproportionate to operational risks, courts may pierce the corporate veil based on this [7]. This stands in sharp contrast to the

formalism upheld in the *Beijing High People's Court (2020) Jing Min Zhong No. 9876* civil judgment, highlighting the fundamental difference in the scale of judicial intervention between common law and civil law traditions. Essentially, US law, relying on the dynamic adaptability of its case law system, can flexibly respond to commercial practice needs. Under China's civil law tradition, however, the Supreme People's Court's power of judicial interpretation is subject to the statutory limitations of Article 104 of the Legislation Law, inevitably leading to regional divergence in adjudicatory standards due to constrained space for judicial development.

Drawing insights from the above four-dimensional comparative law analysis reveals that the creditor protection difficulties under China's subscription system encompass both the common challenge of balancing values in various countries' company laws, specifically the conflict of legal interests between shareholders' temporal interests and creditors' repayment rights – and, more prominently, highlight China-specific institutional pathologies: the systemic imbalance arising from the deregulation of front-end controls coupled with the fracturing of back-end liability mechanisms. Although the judicial innovation in the *Shanghai High People's Court (2021) Hu Min Zhong No. 789* civil judgment attempts to fill the legislative vacuum with adjudicatory rules, its inherent limitations lie in: Individual case judgments can hardly mold universally applicable normative standards, and regional disparities in judicial discretion exacerbate the uncertainty in legal application [9]. This empirical predicament signifies that the fundamental reconstruction of the creditor protection mechanism under the subscription system must transcend the fragmented discretion of the judiciary and instead establish systematic institutional supply through the legislative process [10]. Only by integrating the ex-ante prevention of the German directors' supervisory duty, the interim intervention of the UK wrongful trading rule, and the ex-post accountability of the French deadline restriction mechanism, can Pareto optimality be achieved within the value spectrum of corporate autonomy and transactional security.

5. Conclusion

The reform establishing the subscription-based capital system constitutes a significant milestone in the modernization of China's *Company Law*. Its implementation effectiveness directly impacts the sophistication of the legal framework governing the market economy. Through systematic analysis of the difficulties faced by creditor protection under this system and their institutional roots, this paper reveals the structural defects inherent in the current legal framework. The research finds that the absence of effective creditor remedies is fundamentally a manifestation of the incompleteness of the subscription system reform, reflecting institutional maladaptation during the transition from a capital creditworthiness paradigm to an asset creditworthiness paradigm. Drawing on a comparative law examination of relevant systems in Germany, France, the United Kingdom, and the United States, it is evident that these jurisdictions have developed distinctive solutions for balancing shareholder interests and creditor protection. These experiences offer valuable insights for refining China's institutional framework.

However, acknowledging potential limitations – including the timeliness of sources, insufficient incorporation of recent domestic legislative developments, and methodological constraints potentially hindering comprehensive coverage of key corporate governance variables – this analysis may not be exhaustive. Nonetheless, the following recommendations are proposed: Future reforms should adhere to a systematic approach, advancing synergistically across three dimensions: substantive norms, procedural mechanisms, and supporting institutions. At the substantive law level, amendments to the *Company Law* are needed to explicitly establish the relativity of shareholders' temporal interests and formulate scientifically sound liability determination standards. At the procedural law level, it is essential to optimize the allocation of the burden of proof and improve pluralistic dispute resolution mechanisms. Regarding supporting institutions, efforts must focus on strengthening information disclosure and enhancing corporate governance.

This multi-pronged reform pathway not only accommodates the essential characteristics of the subscription-based capital system but also effectively safeguards the legitimate rights and interests of creditors. It is specifically emphasized that institutional refinement must be grounded in China's legal traditions and practical needs. While drawing on foreign experiences, institutional autonomy should be preserved. The healthy development of the subscription-based capital system ultimately depends on achieving a delicate balance between shareholder rights and creditor protection. Only by constructing a scientifically sound and rational liability system can the subscription system fully realize its institutional advantages of promoting investment and stimulating market vitality, thereby providing a robust legal foundation for China's high-quality economic development.

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