

总主编 ● 顾肖荣 林荫茂



经济刑法研究丛书

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金融犯罪的 国际化防治研究

*Jinrong Fanzui de
Guojihua Fangzhi Yanjiu*

王宝杰 ● 著



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本社常年法律顾问:北京市大成律师事务所哈尔滨分所律师赵学利、赵景波

摘 要

近年来,伴随着金融市场的全球化,金融犯罪也开始突破一国一地的限制,日益呈现出国际化的特征和趋势。为了应对金融犯罪的国际化,维护各国乃至全球金融秩序的安全、稳定,国际社会需要考虑建立统一的法律反应机制。这就是本文所论述的主题——金融犯罪防治的国际化及我国的法律对策。金融犯罪防治的国际化主要表现为金融犯罪防治规则的国际化、金融犯罪防治机构的国际化和有关国际合作的加强三个方面。本文运用了比较研究和实证分析的方法,从国际法、金融法和刑法以及犯罪学的角度对金融犯罪国际化现状、原因以及国际社会防治规则、机构、合作机制和我国金融犯罪的立法、政策和相关司法、行政机制进行了全方位、多层次的探索。

本文共有十一章,分为总论和分论两大部分。第一章至第五章是总论部分,主要内容是论述金融犯罪的国际化问题及其防治规则、机构、合作机制的国际化,并就我国的法律应对及其存在的不足进行探讨,在此基础上就我国目前法律中存在的不足提出了建议。第六章至第十一章是分论部分,分别就妨害货币罪、证券犯罪、期货犯罪、洗钱犯罪、信用证犯罪和信用卡犯罪防治的国际化 and 我国的具体的法律应对问题进行了系统的论述。

第一章是金融犯罪防治的国际化概述。作者以金融的全球化为起点,引出金融犯罪的国际化概念,并对该概念的内涵和外延进行了界定。在此基础上,作者将金融犯罪的国际化与国际金融犯罪作了区分。金融犯罪防治的国际化即是指金融犯罪防治的规则、机构和

机制趋向国际、统一化。金融犯罪防治的国际化是国际社会为应对金融犯罪国际化的最突出的表现。作者重点探讨了金融犯罪防治中的国际标准问题,这种国际标准大致体现在五个方面即:预防、刑事罪量刑和执行、国际司法合作与执法合作、资产追缴(追回)或返还、履约监督。作者还对金融犯罪防治国际化的发展前景提出了四条建议,即:要及时订立、修改有关的国际条约;尽量缩小各国金融刑事立法的差异;继续加强国际间的刑事司法合作;完善相关的组织机构。

第二章是金融犯罪防治规则的国际化。国际条约是国际防治规则最主要的表现形式,如《防止伪造货币公约》、《联合国禁毒公约》等。国际条约内容一般包括犯罪的界定、刑事责任的实现方式、管辖权的确定、刑事司法协助和合作等。除国际条约外,联合国等国际性组织制定的规范性文件和专门性组织制定的规范性文件,如决议、指导性文件、原则宣言、行动计划等也是金融犯罪国际防治规则的重要法律渊源。其中,比较重要的是专门性组织制定的规范性文件。例如,FATF 制定的《反洗钱 40 条建议》和巴塞尔委员会制定的《巴塞尔声明》。

国际组织在防治国际金融犯罪中的作用分在第三章、第四章两个章节。国际组织在防治国际金融犯罪中的作用表现在:制定了一系列防治犯罪的条约、协定等规范性文件来创制新的法律;所制定的防治规则往往会对成员国的国内立法产生直接的影响,一些国际组织所属的司法机构所做的有关涉及刑事问题的判例,可以直接成为国际防治规则的渊源;一些国际组织还专门成立了相应的机构来应对某些国际化的犯罪;有关国际组织为其成员国在防治国际化犯罪提供了一个有效的合作平台。接着,作者又分别就国际联盟、联合国、联合国专门机构、其他专门性机构以及区域性国际组织和集团性国际组织在防治国际化金融犯罪中的地位和作用问题进行了系统论述。

第五章是我国的法律应对。作者在明确界定我国金融犯罪概念

的基础上,阐述了我国目前有关金融犯罪的法律规定体系,包括刑法典、单行刑事法规和附属刑法等三个组成部分。针对我国在防治金融犯罪的法律体系规定,作者分析了其中的不足之处。这种不足表现在以下几个方面:一是在犯罪认定上存在的缺陷,具体体现在法律法规之间对金融犯罪的规定不相协调和法律规定滞后于社会现实上;二是在刑罚适用上存在的缺陷,具体体现在死刑设置不当、缺乏必要的资格刑、罚金刑的规定有欠规范等方面;三是附属刑法存在着无法直接适用的缺陷。针对以上的不足,作者提出了一些实质性的改进和完善措施,如改革罚金刑和增设必要的资格刑等。

第六章是妨害货币犯罪防治的国际化 and 我国的法律应对。对于防治危害货币罪的国际防治规则,制定于 1929 年的《防止伪造货币国际公约》最具有代表性,影响也最为广泛。本文对该《公约》适用对象及其他相关内容进行了阐述。作者接着就法、德、日本等对国际的反货币犯罪规则的制定、完善起着重要的影响作用的国家和地区的货币犯罪立法进行了简要的论述。在此基础上,总结出相应的防治货币犯罪的国际标准,如定罪标准、查封和没收的标准等。然后,作者又探讨了妨害国家货币罪的国际防治机制的相关内容。在该章的最后,是我国关于妨害货币罪的法律应对。作者针对目前我国法律法规、规章规定中的缺陷,提出增加部分罪名、增加单位犯罪规定等改进措施。

第七章是证券犯罪防治的国际化 and 我国的法律应对。在证券犯罪的国际防治规则中,重点论述了由国际证券监管委员会组织(ISOCCO)制定的《证券监管的目标和原则》,欧盟(欧共体)制定的《内幕交易的指令》和《关于内幕交易与市场操纵的指令》。在此基础上作者归纳总结出关于证券犯罪的国际防治标准。在证券犯罪防治的国际机制中,重点论述了证券犯罪国际防治多边合作制度和双边合作制度,其中包括 ISOCO 体系框架内的多边合作、区域性多边合作以及通过相互法律协助条约和通过谅解备忘录进行的合作。在我国,

打击证券犯罪的职能部门有国务院证券委员会、中国证券监督管理委员会和公安部证券犯罪侦查局等。在防治证券犯罪上,我国目前的法律规定中还存在着某些不足,如《刑法》、《证券法》与《公司法》之间缺乏必要的协调统一、刑法中部分罪名的设置不尽合理以及在刑罚适用上也存在一定的缺陷。对此,作者提出了有针对性的改进措施。

第八章是期货犯罪防治的国际化和我国的法律应对。国际行业组织制定的规范性文件是期货犯罪的国际防治规则中最主要的表现形式。其中,《衍生工具风险管理指南》、《温沙宣言》、《东京公报》是其中比较有代表性的三个。这三个规范性文件对期货市场监管、违法行为的防治、相关国际合作等内容作出了相关的规定。同时,作者对美国、日本、新加坡等发达国家和香港等地区有关期货犯罪的立法进行了阐述,并归纳出它们的一些共同之处。在期货犯罪的国际防治机制中,作者主要介绍了一些对期货犯罪的具有防治功能的国际机构,如期货业协会和期货与期权协会。最后,作者针对我国在期货犯罪应对中存在的不足提出了相应的改进建议。

第九章是洗钱犯罪防治的国际化和我国的法律应对。洗钱犯罪国际防治规则,包括联合国、国际性行业组织以及区域组织制定的反洗钱规范,如《禁止非法贩运麻醉药品和精神药物公约》、《FATF 40条建议》、《欧洲反洗钱公约》等等。在国际反洗钱机制中作者重点论述了有关国际组织、区域组织、行业组织在反洗钱中的地位和作用以及反洗钱的国际合作机制。在我国的法律应对方面,主要包括我国的反洗钱法律体系和反洗钱机构以及国际合作机制。本文针对我国在反洗钱法律应对中的不足和缺陷提出了相应的若干实质性的建议。

第十章是信用证诈骗防治的国际化和我国的法律应对。当前,信用证诈骗犯罪的国际防治规则比较薄弱,只有联合国制定的《独立担保和备用信用证公约》、国际商会制定的 UCP500 中有少量涉

及。国际上到目前为止也没有专门针对信用证诈骗进行管辖和制裁的国际组织,只有某些反海运欺诈的国际组织在一定程度上具备反信用证诈骗的功能,如国际商会下设的伦敦国际海事局等组织。具体到我国而言,在目前涉及信用证诈骗和救济的规定散见于刑法和其他的规范性文件之中,最高人民法院《关于印发〈全国沿海地区涉外、涉港澳经济审判工作座谈会纪要〉的通知》则是目前为止在信用证诈骗和救济问题上最重要的文件之一。作者结合当前信用证诈骗的特点和最新的发展趋势,提出了一些防范涉外信用证诈骗的实质性建议,如注意贸易术语的选择、防范信用证中的“软条款”、完善国际立法、加强国际合作等等。

第十一章是信用卡犯罪防治的国际化 and 我国的法律应对,在信用卡犯罪的国际防治规则方面,到目前为止,还没有直接规制信用卡犯罪国际化的国际条约,只有部分关于打击网络犯罪的国际性条约涉及信用卡犯罪,如欧洲理事会制定的《网络犯罪公约》。在信用卡犯罪的国际防治机制中,作者探讨了维萨集团等行业组织和国际刑警组织在防治信用卡犯罪中的作用。我国目前关于信用卡犯罪的立法主要集中于《刑法》和中国人民银行制定的《信用卡业务管理办法》等。在我国打击信用卡犯罪的任务主要由公安机关承担,中国人民银行、中国银监会和各商业银行在打击信用卡犯罪中也负有一定的职责。我国与国际社会的合作主要是通过与国际刑警组织和其他国家的双边合作来进行的。最后作者探讨了我国信用卡犯罪的立法中存在的不足,也提出相应的完善措施,如增加单位犯罪主体、使用信用卡后拒付应予以犯罪化等等。

Abstract

Historically, world financial markets have tended to be separated into distinct functional entities, based on national/geographic location. This is no longer the case. The trend in recent years has been an ever-increasing interconnectivity and interdependence that is becoming truly global in scope. The concept of “one place, one nation” is no longer valid, in the world of finance.

The dynamic changes occurring in financial markets have, unfortunately, also created many opportunities for sophisticated criminals. The very dynamism that makes the world of finance exciting and interesting is, in itself, a weakness. The evolution of international law and regulation in response to new types of criminal activity that know no borders, has been slow and uneven. In order to maintain the security, stability and reliability of global financial markets, it is incumbent upon nation-states to foster deeper cooperation with each other, so they can successfully confront the challenges presented by international criminality.

This paper revolves around the topic of criminal law vis a vis international financial crime. We begin with an in-depth study of the background and current state of law and regulation, as it exists, today. From there, we discuss the current state of this area of law, in China through comparative research and demonstrative analysis, on a multi-dimensional basis. In specific, the analysis includes discussion of mechanisms for in-

ternational cooperation, international law in relation to Chinese law, governmental policies, legislative activities, judicial and administrative enforcement activities and a comparative analysis of national laws throughout the world and their relationship to this issue.

The paper is comprised of 11 chapters, and is divided into 2 parts. Part 1 encompasses the first 5 chapters and is a general overview and discussion of the problems that have evolved in the field of international financial markets because of the development of international financial crimes. Within this discussion we touch upon the current international law, current mechanisms of international cooperation, China's own legal efforts in this area, as well as where there exist deficiencies. Part 1 is completed by way of offering some thoughts and suggestions as to how current Chinese law in the area of international finance could be developed, enhanced or modified to better address the challenges presented by international financial criminality.

Chapters 6 through 11 offer a more in-depth analysis of this issue based on specific problem areas. The topical areas discussed are the regulation of international currency transactions, stocks and securities, futures trading, letters of credit, credit card transactions. These areas are discussed in terms of current international law and China's own responses to problems in these areas.

Chapter one is a summarization of current law governing international financial crimes in the current climate of globalization. This chapter is the "jumping-off" point of this entire volume and introduces the writer's thesis for the paper. That is the idea that financial crime increasingly spans national/political boundaries and typically violates two or more country's national laws, resulting in damage to one nation's financial system or to a multilateral financial administrative system. The writer fur-

ther differentiates between the internationalization of financial crimes and international financial crime and provides dates, reasons for and characteristics of the recent upsurge in financial crime internationalization. In response to the phenomenon of internationalization of financial crime, national governments have responded in obvious manner, by attempting to internationalize the laws that govern international financial crime. Following this, the writer addresses the issue of standardization of these laws between nations, with emphasis on punishment. In totality, the writer delineates the following aspects of the standardization issue: prevention, term of imprisonment, execution of punishment, international judicial and governmental cooperation, replevin and the execution of contracts. Chapter 1 is completed with the offering of four suggestions for the future development of governing international law; international treaties should be made/amended in a timely manner, communicate and negotiate in an attempt to minimize differences in each nation's legislation that governs financial crimes, further strengthen international judicial cooperation and modify national constitutions, as necessary.

Chapter two discusses the internationalization of laws related to financial crime and how these laws are implemented and executed between nation states. Emphasis is given to international treaties in areas such as counterfeiting of currencies and the United Nations treaty regarding illicit drugs. This is followed by a summarization of the construction of specific treaties, including the division of crimes, implementation of criminal burdens, jurisdictional issues and judicial assistance and cooperation. The writer also addresses other information sources in addition to treaties, such as organizations with the U. N. that have a public record of pronouncements and plans of action. Some examples of this are: The 40 suggestions offered by the FATF regarding the interdiction of money

laundering and the "Basel Statement", proffered by the Basel committee. To complete this chapter, the author delves further in his research by putting forth the efforts that have been made to address international financial crimes, by the International Criminal Judicial Justice Convention and the Constabulary Cooperation Convention.

Chapters three and four discuss the role of international organizations in prevention and punishment of international financial crimes beginning with a summary of their functions in this area. This includes making recommendations related to the content of conventions, treaties and domestic legislation, the usage of prior judicial decisions at the national level as a basis for developing international law and the offering of a "platform" to help facilitate cooperation between member nations. In conclusion, the writer elucidates the problems involving status and function of international leagues, the U. N. , the special constitutions of the U. N. , other special constitutions, territorial international organizations and organizations, in aggregate in relation to international financial crimes.

Chapter five discusses current Chinese law in the financial area. The writer first narrows the scope of discussion to criminal activity involving the following areas: banking, currency, securities, credit, invoicing and other financial areas, through forgery, chicanery, etc and the harm imposed on the socialistic financial governing system. This is followed by discussion about the financial crimes within the framework of the Chinese legal system. This is broken into three parts: the Chinese criminal code, accessory criminal law and individual criminal laws. This is then followed by discussion about component features of the law, types of punishments and international cooperation within the framework of the Chinese constitution. To conclude chapter five, the writer discus-

ses current deficiencies and ways in which to improve these deficiencies. Areas of deficiency are discussed in three parts: deficiencies in recognition of financial crimes due to a lag in application of existing laws, secondly, inconsistent penalties, and thirdly, difficulties in the direct application of criminal law to the crimes at hand. This is followed by additional suggestions regarding amelioration of these deficiencies.

Chapter six concentrates on the area of the internationalization of crimes involving currency and how Chinese law has responded. The writer begins by analyzing the character and nature of crimes involving currency, followed by some international laws that have been developed in response, such as the "International Convention on Anti Forging Currency", of 1929. The writer further expounds on this convention in more detail. The writer theorizes that there is a relationship between the ways in which domestic legislation is enacted and the evolution of law relating to the internationalization of these crimes. To site examples, the writer examines legislative enactments in countries such as Germany, France and Japan and goes on to relate their individual national laws to the development of international legal standards. Chapter six concludes with laws relation to currency issues, in China, within the framework of Chinese criminal law, the "Bank Law of the PRC" and administrative rules and regulations. The chapter ends with the writer addressing individual deficiencies and suggestions for improvement.

Chapter seven concentrates in the area of internationalization of crimes involving securities transactions. It begins with a discussion of crimes that occur when stocks and securities are issued and exchanged and how increased globalism has changed the character of such crimes. The writer places emphasis on the "Object and Principle of Supervision and Administration of Securities", as put forth by ISOCO, the "Injunc-

tion of Inside Trading” and the “Injunction of Inside Trading and Market Control”, as put forth by the European Union. Emphasis is placed on bilateral and multilateral cooperation regarding punishment of this type of crime within the framework of ISOCO and cooperation built upon mutual synergies created by treaty and through memos of understanding. Chapter seven concludes with discussion as to Chinese law in relation to internationalized securities criminal activities. The writer further discusses the functional mechanisms that have oversight in this area, such as the Securities Committee of State Department, the SOCC, and the Security Crimes investigation Bureau of Police. In conclusion, the writer addresses the inherent conflicts that exist between China’s systems of criminal law, securities law and business law and regulation. These conflicts are stated in terms of reasonability and consistent application of penalty when crimes are committed. The writer concludes by offering some possible solutions to these issues.

Chapter eight discusses the internationalization of crimes in the futures markets.

The writer cites unique aspects regarding international law in this area. International industrial organizations have a prominent role in the development of regulation in the futures markets. Specific citation is given to three main publications: the “Governing Guide on Derivative Tools Risks”, “Winslow Pronouncements”, and “Tokyo Public”. These provide advice as to oversight and management of futures related criminal activity, prescribed punishments and insight into international cooperation. From this point, the writer expounds upon related legislation and regulation in certain financially developed markets, such as the United States, Japan, Singapore and Hong Kong. The writer finds some commonality in within each of these markets, which he describes in detail.

In conclusion, the writer discusses current international law related to futures crimes and the mechanisms utilized to administer and punish those crimes. The writer ends chapter eight by proffering some suggestions for improvements in areas he believes to be deficient.

Chapter nine concerns the topic of the internationalization of money laundering. We begin with an overview of the origins of the modern concept of money laundering followed by an examination of the characteristics of international money laundering. The author provides discussion relating to United Nations efforts in this area, as well as efforts on the part of international industrial organizations such as the “FATF 40 Suggestions” and the “European Union Anti-Money-Laundering Convention”.

The writer further delineates legislative activities on the part of developed nations and summarizes international standards regarding money laundering crimes as well as the functions of concerned groups and organizations in their effort to foment international cooperation. The chapter is concluded with a discussion of Chinese law and of international cooperation, in China, augmented with a discussion of specific Chinese entities involved in the area. These are the People’s Bank of China, the National Foreign Exchange Administration Bureau, the Police Ministry and each commercial bank. The author notes that there are obvious problems and weaknesses in the current system, such as the lack of a specific anti-money laundering statute. The writer concludes with suggestions as to how to address specific deficiencies.

Chapter ten pertains to the internationalization of crimes related to letters of credit. Discussion begins with an overview of the functions of letter of credit and the evolution of international crimes related to letters of credit. The writer analyzes the reasons behind the level of crimes that

are related to letters of credit from both a theoretical and practical aspect. He believes that international regulation is lacking in this area and that only the United Nations and the ICC have conventions concerning this area of regulation. The writer then compares legislation in the United States and Great Britain. There is little or no international legislation in this area, with the exception of anti-marine fraud organizations, such as the London International Marine Bureau of the ICC. In China, the laws regarding letter of credit fraud and redress are sparse and thinly spread throughout the criminal code and other regulatory areas. Civil statutes are somewhat better and at least allow a litigant to opt for civil redress. Hong Kong and Macao currently have the most developed regulation to date, within China. Chapter ten concludes with some suggestions to address anti-fraud issues with the letter of credit. Specifically, the writer talks about giving attention to detail in choosing terms of trade and care in crafting of clauses so that unscrupulous individuals cannot use “soft clauses” to manipulate intended terms.

Chapter eleven further elucidates upon the internationalization of crimes regarding letters of credit. The writer discusses the characteristics of crimes involving international fraud as related to letters of credit. To date, there has been no international treaties related to letter of credit fraud statutes although there have been treaties regarding anti-web crimes that touch upon the area of letters of credit such as the “Crimes of Network Treaty”, from the European Union. The writer briefly discusses legislation pertaining to letters of credit fraud from Germany, France, Japan and Canada, etc. The writer further sheds light on the activities of industry groups and international policing organizations in the apprehension and punishment of criminals, in this area. In China, most law related to letter of credit fraud is contained in the criminal code, while some

regulations, such as those governing operations and use of credit cards, has been put forth by the Bank of China. Enforcement still lies mainly with police agencies, although the Bank of China's Supervisory and Administrative Committee of Commercial Banks play a smaller part. The writer concludes Chapter eleven with a discussion China's efforts, along with other nations, to develop bilateral and multilateral cooperation between Chinese policing entities and those of other nations. He also offers suggestions about improving and eliminating the problems and deficiencies in the laws relating to letters of credit.