法律论丛

LAW

交易所非互助化及其对自律的影响

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总　序

一、法律方法与经济问题

本套专著有一个共同的特点，就是作者们不约而同地采用法律方法研究经济问题。过去我们在二十多年的时间内，多看到用经济学的方法分析法律问题。特别是国外法学界开展的轰轰烈烈的“法律的经济分析”，已有若干部专著翻译成为中文。而现在，在中国的大学和研究机构里，法律研究工作者开始进入经济学、公共管理学和工商管理学的领域，用法律的方法来研究这些边缘领域的问题。

在社会科学几个相近的领域，例如经济学、公共管理学、工商管理学和社会学等领域，都有法律研究的论文和著作，这种跨学科的研究成果，也越来越多了。在中国政府将“依法治国”定为基本国策之后，采用法律的思维与方法分析目前的经济改革问题也非常有意义。其意义就在于，我们所说的“依法治国”，不仅仅是表现在一个宏观的口号上，而是要将“依法治国”作为可以实际操作的、用来实际分析经济问题的、作为经济政策设计基础的法律方法。

记得前年，全国人大常委和人大财经委员会委员、北大前校长吴树青老师问我，依照《宪法》，“债转股”是否应该提交人大财经委讨论？我说需要研究一下法律，才能回答。最近，国务院关于“国有股减持与成立社保基金”的办法出台，又有人问我，这么大的财政支付转移，是否应该经过人大财经委开会讨论？我回答说，需要研究法律。直到我在写这个序的时候，相关的法律研究工作还在进行。我希望从法律制度变迁的角度和我国财经法制程序演讲的过程中找出符合法律的答案。

不断遇到类似问题，使我开始研究与思考经济学家们提出的问题：“人大财经委员会的职权范围究竟是什么？”“人大财经委员会对于国家重大财政支付转移是否有权审议？”从法律学的角度来研究这些经济学问题，本身就构成了一个重要的法律制度程序化和司法化

的法学课题。

二、经济学家敏感，法学家稳重

还记得有一次，一位金融业界人士对我说："改革十多年来，讨论经济改革的问题，几乎都是经济学者的声音，这不奇怪。目前，讨论《证券法》或公司治理的问题，也几乎都是经济学者的声音，这也不奇怪。奇怪的是，所有这些问题的讨论中，几乎听不到法学家的声音！"说到这里，这位朋友几乎用质问的口气对我说："你们法学家们关心什么？为什么听不到声音？你们都干什么去了？"

我一下子被他的语气盖住了！当时我想不出用什么简单办法向他来解释。尽管我不完全同意他的看法，因为这里可能有他个人信息渠道的问题，也可能有社会媒体关注的偏好问题，但还有可能是更深层的问题，例如，在改革过程中，许多法律制度和程序都尚未定型，如果采用法律的方法，可能会增加改革的成本，特别是时间方面的成本等。

本套专著的作者们都是研究法律的，他们也可以称为年轻的"法学家"了，因为，他们已经发表了相当一批研究成果，从事法学专业研究的时间都在10年以上，司法实际工作2～5年以上了。他们长期研究的成果，似乎可以部分地回答前面那位朋友的问题了。法学家可能没有经济学家那样敏感，但是，法学家多数比较稳重。法学家的发言将影响经济政策与制度的设计，也影响经济操作与运行。经济发展要考虑效率，但是不能仅仅考虑效率，还要考虑到多数人的公平与程序的正义。我们的政府和社会都可能需要一段时间接受和适应法学家的分析方法和论证方法。

三、研究成果的意义

邀我写序的这套专著的作者们，经过三年多时间的专门研究，又经过一段时间的修改，才拿出这样厚重的成果来。我看到这些成果时，就像看到美国最高法院门前的铜铸灯柱底下基座的铜龟，给人以一种稳重、缓慢、深思熟虑的感觉。中国古代在比美国更早几千年的时候，政法合一的朝廷大殿，就有汉白玉雕刻的石龟。龟背上驮着记

录历史的石碑，同样给人以庄严、持久、正义的印象。中外司法与法学研究在历史上流传至今，给人的形象方面的印象和感觉是非常类似的，这种感觉在今天还有。

在不太讲究政治经济学基本理念的时光中，又是在变动未定型的过渡时期，经济学家关于对策性的看法是敏捷和回应迅速的。在回应中有许多是充满了智慧的解决方案和温和的中庸选择。相比之下，法学领域的回应还显得少些，也慢一些。有一个可能的答案，也是从本套研究性专著中解读到的：经济学家们谈论的是"物"（商品与交易），法学家谈论的是"人"（权利与义务）。

现实情况也是如此。市场中的"物"，无论是动产，还是不动产，几乎都成为商品，早已流通。现在，更加上升了一个台阶，市场将作为商品的物，进化到了证券化的虚拟资产的形态了。但是，法学这边的情况呢？《物权法》还在起草过程之中，该法案能否在今年内通过，目前还是一个未知数。但是，立法的稳重并不影响市场的发展，法学家们在实务性工作方面，特别在市场中的交易契约设计方面，已经在研究具体的问题，在这方面的成果，也已相当可观。

经济学家对问题的讨论，观点可以是多元化的，也有争论。但是，总的方法还是建立在一个统一的理论框架下和一致的假设前提下的。但是，法律则不同。法律天生就是对抗性的，生来就有正方与反方。抗辩是法律运作的方式，法律的逻辑和理念就是在这种对抗之中发展的。对抗性的法学，本身也导致了它的成果在外界人士看起来充满矛盾性和冲突性。甚至让他们感到，这群人搞的不是科学，而是一种抗辩的技术。

四、国际与国内金融法的融合

如果有人要我用一句话来表达什么是国际金融法，我就会说，它是一张没有国界，只有金融中心与边缘关系的地图。如果说，国内金融法与国际金融法还有什么区别的话，只是时间上的区别了，我国加入 WTO 后，区别将越来越缩小。

如果我们承认一美元在美国和在亚洲都等于一美元的话，国际金融的国界就越来越失去意义。而美元市场上中心与边缘的流通关

系，就变得越来越有意义。任何国家国界之内的法律制度如果符合金融流通与发展规律的话，这个国家的经济与社会发展就会顺利，否则就曲折。荷兰的人口是俄罗斯人口的10%，但是，荷兰的金融规模超过俄罗斯的规模。英国人口6000万，是印度人口的6%，但是，伦敦金融市场的规模比印度大若干倍。这就是金融中心与边缘之间的关系之一。所以，区别国内与国际金融市场，在法律规则方面已经不如以往那样重要，重要的是发展中国家中的大国，如何抵御西方金融中心的垄断，将以美元为基础的金融中心从一极化发展为多极化。

具体到我国，研究国际金融法与国内金融法是不可分的，而且这个领域范围之广袤，课题之宏大，数据之丰富，关系之复杂，都是非常吸引人的。特别是年轻人。这个天文般宏伟的领域，特别适合青年人研究与学习。因为，在这个领域比其他法学领域出新成果的机会要更大，创新成果也相对较多。这套专著的出版，就是一个例证。

本来这套专著的作者们要我写个小序，他们的书稿引发了上面一些话语，我感到有些喧宾夺主了。我感谢作者们以加速折旧的生活方式，写出了这样多的研究成果。学者们的生活，分为两个阶段，在学习的时候，取之于社会；而做研究的时间，特别是出成果的时候，是学者用之于社会和回馈于人民。

愿这些专业研究对金融业内人士有所帮助，对金融体制改革有所贡献。

吴志攀　谨志

2001年6月28日

Foreword

In all the capital markets of the world there is an active debate on the future of stock exchanges. The reason is simple: technology has given investors and users of capital choices which go far beyond what exchanges have traditionally offered.

Large international securities firms have begun to link up between themselves to trade derivatives. This has accounted for a large drop in the volume of trading in derivative exchanges. Large investment funds have also decided not to trade through exchanges where possible. Instead, they exchange shares through electronic networks after the markets have closed, using the mid point of the closing bid ask prices of the relevant stocks to value their trades. This enables them to save brokerage fees and at the same time, relieves them of having to value stock bought or sold at different prices at different times of the day.

The US Securities and Exchange Commission have for some years now issued rules on the offer, sale and purchase of stock through the Internet. Alternative electronic trading systems such as Instinet have taken away a substantial amount of trading from exchanges. Technology is bound to revolutionize the way investors invest and the way issuers of investment instruments deal with investors.

It is not therefore surprising that exchanges throughout the world have begun to look at themselves to see if they have a future. Many exchange have had long histories, so they are not quick or flexible enough to make drastic departures from the past. But to the credit of some exchanges, they have come up with two

solutions. The first, and more important solution, is to turn themselves from traditional membership associations into joint stock companies. The second is to join forces in the use of technology and in the concentration of trading, or at the very least, cross listings and information sharing.

The second solution is relatively obvious, so let me deal with that first. The alliance of the Paris, Brussels and Amsterdam exchanges into EURONEXT is an example of exchanges getting together to trade in a single platform. This of course has been facilitated by the European Community's Directive on Investment Services and there is much regulatory cooperation between European regulators. Many exchanges are experimenting with cross listings and cross border clearing and settlement. The stock exchanges international body, FIBV, has recently produced a study which suggests that exchanges will in future gravitate to three models: global exchanges, regional exchanges and alliances. Whatever model exchanges adopt, the way in which each exchange implements its business model will be dictated by the first solution.

So, let me now come to the first solution which is less obvious and more complicated. It seeks to do three things. The first is to change the governance of the exchange into one which is not dominated by members. This will enable the exchange to pursue interests beyond the narrow interests of the majority of its members. Many exchanges have been unable to make innovations because their boards are dominated by members who prefer not to make changes. The second is to make the exchange into a profit making organization where shareholders will have a right to share in the results of the activities of the exchange. Shareholdings in exchanges have traditionally been tied to the right to conduct trading in the exchange. So only membership of exchanges have traditionally been restricted to securities firms. This also accounts

for the fact that most exchanges are non-profit organizations. The profits made are ploughed back into the operational and development funds of the exchange. This situation had given rise to exchanges exacting the lowest possible fees from their members and the highest possible fees from the public. If the exchange is profit making, at least the board will have the responsibility to ensure that economic fees are charged for services to members. But that would not be sufficient if all the shareholders were members. The third objective therefore is to delink the nexus between trading rights and shareholding in the exchange and at the same time, open up the share register to anyone who will care to invest in the exchange. These three objectives have been pursued in a process which, in foreign capital markets, have been called the process of "de-mutualization". It is so called because the process involves breaking up the exchange from a mutual society into a joint stock company which everyone can invest in. The next logical step is for exchanges to raise money publicly and to list. Since in most markets, there is only one stock exchange, a stock exchange will have to list on its own board.

"Demutualization" has, at the time of writing this foreword, taken place in Sweden, Germany, Britain, Australia, Toronto, California and Hong Kong. It has brought with it a whole series of questions. These questions have centered on the public responsibilities of exchanges versus their commercial role as profit making organizations. Exchanges have traditionally been looked upon as non-profit organizations with the public responsibility of ensuring that trading in their markets are transparent and orderly. So exchanges are self regulatory bodies who regulate their members and help the regulator to police the markets for abuses. The fear is that since such regulatory roles are not money making, then the profit making imperative will take over and the exchanges will be

tempted to cut corners. Another fear is that since exchanges would like companies to continue to list on them, they will not seek to offend the officers of their listed companies too much. Yet another fear is that since most exchanges will have to list on their own boards, there will be a conflict of interest when the time comes to enforce listing rules. These questions has prompted the Technical Committee of the International Organization of Securities Commissions to issue a Discussion Paper on "Exchange Demutualization" in 2000.

Despite the many issues raised by the demutualisation of exchanges, the debate has served to make everyone think more clearly about the role of exchanges. The research now published by Dr. Yu Xugang on the role of exchanges is a valuable part of this debate.

The exchanges in our country are young by comparison to the exchanges of other markets. Although they are membership organizations, their members do not dominate the decision making. Instead, the regulator has a decisive influence in the direction that each exchange takes. Dr. Yu Xugang's research will I am certain help both the exchanges and the regulator think through the issues relating to the future of our exchanges.

Liang Ding Bang
Beijing, August 2001

序

关于证券交易所的未来，全球资本市场正在展开一场热烈的讨论。理由非常简单：科技给投资者和资本使用者带来了传统交易所所无法提供的选择。

大的国际证券公司之间已经开始建立连接，从事衍生工具交易，这导致衍生工具交易所的交易量大幅度下跌。同样，大的投资基金也决意尽可能绕过交易所进行交易，他们通过电子网络在市场闭市以后交易股票，交易价格为相关股票闭市买卖价的中间价。这样，投资基金既可以节省经纪费用，又可以从随时得对证券交易价格进行评估的繁重劳动中解脱出来。

近年来，美国证券交易委员会就网上发行、买卖证券已颁布了有关规定。像 Instinet 一样的另类电子交易系统（Alternative Electronic Trading Systems）带走了交易所的大量交易，科技必然对投资者的交易方式以及投资工具发行人与投资者的交易方式带来革命性的变革。

因此，全球的交易所都开始关注并重新审视自己的未来也就不奇怪了。许多交易所有着悠久的历史，因此不能迅速而灵活地告别过去。但值得称赞的是，一些交易所提出了两种解决方案：方案一，也是更为重要的一种方案，由传统的会员制联合会转变为股份公司；方案二，交易所之间联合运用技术与集中交易，或者至少实现交叉上市与共享信息。

相对而言，目前第二种方案取得的效果更为显著。巴黎、布鲁塞尔与阿姆斯特丹交易所结盟组成的 EURONEXT 已成为交易所在单一平台集中交易的典范，这当然也得益于《欧盟投资服务指令》提供的便利，而且欧洲监管者之间已达成了许多监管合作。许多交易所正在试着进行交叉上市与跨境清算和交割。证券交易所国际组织（FIBV）最近发布了一项研究报告，提出未来的交易所将倾向于三种

模式:全球交易所、区域交易所及交易所结盟。不管采纳何种模式,每家交易所实施自己商业模式的方法都将受前述第一种方案(由会员制转为股份制)支配。

现在我们来关注一下效果尚不明显,但更加复杂的第一种方案。第一种方案试图解决三个问题。首先,改变交易所的治理结构,摆脱会员的支配,这将促使交易所寻求更为广泛的利益,而非仅仅服从多数派会员的利益。许多交易所之所以不能创新,是因为他们的董事会为拒绝变革的会员所控制。其次,使交易所成为营利性组织,股东们有权分享交易所的经营成果。传统上,交易所股权与在交易所进行交易的交易权紧密相连,交易所的会员资格仅授予证券公司,因此绝大多数交易所是非营利性组织,交易所赚取的利润再转化为交易所运营与发展的基金。这导致了交易所尽量减少对会员的收费,却尽量提高对公众投资者的收费。如果交易所以营利为导向,那么董事会至少有义务确保向会员收取的服务费用是有利可图的,但是如果所有的股东都是会员,收取的费用仍将很少。因此,第三个目标旨在断开交易所股权与交易权之间的联结,同时将股东名册向所有希望在交易所投资的人开放。在海外资本市场所谓的"非互助化"(demutualization)的进程中,这三个目标一直是人们孜孜以求的。之所以称为"非互助化",是因为这一过程促使交易所由互助性社团转化为人人皆可投资的股份公司,顺理成章地,下一步自然是交易所公开筹资与上市。由于大多数证券市场只有一家证券交易所,证券交易所将不得不在自己的市场上上市。

在本序成篇之时,"非互助化"已在瑞典、德国、英国、澳大利亚、多伦多、加利福尼亚与香港展开,并带来一系列问题。这些问题集中于交易所肩负的公共职责与身为营利组织的交易所所扮演的商业角色之间的矛盾。交易所历来被视为肩负公共职责的非营利性组织,有义务确保本市场交易活动的透明与有序。因此,交易所属于自律性组织,监管自己的会员,并帮助监管者纠察市场上的权利滥用行为。人们担心,由于监管角色与营利的冲突,一旦营利动机占了上风,交易所会有急功近利的行为;同时,由于交易所希望上市公司继续在自己的市场上市,他们将不会试图冒犯上市公司的管理者。此外,人们还

担心，由于大多数交易所不得不在自己市场上市，在执行上市规则时会存在利益冲突。这些问题促使“证监会国际组织技术委员会”于2000年发表了《交易所非互助化》的讨论文章。

尽管交易所非互助化提出了许多问题，这场讨论将使得每一个人更为清晰地思考交易所的作用。于绪刚有关交易所作用的研究成果即将出版了，这一著作构成了这场讨论中卓有价值的一部分。

与其他市场的交易所相比，我国的交易所十分年轻，尽管它们是会员制组织，实际上会员并不能支配决策过程，而监管者对于每家交易所的发展方向有着决定性的影响。我相信，在考虑我国交易所的未来及其他有关问题时，于绪刚博士的研究成果无论对交易所还是对监管者都将提供借鉴。

梁定邦

2001年8月于北京

ABSTRACTS

The traditional exchange has existed for nearly 400 years if considering the establishment of Amsterdam Exchange in 1611 as the nascence of the Stock Exchange. Historically, most exchanges are not-for-profit organizations mutually owned by their members, who are not only the decision-makers but also the direct users of their trading services.

The market should be operated in order for protecting the investors. The spontaneity of the securities trading demonstrates that the regulation of the securities markets is, to some extent, of Self-Regulation; at the same time the specialization of the securities trading requires the participants of the securities markets be charged with the responsibility of Self-Regulation. And so nearly all of the securities law all over the world stipulate that, as the main markets, the stock exchanges be non-for-profit, for public interest, and of Self-Regulation Organization (SRO). Over the past few years, however, there has been a trend among exchanges to consider alternative governance structures to these traditional mutual or cooperative models. The transformation of an exchange into a for-profit shareholder-owned company is referred to as "demutualization". In most cases, the demutualized exchange becomes a for-profit enterprise. A demutualized exchange may take many forms, each raising its own issues. Some exchanges have demutualized and become public companies listed on their own exchanges such as The Australian Stock Exchange. Other exchanges have demutualized but have remained private corporations such as The Toronto Stock Exchange. Still others are

subsidiaries of publicly traded holding companies such as The Sweden Stock Exchange.

At the 1999 annual meeting of the Federation internationale des bourses des valeurs ("FIBV"), it was reported informally that of the 52 exchanges present, 15 had demutualized, 14 had member approval to demutualize and 15 were actively contemplating demutualization. Nowadays, all of the traditional exchanges in Europe have finalized their demutualization, among which the Sweden Exchange and the Deutsche Borse Group have been self-listing on their own markets; the Australian Stock Exchange is the first self-listing after its demutualization all over the world; most exchanges, except the NYSE, in the North America including the USA and Canada, have demutualized; the securities industry is the backbone of Hong Kong and Singapore, and so in order to preserve and develop their international position, the exchanges in two jurisdictions demutualized and self-listed in 2000. For the time being, this kind of transaction is proceeding in Japan, Philippine, and the South Africa. Therefore the demutualization of exchanges is sweeping all over the world, becoming a global phenomenon.

Why to demutualize? How to deal with conflicts of interest created or increased where a for-profit entity also performs the regulatory functions that an exchange might have? What can we benefit from this transition? All are studied in this Dissertation, composed of six chapters.

The sea-change at the Stock Exchange referred to as demutualization is the transition from mutual organization to demutual one, and so the 1st chapter starts with the analysis of the organization and the governance structure of traditional exchanges. Being limited by the legal systems, most scholars in Mainland China misunderstand the organization of stock exchanges, especially the companization one. Therefore this Chapter begins

with the difference of the two legal systems related to the stipulation on the organization of corporations. Generally speaking, whether a companization one or a membership one, the traditional exchanges are mutual, inside which there are lots of shortcomings: Decisions are usually made on a one-member, one-vote basis and often are made by committees of representatives of member firms; Ownership rights may not be freely tradeable and terminate with cessation of membership; Mutuals seldom are able to raise capital from anyone other than members, all of which block the development of the traditional exchange under the background of Globalization, Electronication, and Internet. This is just the conclusion of the 1st Chapter.

Although there are some flaws as far as the governance structure of traditional exchanges is concerned, they existed for 400 years reasonably. The reason why the traditional exchanges demutualize at the end of 20 century is that the background changes fundamentally, which is the answer of the 2nd Chapter. Electronic Communication Networks (ECNs) allow brokers and investors to bypass dealers and transact directly with others in the market who want to buy or sell. Through Internet, the investors can obtain the information as fast as the broker-dealers. And so, boundlessly and virtually, the securities trading challenges the mechanism by which the members control the exchanges. Just as Mr. Alan Greenspan said, "these technology-based developments have so expanded the breadth and depth of markets that governments, even relevant ones, increasingly have felt they have little alternative but to deregulate and free up internal credit and financial markets." Suppressed markets in one location would be rapidly displaced by others outside the reach of government controls and taxes. Consequently it was seen that the London Big Bang reconstructed the international situation of the international financial market;

faced with the failure, the Stockholm Stock Exchange was forced to demutualize for its competition with the London Stock Exchange. Simultaneous with the demutualization of the Stockholm Stock Exchange, the promulgation of the EC Investment Services Directive promoted the process of the integration of the European Securities Markets, the liberalization of which impacted the interest of the USA and Japanese Securities Industry. And hence we saw the collapse of the Glass-Steagall Wall and the emerging of the Japanese Big Bang. From then on, to our surprise, in the last 10 years of the 20th century, we discerned the spectacularity of the globalization of the securities market: not only the merger but also the restructuring of exchanges globally. Meanwhile, the nascence of Euronext, Eurex, Jiway and Virt-x demonstrates the future of the securities markets. As a result, in order to preserve the position in the international securities markets, it becomes the linchpin for the traditional exchanges to promote the efficiency of its decisions and have access to new capital in a variety of ways and from various sources. Therefore the mutual organization should be reformed.

In the 3rd Chapter, the author considers that the electronication and Internet not only have written the Blueprint for the Global Securities Market but also cultivated the gravedigger of the traditional exchanges: the Alternative Trading Systems (ATSs). Because the traditional exchanges are controlled by their members, the investors are forced to pay the brokers for their brokerage. Along with the development of electronication and the institutionalization of securities trading, the ATSs come out, virtual, proprietary, cost-efficient, disintermediate, and anonymous, and impact heavily on the traditional exchange especially in the USA. New technology does not come cheaply, highlighting the need for broader access to capital. Increasing