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CONTENTS

Shift of Financial Regulatory Paradigm against the Background of FinTech

……Zhou Zhongfei and Li Jingwei

Abstract: FinTech, while increasing financial efficiency and financial products, also brings about the pervasiveness of financial risk. Financial rules under the traditional financial regulatory paradigm are products of crisis-oriented legislation and regulation with command and control as their main features. They fail to tackle such problems arising from FinTech as over-financialisation, high frequency of financial risks, and endogenous and exogenous risks in financial systems. Therefore, a shift of financial regulatory paradigm is inevitable. Under the new financial regulatory paradigm, an agency responsible for regulating cross-sector risks should be established above specialist financial regulatory agencies to prevent risk contagion between and out of financial systems. The new paradigm is both adaptive regulation and experimental regulation. Adaptive regulation is intended to allocate rule-making functions among legislator, financial regulatory agencies and regulated firms while the purpose of experimental regulation is to deal with the timing of regulatory intervention. The new paradigm is also data-driven regulation, under which it is possible to regulate FinTech in real time or quasi real time, thus solving the regulatory pacing problem.

Keywords: FinTech; cross-sector risk regulation; adaptive regulation; experimental regulation; SupTech

The Social Attributes of Internet Finance Risks and Changing Financial Regulatory Policies ……Xu Duoqi

Abstract: The application of social network analysis method to Internet financial risk analysis reals two social characteristics of Internet financial risks. First, the connection density between multiple nodes has the dual role of decentralizing and reducing financial risks as well as aggravating the accumulation and spread of financial risks. Second, the formation and social amplification of Internet financial risks are constrained by the “embedded relationship network”. The financial relationship network established by the Internet leads not only to the complexity, abruptness, rapidness, and extensiveness of the spread of systemic risks of Internet finance, but also to such new forms of expression as “too many connections to collapse” and “too fast to collapse”. With the gradual manifestation of the risks and social characteristics of China’s new Internet finance industry in its development in the past two decades, the regulatory authorities have responded by stages with three regulatory methods: “tolerant regulation”, “regulation in principle” and “campaign-style regulation”. The recent regulatory failures have made it clearly that, due to the lack of appropriate data and technology, traditional divided financial regulation system, also known as “PBC and three commissions system", falls far short of curbing the rampant growth of illegal Internet finance and preventing the accumulation and spread of financial risks. As a remedy, a new Internet finance regulation system with advanced regulatory ideas, coordinated and data-sharing

regulatory organs, regulatory principles matching underlying risks, and a RegTech arsenal has been proposed. The ongoing reform of the financial regulatory system in China is a big step in the right direction, and RegTech is the most important basis of Internet finance regulation regime.

Keywords: social network analysis; systemic risk; Internet finance; FinTech; RegTech

Abstract: Under the intelligent finance mode, the traditional legal framework, which mainly takes financial professionals as its regulatory targets, is impractical and ineffective in regulating robo-advisors, which have no independent legal personality, thus leading to such problems as non-enforcement, the nihilization of obligors and the failure of the existing system of duties. To deal with this dilemma, lawmakers need to restructure the obligor's identification mechanism and the duty system. To be specific, the robo-advisors are the long-arms of the operators (the investment advisory institutions), outreaching for business; therefore, the operators and the person monitoring robo-advisors should be identified as the trustees by law and undertake the fiduciary duty and compliance duty accordingly. The design and manufacture of robo-advisors is actually a process of pre-processing the advisory action into algorithm, a simulation of the natural person's investment advisory behavior. The duties of the programmers should be distinguished from those of financial professionals who provide transaction and decision models for intelligent agents. The former should be identified as assistants to investment advisors, who do not bear the advisors' obligations, while the latter should be identified as the investment advisors by law, who should fulfill the advisors' duties. The substance of the duties of the robo-advisor mode needs to penetrate through the complex veil and reach the algorithmic level to reflect their essential characteristics. The basic principle to be followed by the new regulatory paradigm is to fully embrace new developments of artificial intelligence, so as to prevent the absence of accountabilities resulting from the evasion and reduction of duties by algorithm black box, while at the same time avoid overburdening the obligors.

Keywords: intelligent finance; robo-advisor; algorithm; the long-arm rule; fiduciary duty

Abstract: There is an inherent connection between legal dogmatics and the rule of law. On the one hand, a brief investigation into the history of ideas shows that legal

dogmatics can be understood from two perspectives, i.e., legal dogmatics as knowledge and legal dogmatics as method. On the other hand, the minimum concept of the rule of law includes two elements: in terms of its value goal, it takes the certainty of law as its constitutive element; and in terms of its institutional goal, it takes the existence of a coherent legal system as its basic condition. Legal dogmatics as a method can both enhance the certainty of law and help to construct a coherent legal system, and therefore is of great importance to any type of rule of law. China, in the construction of the rule of law, should develop its own system of legal dogmatics, which means that it should not only promote research on legal methodology and general legal doctrine at the level of doctrinal methods, but also combine case law studies, custom explorations and codification of law commentaries at the level of doctrinal knowledge, so as to construct a doctrinal knowledge system with Chinese characteristics.

Keywords: legal dogmatics; the rule of law; the certainty of law; a coherent legal system; construction of the rule of law in China

The Theory of Registration Confrontation of Chattel Mortgage…… Zhuang Jiayuan

Abstract: When the chattel mortgage was introduced into China, only relatively rough rules were transplanted. The legislator neither considered the role of the chattel mortgage in the bankruptcy and enforcement of the guarantor, nor examined the publicity principle of the notice filing system. As a result, chattel mortgages are not only unable to function as expected, but also theoretically misunderstood in China. The enforcement of chattel mortgages is time-consuming, labor-intensive and inefficient. Many scholars still advocate that the principle of publicity of real estate registration is applicable even to the registration of chattel mortgages, which does not conform to the consensus principle of the establishment of chattel mortgage. Registration confrontation element of chattel mortgages has the functions of negative publicity, priority allocation, and prevention of fraud. Negative publicity means that if a chattel mortgage is not registered, it cannot be paid in preference to other security rights. Therefore, if the chattel in question is not registered, the creditor does not have to take further investigation measures. The effect of priority allocation allows the mortgagee to determine the outcome of the priority competition with other interested parties on the basis of the registration time. Since a secret security right would make the debtor’s property superficially unburdenable, it may constitute fraud against ordinary people. Therefore, the registration system is regarded as some form of insurance against creditor fraud. An unregistered chattel mortgage is not an obligation right, but still a real right. It is in a relatively inferior position in term of priority in bankruptcy and enforcement procedures. If the mortgagor has no right to transfer unlicensed special chattels to a third party, the fate of the unregistered mortgage shall be determined in accordance with Article 106 of the Property Law.

Keywords: registration confrontation; chattel mortgage; special chattel; priority

allocation; goodwill third person

Abstract: The institution of Gegenleistungsgefahr has the fundamental structure of "basic principle—exceptional interruption". The basic principle is that the burden of Gegenleistungsgefahr should always stay with the debtor before the main obligation is completely fulfilled. This principle is based on the synallagma between the main obligations of bilateral contracts and reflects the jurisprudential idea of commutative justice. The exceptions include the following situations: the handing-over-act is accomplished; the status of delay on the side of the creditor arises; and a factor attributable to the creditor has led to the impossibility of fulfilling the main obligation. In these situations, the burden of gegenleistungsgefahr will be shifted to the creditor in advance or even should be shouldered by the creditor from the outset. Each of these three rules of exception has its own legitimacy. The rule that the handing-over-act can cause the Gegenleistungsgefahr to shift in advance applies also to sales contracts involving carriage. The risk-shift function of the institution of default of creditor takes followings as its normative pre-conditions: the debtor is able and willing to fulfill the main obligation; the debtor has factually made the tender of performance or, in exceptional circumstances, has tendered with words—only in rare cases is the tender of performance unnecessary; and the creditor has not implemented the act of cooperation. As for the judgment of whether or not the relevant factors are attributable to the creditor, the fundamental criterion lies in the content of contract and the construction of the declaration of will of the contractual parties. In the course of unfolding the third kind of exception, the creditor should be held responsible for the impossibility of performance and bear the burden of Gegenleistungsgefahr from the outset under the following situations: the creditor breaches the duty of protection or the main obligation; the creditor does not implement necessary acts of cooperation; or the creditor takes extra risk as a result of a special promise or specific category of transactions. In the Chinese Contract Law, there are still many statutory gaps with respect to the institution of Gegenleistungsgefahrtragung, which should be filled up in the Title on Contract Law of the Draft Chinese Civil Code.

Keywords: risk-bearing; synallagma; handing-over-act; default of creditor

Abstract: With the rise of the cultural industry in a broad sense, the status of the production and consumption of works has become increasingly prominent in the economic and social development. As a special business sign in the culture market, the title of a work plays an extremely subtle role of identification, which involves multiple legal relations. In terms of the basic function of identifying and distinguishing a particular work, the title of a work shall be protected by *sui generis*

title right; if the title actually identifies the origin of the work, it may be protected as a trademark. As to cultural masterpieces, the titles also function as a channel of advertisement and promotion, of which merchandising right should be regulated by law. Although titles of works could be subject matter of multiple rights, they only enjoy very limited protection as “specific names of famous products” before the newly promulgated revision of the Anti-Unfair Competition Law in China, which is much weaker than similar laws both in European countries and in America. As a result, titles of works are not effectively protected domestically and Chinese enterprises lack the ability to enforce their rights and prevent risks when competing with their counterparts in overseas markets. In the first revision of the Anti-Unfair Competition Law, China has made some beneficial explorations in introducing the legal framework of title protection. Although Article 6 Paragraph 3 of the Law only explicitly mentions “main part of domain names, web names and web pages”, the enumerative approach of legislation and its catch-all Paragraph 4 opens a possibility to provide the above-mentioned protection to titles of “channels, programs, columns and books” that once appeared in the earlier drafts of the revision, as well as books, newspapers and magazine, films, software and video games, etc. In the short term, amendment to Article 6, Paragraph 3 could be made on the basis its judicial application so as to set up a more targeted *sui generis* regime of title protection; in the long run, it is necessary to revise both Anti-Unfair Competition Law and Trademark Law to enable the Trademark Law to cover title protection and officially establish *sui generis* title right. In this way, different roles of titles could function normally and fair competition in cultural market could be legally guaranteed.

Keywords: titles of works; function; title right; trademark right; merchandising right; Anti-Unfair Competition Law

Embezzlement: The Direction of Interpretation of the Crime of Corruption

……Wang Yanqiang

Abstract: The recent adjustment of the standard of the crime of corruption, especially the substantial increase of the amount standard of this crime, by the new amendment to the Chinese Criminal Law and related judicial interpretations has led to serious punishment imbalance between the crime of corruption and such ordinary property crimes as theft and fraud and it is therefore necessary to seek an appropriate solution

to this problem in criminal dogmatics. The solutions based on the concurrence theory—either treating the relationship between this two kinds of crime as “imaginative joiner of offenses”, or treating it as “overlap of articles of law” and dealing with it according to the principle of “heavier clause first”—are simple and easy to implement, but difficult to adopt, because these two solutions may lead to serious “crisises in dogmatics”: the former ignores the fact that the legal interests protected by corruption crime and those protected by ordinary property crimes are identical, and blurs the boundary between “imaginative joiner of offenses” and “overlap of articles of law”, whereas the latter confuses the quality element with the quantity element, undermines the unity of conduct classification, and even leads to new imbalance between crime and punishment within the same category of conduct. Therefore, we can only try the solution based on mutex, which insists that “embezzlement” is the only behavior type of the crime of corruption; that there is no concurrence relation between the crime of corruption and the crimes of theft and fraud in the first place; and that the behavior which is called “committing theft or fraud by taking advance of his or her position” only constitutes the crime of theft or fraud and has nothing to do with the crime of corruption. In this way, the problem of punishment imbalance arising from the concurrence between these two kinds of crimes can be easily solved. It can be argued that the solution based on mutex is tenable both from the perspective of the necessity of realizing the balance of penalty and from the perspective of systematic interpretation, reasoning behind legal provisions, literary interpretation or teleological interpretation.

Keywords: crime of corruption; crime of embezzlement; solutions based on the concurrence theory; solution based on mutex; embezzlement

Abstract: During the revision of the Chinese Criminal Procedure Law in 2012, the legislator added a new article to the law—Article 152 on the use of evidence collected through covert surveillance. The article should be interpreted as below: firstly, it lifts the ban on use of such evidence; secondly it provides three models of evidence use; and thirdly, it doesn’t give clear answers to many questions about how to use surveillance evidence. The judicial practice in the four years since the implementation of the revised Criminal Procedure Law on January 1, 2013 has highlighted the dilemma faced by courts in the application of Article 152 of the Law. This paper reviews 73 sample cases selected from China Judicial Verdicts Website between 2013 and 2016 and shows a series of practical challenges faced by courts relating to use of surveillance evidence. To balance the value of investigation efficiency and that of civil rights protection, it is necessary to establish a series of institutions on the use of surveillance evidence: the defense lawyers should have the right to know such evidence before the trial and the chance to cross-examine it; original evidence should be used; if the judge wants to use hearsay evidence or alternative format of surveillance evidence, they should comply with the procedure of authentication of

physical evidence; judges can investigate such evidence out of court, but in doing so, should guarantee the right of the defendant to fair trial; and, in order to protect the interests of methods and process of investigative surveillance, national security and personal safety of related persons, policy makers can design some value-balanced procedures to use surveillance evidence, for example, to use alternative format of evidence, keep sources of evidence as confidential and establish the institution of special lawyer to cross-examine evidence. In addition, this paper also finds out that the function of covert surveillance is looking for clues of investigation, rather than collecting evidence. The reason for this is directly related to the provisions of the Constitution and the principle of legality.

Keywords: covert surveillance; evidence collected through covert surveillance; telephone wiretapping; use of evidence

Abstract: In the past, researchers have emphasized the role of “the society and the state”, rather than “the state and the individual” in dispute resolution in the Qing Dynasty. The suppression of litigation was the basic position of county yamens in the Qing Dynasty. Therefore, the initiation of litigation mainly depended on the difficult actions taken by the individual. In the process of awaiting trial although the litigation might be stalled because of the passiveness of the state, the individual would strive to promote the litigation process through prosecution. At the trial stage of the litigation, the state often hoped to close the case by only one hearing. If the parties were unwilling to accept the outcome of the trial, they would refuse to sign the instrument of acceptance, sue again and even appeal. However, such requests for retrial would also be suppressed by the state. Since litigation was an “unbearable burden” for both the state and the individual, individuals would not give up their efforts to reconcile at any stage of the lawsuit. Once a settlement was reached, the state would also support the end of the litigation. The suppression and the negative attitude taken by the state on the one hand and the difficulties faced and the positive attitude taken by the individual on the other hand were two sides of the “repressive litigation” in the Qing Dynasty. The explanation of “repressive litigation” emphasizes the defects of the dispute resolution mechanism in the Qing Dynasty and suggests that the judicial capacity of the state should be strengthened and opened up.

Key Words: litigation, county yamen, the state, the individual, repressive litigation

Abstract: The Constitution of Russian Soviet Federative Socialist Republic, adopted

on July 10, 1918, was the first socialist constitution in human history. In China, the first translator of the Soviet-Russian Constitution was Zhang Junmai and his Chinese translation of the Constitution was published on November 15, 1919. Since then, there had been more than ten kinds of books containing the full text of the Soviet-Russian Constitution, and tens of thousands of articles citing the provisions of the Soviet-Russian Constitution. The Soviet-Russian Constitution had been spreading rapidly throughout China. The Communist Party of China not only actively spread the Soviet-Russian Constitution, but also seriously practiced the Soviet system. Moreover, the 1954 Constitution of the People's Republic of China had embodied fundamental system and the basic spirit of the Soviet-Russian Constitution. Although the Soviet-Russian Constitution, which was born a hundred years ago, has become history, its spirit will last forever. The status and influence of the Soviet-Russian Constitution in the history of world should never be neglected. The cause of socialist constitution that was initiated by the Soviet-Russian Constitution will be brought to a new stage of development and achieve success in the great practice of the socialism with Chinese characteristics.

Keywords: Soviet-Russian Constitution; socialist constitution; the 1954 Chinese Constitution; Zhang Junmai