复旦民商法学评论

《复旦民商法学评论》编委会

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2004年12月 (总第三集)

Fudan Civil &Commercial Law Review

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复旦民商法学评论

法律出版社

The Ownership's Degeneration

Author: Cui Jianyuan

【Abstract】 the common properties should be divided into some categories, and the owners of them are administerial bureaus. The viewpoint that the ownership of the common properties belongs to administrative law is not proper, and the way that it is seen as the ownership in civil law can be thought to accord with principle of law.
【Key words】 the common properties, the ownership of the common properties, the ownership in administrative law, the ownership in civil law.

On Civil Capacity

Author: Li Xihe

【Abstract】 The legal concept of "capacity" has always been interpreted as a kind of qualification. This article argues that "capacity" is the subjective condition to obtain legal qualifications by a person, i. e. the basis of obtaining legal qualifications Legal qualifications are recognition of "capacity" by law. Put another way, legal qualifications are legal reflection of "capacity". From this point of view, this article explores a new perspective of civil capacity.
【Key words】 capacity, qualification, condition, personality

On Third Party Beneficiary Contract And Its Development

Author: Li Xiaojun and Hou Wei

【Abstract】 Third party beneficiary contract enjoys a long history from the glories ancient Rome Law and develop to it's thrive time in modem legal system. This thesis first gives a profile of third party

beneficiary contract by tracing down its long time history and comparing it with some other similar legal systems. Then the focus is laid on the theoretical analysis of third party beneficiary contract in which the author introduces the original source of the third party's right, the independence nature of this contract as well as its relation with the cause that brings about itself. Mechanism design is another core part of this thesis. The author suggests idea from 3 aspects: establishment, effectiveness and remedy. At last the author makes some comments on regulations of third party beneficiary contract in prevailing contract law of PRC.

【Key words】 Beneficiary Contract, Third Party, debt

The Validity And Invalidity of Legal Act

Author: Liu Jingwei

【Abstract】 the author, by defining the validity of legal act at first, analyzes concretely these three factors deciding the validity of legal act and those circumstances of legal act taking effect, because of the confusion between the validity of legal act and its taking effect at the present law theory. The author, by distinguishing the validity of legal act from its taking effect, draws the conclusion that the former is judged on the basis of legal value, while the latter is on the basis of fact. In the end the author emphasizes the significance of making the difference between the validity of legal act and its taking effect.

【Key words】 legal act, validity, taking effect

Legal Issues on the Transfer of the Right of Denomination

Author: Shen zhixian and Fu Wang

【Abstract】 It becomes a new problem for the judicatory practice with the increasing number of transfers of the right of denomination and disputes related. Firstly, this article classifies the various transfer acts. then analyzing the connotation and legal character of the transfer of the

right of denomination in detail. On the basis of the above, the article offers the author's opinions on the potential risks of the transfer contract of the right of denomination and how to avoid them, and gives suggestions on the trial of relevant case in light of the legal practice.
【Key words】 the right of denomination; transfer

Studies on the Separate Position of Business Law in Our Couture's Law System

Author: Zhang Min'an

【Abstract】 The author thought business law has become a separate law department in our country's law system on the theory of business law's position. Considering the relationship of Civil law and Business law and our nation's situation, this article brings forward a unique opinion relevant to the necessity and main content of the Business Law Code.
【Key words】 business law, Business Law Code

On the Trustee's Right, Obligation and Liability in Trust

Author: Yu Xianyu and Xue Ru

【Abstract】 As the legacy of British equity, legal principles of trust has been highly systemized in the long judicatory practice in common law countries. Although the trust in the civil law is introduced from the common law, there are still a lot of differences between them, especially in the restrictions and protections of trustee which is the major role in a trust. In accordance with the reality in Chinese trust law, with the comparison of the trust law between civil law and common law, this article analyzes the loopholes of our trust law in the provisions regarding trustee's rights, obligations and liabilities, and presents the author's opinions on the revisions of the Chinese trust law.
【Key words】 trust; trustee; right; obligation

A Preliminary Analyse on Incontestability Clause in Life Insurance Contract

Author: Fan Qirong and Cheng Fang

【Abstract】 Incontestability clause is a particular rule for policy contestation in life insurance contract. The clause is to prevent the insurer's policy rescission right that arises out of the insurance applicant or the insurant violating the informing obligation when entering into the insurance contract, and to urge the insurer to perform the obligation of investigation and verifying within a reasonable period. The clause protects the applicant's (or the insurant's) expectation interest or reliance interest on the policy, standing for the special care for the value of the insurant's life, carrying a strong function of appraisal on the ethical value. The legal theory of incontestability clause can be traced back to the Anglo-American life insurance practice in the middle 19th century. The clause has been evolved from an optional clause to a compulsory one in statute, and its function has also been extended from merely restricting the insurer's right of contestation to controlling the content of excluded liability clause in policy. The current "Insurance Law" of our country doesn't regulate the incontestability clause and that shows inconsistency with the trend of legislation on insurance. Especially, as many foreign-invested insurance companies have entered China market, continuing absence of regulation on incontestability clause will surely harm the interests of the mass insurance applicants. In the whole picture of WTO, our insurance legislation should, according to the current status of our life insurance industry, take the incontestability clause regulation as reference and follow the proper practice, to improve the level of legal protection on mass insurance applicants.

【Key words】 Life insurance contract, Incontestability clause, Informing obligation, Legislative regulation

Studies on the Legal Mechanism of Risk Aversion of Financial Asset-Backed Securitization

Author: Xu Lingyan

【Abstract】 The financial asset-backed securitization is a delicately designed brand-new financial tool which comprises vast profits and great risks. Its effective function particularly demands a series of complete legal mechanism of risk aversion. In the author's opinion, there were five legal mechanisms to prevent the risks of financial asset-backed securitization: 1. bankruptcy risk aversion mechanism, viz. special arrangement of the securitized financial transaction structure in law, which is in the aim to guarantee "bankruptcy remote"; 2. False transfer risk defend mechanism, viz. the originator and special purpose organization should not falsely transfer assets. According to the specialty of the false transfer assets contract in the financial asset-backed securitization, the author proposes that contract should be a voidable contract; 3. connected transaction risk aversion mechanism, the author advises to prohibit the connected transactions between the originator and special purpose organization; 4. risk aversion mechanism in the issuance and transactions of securities. The author thought we should strengthen the risk defends mechanisms of administration, credit, information disclosure and so on; 5. risk aversion mechanism in the legal cognizance, viz. because of the numerous legal voids and fussy legal obstacles in the financial asset-backed securitization in our country, the author suggests it should be specially legislated, and it is necessary to amend the regulations related to it to comply with the asset-backed securitization law.

【Key words】 financial asset-backed securitization, bankruptcy remote, true sale, structured finance, risk aversion

Should the Straight Bill of Lading be required to Present? — Is it still a question?

Author: Yang Liangyi and Yang Daming
Translator: Jin Hao and Liu Jun

【Abstract】 This thesis is not supposed to discuss all kinds of shipping documents in depth, but merely to intensively probe into one of them, the straight bill of lading, and its significant progress recently(and it is still progressing). The author thinks a similar case is being heard by Supreme People's Court of the PRC. In England, Rafaela S tried by Appellate Court will soon appealed to the highest court of England-House of Lords.

【Key words】 straight bill of lading, present

The New Trends in the Corporation Law in Korea

Author: Jin Shanguo

【Abstract】 Since the financial crisis in 1997 Korea has modified the basic laws of the third chapter of business law to regulate the behavior of corporation. The author discusses the important system and trends in the modification of corporation law, circling on the modifications of 1998, 1999and 2001. The article analyzed the main problems in the end.

【Key words】 modification, shareholder, share, director

The Legal System of Disgorgement of The Insider Short-swing Trading

Author: Zhu Chuan

【Abstract】 The legal system of disgorgement of the insider short-

swing trading is an important preventive measure used to regulate the insider trading of stocks, which is that whether insiders know or make use of the insider information in their companies or not, the law will impose liability for disgorging the short-swing profit back to the company upon these statutory insiders, as long as they engage in stock trades within a statutory period. By the enforcement of the disgorgement after this kind of trading, the system can dispel insider's motive of frequently doing a short-term dealing, and so can keep the insider from trading indirectly.

The legal system of disgorgement comes originally from the section 16(b) under "Securities Exchange Act of 1934"of U. S. which, as a standard prototype, is followed by securities legislation in other countries. And then, through Article 157 of Securities Exchange Act, this legal system was also established in Taiwan province. So referring to these two models, Article 42 of Securities Law founded the system in China. Actually, from the angle of its logical sequence, there are two links involved in this system—the recognition of the insider short-swing trading and the exercise of the disgorgement. Accordingly, based on the comparison of this system in China with its counterpart in America and Taiwan, this thesis expands its main content along the line of this system's logical sequence mentioned above.

【Key words】 Insider, Short-swing Trading, Disgorgement, Article 42 of China's Securities Law

The Study of Business Law In Game Theory Perspective

Author: Fan Hongrui

【Abstract】 This thesis is on the basis of such a prerequisite that Game Theory can offer a new visual angle to those who hope to understand how law influence people's behavior. This visual angle mostly proceeds from theory of human behaviouristics, and to a certain extent combines with economics closely. This article doesn't try to set up a complete theory system, and just to explain the basic concept and theory of Game Theory. It discusses deeply the correspondence of

strategy choice and Nash equilibrium. At first it explain some fundamental concepts and theory through prisoners' dilemma, such as non-cooperative game, strategy choice and Nash equilibrium. Then it categorizes the game according to action order and whether the information is complete, concluding complete information static game, complete information dynamic game, incomplete static game and incomplete dynamic game, as well correspondent equilibrium: Nash equilibrium, subgame perfect Nash equilibrium, Bayesian Nash equilibrium and perfect Bayesian Nash equilibrium. Through using this theory, it also interprets how action order and information disclosure influence the participants' finial decision. Through the example analysis, such as mobile communication competition and monopoly behavior of market, it can make people understand interdynamic relation between law and noncooperation game better.

【Key words】 non-cooperative game, strategy profile, Nash equilibrium, information disclosure

Summarization of the 2004 International Property Law Proseminar

Author: Hu Hongwei & Lu Ronghan

【Abstract】 2004 International Property Law Proseminar was held in Fudan University on May 27th to 28, 2004. The experts of the convention took a detailed study and reasoning on the hot topic of property law, including the current legislation of property law. The convention involved the basic theory of property law, the transfer and registration of property, the ownership, usufructuary right and security interest etc. chinese and foreign scholars exchanged their opinions and brought forward a series of constructive suggestions on the legislation of property law.

【Key words】 property law, transfer and registration of property, usufructuary right, security interest

On Claim for Real Rights

Author: Teruaki Tayama
Translator: Zhang Wei

【Abstract】 From clarifying the connotation of the right of the real claim, the article illustrates this right's legal character, types and obligor of the right. And on the basis of the comparison of different theories, the author analyzes the overlap and burden of cost of the claim for real rights.

【Key words】 claim for real rights, interference, overlap, burden of cost

说　明

鉴于作者提交论文和编辑出版之间的时间差，故有四篇论文没有中、英文提要，请读者见谅。

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一、民法篇

所有权的蜕变?

崔建远*

【内容提要】 公产,应被区分为若干类型,其上存在着所有权,其主体为行政机关。公产所有权属于行政法上的所有权的观点不可取,以民法所有权来定性公产所有权完全符合法理。

【关键词】 公产 公产所有权 行政法所有权 民法所有权

公用物,在经济学上大多译为公共物品,法国法从财产的层面观察它,取名为公产,并发展出公产所有权的制度及其理论。由此似乎使得以公产为客体的权利即公权成为一条铁律。果真如此吗?为了说清问题,有必要首先考察法国法上的公产制度及其理论,然后再作评论。

公产与私产的区别在古代罗马法上就已经存在。然而在近代法国法中,这种区别直到19世纪以后才首先由学说提出来,而后为法院的判例所接受,最后出现于成文法中。《法国民法典》虽然也使用"公产"一词(第538条),但不具有特殊意义。19世纪初有少数民法学者在解释《法国民法典》时,根据第538条所用"公产"一词和第541条使用"属于国家所有"的表述,认为公产和属于国家所有的财产是两个不同的法律范畴,属于国家所有的财产是国家的私产。不过,该解释在当时未曾产生影响。根据后来的法国学者研究,《法国民法典》使用"公产"和"属于国家所有"两个词,在意义上未作区别。认为存在区别的,系后来持公产学说的理论家为了替自己的学说找

* 崔建远,清华大学法学院教授、博士生导师。

出一个法律根据而强加给《法国民法典》的。[①] 第戎法学院院长 V. 普鲁东受民法学说的启发，于 1833 年著书《公产论》，对公产理论首次作出系统的说明。他认为，在政治共同体的财产中，有一些属于共同体所有，可以用作谋取利益，如同私人的财产属于私人所有一样，为私产；另一些则是公共财产，供一般公众使用，叫作公产。正因公共财产供公众使用，所以，其用途未改变之前，它不得转让，也不得作为取得时效的标的。普鲁东的理论在 19 世纪后期很快为学术界和司法界所接受，认为公产不能转让，也不因时效而丧失。舆论界主张，必须把行政主体的财产在法律上一分为二，一类受私法规范，一类不适用私法规则。[②] 公产与私产的区分得到了判例和成文法的肯定。在 19 世纪，判例承认供公众直接使用的财产为公产，例如交通大道、可以航行的河流等。在 20 世纪初，著名法学家奥里乌和狄骥等首先提出，除供公众直接使用的财产以外，供公务使用的财产也是公产。但供公务使用的财产在范围上很广泛，不明确，如何确定，见仁见智。直到 1946—1947 年时，民法改革起草委员会作为建议提出一个标准，立即得到法院和学术界的采用。其标准是行政机关的下列财产属于公产：1. 公众直接使用的财产；2. 公务作用的财产，但该财产的自然状态或经过人为的加工以后的状态必须是专门地或主要地适用于公务所要达到的目的。[③] 1957 年，法国的《国有财产法典》规定，国有财产中，由于本身性质或由于政府指定的用途而不能作为私有财产的属于公产（第 2 条）。这种区别私产与公产的标准只是反映了 19 世纪的公产观念，受到了学术界的批评，因为没有财产在性质上不能作为私有财产的。它未被普通法院和行政法院所采纳。时至 20 世纪末，成文法与判例承认的公产包括海洋公产、河川湖泊等公产、空中公产和地面公产。[④] 在现代法上，公物是指直接供公的目的使用之物，并处于国家或其他行政主体所得支配者而言。成为公物必须具备两项条件：一系直接供公的目的使用，二系处于国家或者

① J.M. 奥比，R. 杜科扎德尔：《行政法》、《公有财产》，1983 年法文版，第 257 页；德洛巴德尔：《行政法论》，第二册，1980 年法文版，第 128 页。转引自王名扬：《法国行政法》，中国政法大学出版社 1988 年第 1 版，第 302～303 页。

② 前揭王名扬著：《法国行政法》，第 303 页。

③ 德洛巴德尔：《行政法论》，第二册，1980 年法文版，第 131 页。转引自前揭王名扬著：《法国行政法》，第 306～307 页。

④ 前揭王名扬著：《法国行政法》，第 311～312 页。