

## RESEARCH HANDBOOK ON Asian Financial Law

*'This volume brings together leading experts in Asia-Pacific financial law and regulation, offering distinguishing perspectives from literature focused on the US/EU/UK. Asian financial law and regulation deserves its own platform and this volume is timely and highly valuable to researchers and practitioners alike.'*

Iris H.-Y. Chiu, University College London, UK

*'This Research Handbook brings together the region's pre-eminent financial law scholars to analyse the major issues confronting East Asia. It is filled with illuminating and incisive insights across a broad and comprehensive canvas. I commend it to all who are interested in the development of the financial systems in our part of the world. No one could dip into this work without being deeply educated.'*

Ross Buckley, University of New South Wales, Australia

This comprehensive *Research Handbook* provides an in-depth analysis of the different financial law approaches, legal systems and trends throughout Asia. Considering how reforms following the crises have been critical for the development and growth of the region, this insightful book explores a broad range of post-crisis financial regulatory issues. It also examines how inconsistent and divergent approaches to financial market regulation are curtailing the region's potential.

By focusing on the legal frameworks and regulatory models at a national level, this innovative *Research Handbook* addresses opportunities and challenges for financial markets and convergence in the region. Key topics include the different legal and regulatory approaches to common issues, such as banking regulation and resolution, FinTech, insolvency frameworks and ASEAN financial market integration. Specific regulatory approaches are discussed in relation to areas such as Renminbi internationalization, Islamic banking and finance, shadow banking, crowdfunding, venture capital, derivatives, bond and securities markets. The book concludes with an analysis of the impact of FinTech on regulatory convergence in Asia.

The *Research Handbook on Asian Financial Law* will be of great value to law students, academics and policymakers working across a diverse range of fields including financial regulation, Asian studies, banking resolution and insolvency.

**Douglas W. Arner** is at the University of Hong Kong, Hong Kong, **Wai Yee Wan** is at Singapore Management University, Singapore, **Andrew Godwin** is at The University of Melbourne, Australia, **Wei Shen** is at Shanghai Jiao Tong University, China and **Evan Gibson** is at the University of Hong Kong, Hong Kong.

**Edward Elgar**  
PUBLISHING

The Lypiatts, 15 Lansdown Road, Cheltenham, Glos GL50 2JA, UK  
Tel: + 44 (0) 1242 226934 Fax: + 44 (0) 1242 262111 Email: info@e-elgar.co.uk

William Pratt House, 9 Dewey Court, Northampton, MA 01060, USA  
Tel: +1 413 584 5551 Fax: +1 413 584 9933 Email: elgarinfo@e-elgar.com  
www.e-elgar.com www.elgaronline.com

ISBN 978-1-84980-455-4



9 781849 804554

RESEARCH HANDBOOK ON  
Asian Financial Law

Douglas W. Arner • Wai Yee Wan  
Andrew Godwin • Wei Shen • Evan Gibson

**EE**  
Elgar

**EE**  
Elgar

## RESEARCH HANDBOOK ON Asian Financial Law

Edited by

**Douglas W. Arner • Wai Yee Wan**

**Andrew Godwin • Wei Shen • Evan Gibson**



RESEARCH HANDBOOKS IN FINANCIAL LAW

## RESEARCH HANDBOOKS IN FINANCIAL LAW

**Series Editor:** Rosa Lastra, *Queen Mary, University of London, UK*

This important new *Research Handbook* series presents high quality, original reference works that cover a range of subjects within the evolving field of financial law. National, regional and global financial markets are at the epicenter of economic, political and social developments. They are shaped by their own intrinsic dynamics, but are also at the receiving end of potent external forces, including monetary developments, state regulation and policies towards international and regional financial integration and free trade areas.

Under the general editorship of Rosa Lastra, these *Research Handbooks* are edited by leading scholars in their respective fields, and comprise specially commissioned contributions from distinguished academics, who critically, innovatively and substantially analyze a wide range of current issues in financial law.

Each of the individual *Research Handbooks* is a definitive reference work, essential for both scholars of financial law as well as for practicing lawyers. The comprehensive coverage and thorough examinations of the significant topics and ideas in financial law signify the *Research Handbooks'* position as authoritative and scholarly information resources.

Titles in the series include:

Research Handbook on Securities Regulation in the United States  
*Edited by Jerry W. Markham and Rigers Gjyshi*

Research Handbook on Secured Financing in Commercial Transactions  
*Edited by Frederique Dahan*

Research Handbook on Crisis Management in the Banking Sector  
*Edited by Matthias Haentjens and Bob Wessels*

Research Handbook on International Financial Crime  
*Edited by Barry Rider*

Research Handbook on State Aid in the Banking Sector  
*Edited by François-Charles Laprèvote, Joanna Gray and Francesco De Cecco*

Research Handbook on Central Banking  
*Edited by Peter Conti-Brown and Rosa Lastra*

Research Handbook on Shadow Banking  
Legal and Regulatory Aspects  
*Edited by Iris H-Y Chiu and Iain MacNeil*

Research Handbook on Cross-Border Bank Resolution  
*Edited by Matthias Haentjens and Bob Wessels*

Research Handbook on Law and Ethics in Banking and Finance  
*Edited by Rosa Maria Lastra, Costanza Russo and Sir William Blair*

Research Handbook on Asian Financial Law  
*Edited by Douglas W. Arner, Wai Yee Wan, Andrew Godwin, Wei Shen and Evan Gibson*

# Research Handbook on Asian Financial Law

*Edited by*

Douglas W. Arner  
*University of Hong Kong, Hong Kong*

Wai Yee Wan  
*Singapore Management University, Singapore*

Andrew Godwin  
*The University of Melbourne, Australia*

Wei Shen  
*Shanghai Jiao Tong University, China*

Evan Gibson  
*University of Hong Kong, Hong Kong*

RESEARCH HANDBOOKS IN FINANCIAL LAW

 **Edward Elgar**  
PUBLISHING

Cheltenham, UK • Northampton, MA, USA

© The Editors and Contributors Severally 2020

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by  
Edward Elgar Publishing Limited  
The Lypiatts  
15 Lansdown Road  
Cheltenham  
Glos GL50 2JA  
UK

Edward Elgar Publishing, Inc.  
William Pratt House  
9 Dewey Court  
Northampton  
Massachusetts 01060  
USA

A catalogue record for this book  
is available from the British Library

Library of Congress Control Number: 2019951879

This book is available electronically in the **Elgaronline**  
Law subject collection  
DOI 10.4337/9781788972208



ISBN 978 1 84980 455 4 (cased)  
ISBN 978 1 78897 220 8 (eBook)

Typeset by Servis Filmsetting Ltd, Stockport, Cheshire  
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

---

## Contents

---

<i>List of figures</i>	viii
<i>List of tables</i>	ix
<i>List of contributors</i>	x

### PART I INTRODUCTION AND CONCEPTUAL FRAMEWORK

1 Introduction to <i>Research Handbook on Asian Financial Law</i> <i>Douglas W. Arner, Wai Yee Wan, Andrew Godwin, Wei Shen, and Evan Gibson</i>	2
2 The historical development of financial regulatory principles: influences on Asia-Pacific systemic supervision <i>Evan Gibson and Douglas W. Arner</i>	10
3 Trends and theory in financial regulation and regulatory design after the global financial crisis <i>Steve Kourabas</i>	30

### PART II FINANCIAL REGULATION IN ASIA

4 Financial regulatory models in the Asia-Pacific – a case study in diversity <i>Andrew Godwin</i>	50
5 Bank resolution <i>Christian Hofmann</i>	64
6 Networked securities markets: from cross-listing to direct connection <i>David C. Donald</i>	86
7 Regulation of derivatives in Asia: when technology meets financial engineering <i>Christopher Chen</i>	101
8 Internationalization of renminbi: offshore renminbi businesses, offshore renminbi centres and renminbi's reserve currency status <i>Wei Shen</i>	122

### PART III FINANCIAL INTEGRATION IN ASIA

9 Understanding ASEAN integration and trade <i>Deborah Elms and Minh Hue Nguyen</i>	145
10 Cross-border regulation of securities markets in ASEAN <i>Wai Yee Wan</i>	173

11	ASEAN bond markets: developments and challenges <i>Tir Srinopnikom</i>	192	25	Financial regulation as interagency competition? The saga of venture capital rule-making in China <i>Sirui Han and Chao Xi</i>	499
12	Consumer financial dispute resolution in a time of increased regulatory scrutiny <i>Vivien Chen, Andrew Godwin and Ian Ramsay</i>	209	26	Is a bird in the hand worth two in the bush? Reflections on equity crowdfunding regulation in Taiwan <i>Chang-hsien Tsai</i>	525
13	Depositor preference and deposit insurance schemes – challenges for regulatory convergence and regulatory coordination in Asia <i>Angus Chan, Andrew Godwin and Ian Ramsay</i>	233	27	Sandboxes and bridges – the impact of Fintech on regulatory convergence and coordination in Asia <i>Lev Bromberg, Andrew Godwin and Ian Ramsay</i>	547
14	Cross-border insolvency in East Asia: cooperation and convergence <i>Casey G. Watters</i>	257		<i>Index</i>	569
PART IV COUNTRY STUDIES					
15	Anti-‘grey rhino’: prudential regulation and bank resolution in China <i>Simin Gao</i>	274			
16	China’s puzzling banking and shadow banking sectors after the global financial crisis <i>Wei Shen</i>	293			
17	Macau banking law and financial institutions <i>Leong Cheng Hang</i>	315			
18	Indonesian financial laws: banking, insolvency and taxation <i>Tim Lindsey and Simon Butt</i>	336			
19	The development of Islamic banking and finance: the Malaysian experience <i>Nik Norzrul Thani and Ili Rahilah Ibrahim</i>	368			
20	Financial regulation in New Zealand: optimizing twin peaks <i>Helen Dervan and Simon Jensen</i>	387			
21	Financial consumer protection in Singapore <i>Dora Neo</i>	408			
PART V FINTECH AND INNOVATIVE FINANCE					
22	FinTech and its regulation in Hong Kong <i>Douglas W. Arner, Evan Gibson, and Janos Barberis</i>	431			
23	Recent developments of Japanese laws and regulations on FinTech <i>Tetsuo Morishita</i>	454			
24	Lessons from Mt Gox: practical considerations for a virtual currency insolvency <i>Stacey Steele and Tetsuo Morishita</i>	479			

---

## Figures

---

9.1	ASEAN trade as a percentage of gross domestic product	149
9.2	ASEAN merchandise trade	150
9.3	ASEAN trade in services	150
9.4	Kitchenware tariff code in Vietnam tariff schedule	156
9.5	Burden of customs procedures in ASEAN	158
9.6	ASEAN Scorecard 'Table 1' single market and production base	164
9.7	ASEAN Scorecard: 'Table 2' competitive economic region	165
9.8	ASEAN Scorecard: 'Table 3' equitable economic development	166
9.9	ASEAN and the dialogue partners	167
9.10	ASEAN Scorecard: 'Table 5' integration into the global economy	168
11.1	Mapping ASEAN bond market cooperation	194
25.1	Growth in the number of registered venture capitalists in China from 1985–1999	504
25.2	Growth in the number of registered venture capitalists in China from 2006–16	505
25.3	Constituents of venture capitalists in China from 2006–16	506
26.1	Multi-level securities markets in Taiwan after the Financial Supervisory Commission structuring	531
26.2	Participants and their responsibilities in equity crowdfunding ecosystems	541

---

## Tables

---

3.1	Financial stability regulators in select jurisdictions	36
8.1	Types of Renminbi bonds	132
9.1	Intra-ASEAN trade as percentage of total trade in goods and services, 2007–16	147
9.2	The 'Government Effectiveness Indicator' of ASEAN members	153
9.3	The 'Regulatory Quality Indicator' of ASEAN members	154
9.4	Logistics performance index in 2014 and 2018	159
9.5	Simple average MFN rates of ASEAN members in 2016	169
9.6	External trade agreements (including under negotiation, signed and in effect)	171
11.1	Credit ratings in Thailand, Malaysia and the Philippines	206
13.1	Deposit insurance schemes in Asia	243
15.1	The rationale for regulating commercial banks	275
15.2	Commercial banks' corresponding asset management companies	285
23.1	Volume of virtual currency transaction in Japan between 2014–17	470
25.1	Aggregate capital managed by Chinese venture capitalists (2007–16, CNY100 million)	506
26.1	The GISA Regulations on investors and investment caps	534
26.2	Comparison among three types of equity crowdfunding platforms in Taiwan	539
27.1	Flexibility accorded by MAS's regulatory sandbox (examples)	553

---

## Contributors

---

**Douglas W. Arner**, Kerry Holdings Professor of Law and Director, Asian Institute of International Financial Law, Faculty of Law, University of Hong Kong, Hong Kong.

**Janos Barberis**, Research Fellow, Asian Institute of International Financial Law, Faculty of Law, University of Hong Kong; Board Member, Centre for Finance, Technology and Education, London, United Kingdom.

**Lev Bromberg**, PhD Candidate and Research Fellow, Melbourne Law School, The University of Melbourne, Australia.

**Simon Butt**, Professor of Indonesian Law, Associate Director, Centre for Asian and Pacific Law, University of Sydney Law School, University of Sydney, Australia.

**Angus Chan**, Research Fellow, Melbourne Law School, The University of Melbourne, Australia.

**Christopher Chen**, Associate Professor, School of Law, Singapore Management University, Singapore.

**Vivien Chen**, Lecturer, Department of Business Law and Taxation, Monash Business School, Monash University, Australia.

**Helen Dervan**, Senior Lecturer in Law, School of Law, Auckland University of Technology, New Zealand.

**David C. Donald**, Professor, Faculty of Law, The Chinese University of Hong Kong, Hong Kong.

**Deborah Elms**, Executive Director, Asian Trade Centre, Singapore.

**Simin Gao**, Associate Professor, Tsinghua University Law School, China.

**Evan Gibson**, Assistant Research Officer, Asian Institute of International Financial Law, Faculty of Law, University of Hong Kong, Hong Kong.

**Andrew Godwin**, Associate Professor, Associate Dean (Engagement), Director, Transactional Law Group, Director of Studies for Banking and Financial Law, Associate Director (Asian Commercial Law), Asian Law Centre, Melbourne Law School, The University of Melbourne, Australia.

**Sirui Han**, Postdoctoral Fellow, Fulbright-RGC Research Scholar, Faculty of Law, The Chinese University of Hong Kong, Hong Kong.

**Leong Cheng Hang**, Senior Instructor, Faculty of Law, University of Macau, Macau.

**Christian Hofmann**, Assistant Professor, Faculty of Law, National University of Singapore, Singapore.

**Ili Rahilah Ibrahim**, Legal Counsel, Malaysia.

**Simon Jensen**, Consultant, BuddleFindlay, Wellington, New Zealand.

**Steve Kourabas**, Lecturer, Deputy Director, Centre for Commercial Law and Regulatory Studies, Monash Law School, Monash University, Australia.

**Tim Lindsey**, Malcolm Smith Professor of Asian Law, Redmond Barry Distinguished Professor, Director of the Centre for Indonesian Law, Islam and Society, Melbourne Law School, The University of Melbourne, Australia.

**Tetsuo Morishita**, Professor, Sophia University Law School, Japan.

**Dora Neo**, Associate Professor, Director, Centre for Banking & Finance Law, Faculty of Law, National University of Singapore, Singapore.

**Minh Hue Nguyen**, Freelance Consultant, Vietnam.

**Ian Ramsay**, Harold Ford Professor of Commercial Law, Redmond Barry Distinguished Professor, Director of Studies Commercial Law, Corporate Law for the Melbourne Law Masters Program, Director, Centre for Corporate Law, Melbourne Law School, The University of Melbourne, Australia.

**Wei Shen**, KoGuan Distinguished Professor of Law, KoGuan Law School, Shanghai Jiao Tong University, China.

**Tir Srinopnikom**, Legal Director, Central JD Commerce (Central Group), Thailand.

**Stacey Steele**, Associate Professor, Associate Director (Japan) of the Asian Law Centre, Melbourne Law School, The University of Melbourne, Australia.

**Nik Norzrul Thani**, Chairman and Senior Partner of Zaid Ibrahim & Co., Malaysia.

**Chang-hsien Tsai**, Professor of Law and Business, National Tsing Hua University, Taiwan.

**Wai Yee Wan**, Dean, Postgraduate Research Programmes, Professor, School of Law, Singapore Management University, Singapore.

**Casey G. Watters**, Assistant Professor, Nottingham University Business School, China.

**Chao Xi**, Professor and Vice-Chancellor's Outstanding Fellow, Associate Dean (Research), Faculty of Law, The Chinese University of Hong Kong, Hong Kong.

economic reform should reduce state economic planning by pushing for more market forces in the areas of credit allocation, capital flow, liberalization of interest rates and the RMB exchange rate. These policies would not only be pivotal to the future of China's financial system but also the entire economy by increasing private businesses' access to capital and interest income for China's vast population of savings account holders. In a survey conducted by the European Union Chamber of Commerce in China, covering 550 European businesses operating in China, released on 9 June 2013, only 38 per cent of the respondents indicated their confidence in the new leadership and its determination to implement significant economic reforms while half were unsure.<sup>104</sup> Some foreign investors perceived few tangible changes despite the increasing rhetoric from senior leaders that efforts will be taken to transform and level the regulatory environment to allow for a greater emphasis on market forces. In the finance sector, the business community called for a greater effort to treat foreign and domestic enterprises equally, allowing foreign businesses to participate in the financial sector that has traditionally been off-limits. In 2014 Premier Li Keqiang sought to make urbanization a national strategy in the hope of creating fresh growth dynamics.<sup>105</sup>

## 7. CONCLUSION

China's banking sector has been undergoing continuous and dramatic changes as part of its transition from a planned economy to a 'socialist market economy'. Substantial progress has been made in transforming China's banking sector during the past three decades. Banking institutions have become diversified and have made great progress towards commercialization, marketization and, along with China's accession to the WTO in 2001, the banking market has been opened to foreign investment. Although commercial banks have performed better than their Western counterparts since the financial crisis, they have path-dependence problems, which made their high growth model increasingly difficult to sustain. The G-SIBs are analogous to 'fragile giants'<sup>106</sup> and remain heavily exposed to lacklustre export growth, debt-laden local government financing problems and manufacturers afflicted by oversupply. Funding and the way local officials evaluate expansionary projects have been core to the urbanization plan. The Chinese government's urbanization initiative may have only provided renewed impetus for local governments to expand their borrowing capacity. Past experience of Western countries has pointed in a different direction: economic development largely depends on financial sustainability. Sustainable credit expansion should therefore be a priority for China's leadership.

<sup>104</sup> Victoria Ruan, 'Rising Wages and Doubts over Reform Dent Business Optimism in China', *South China Morning Post*, 10 June 2013 (online).

<sup>105</sup> Premier Li announced his urbanization vision in the autumn of 2012. However, a clear roadmap is still being deliberated among governmental bodies and researchers. Li has stressed however that the new urbanisation strategy should not repeat the old model of unrestricted expansion, which damaged the environment and increased financial risks.

<sup>106</sup> Patrick Jenkins, Joe Leahy and Simon Rabinovitch, 'Fragile Giants at the Heart of Western Hopes' *Financial Times*, 14 September 2011, p. 9.

## 17. Macau banking law and financial institutions

*Leong Cheng Hang*

### INTRODUCTION

This chapter will provide an overview of Macau's banking law and financial institutions. From the historical phases of the Macau financial service system, three phases will be discussed: (1) the initial phase: before 1902; (2) the sprout phase: from 1902, when the Portuguese BNU officially started business in Macau, until August 26, 1970 when the Macau government enacted the Banking Act; and (3) the improvement phase: the period beginning roughly from the date of implementation of the Banking Act of 1970 to the Decree-Law No. 35/82/M, promulgated by the Macau government on August 2, 1982.

Section 2 looks at the financial legal system of Macau, which can be generally divided into three major parts: first, financial regulations (regulating financial systems, credit institutions, financial activities other than insurance activities and financial intermediary activities); second, insurance activity regulations (regulating activities of insurance, insurance intermediaries and pension funds); and third, monetary system and exchange system regulations.

This will be followed by a discussion on Macau financial institutions, which generally include: (1) the Monetary Authority of Macau, formerly known as the Monetary and Foreign Exchange Authority of Macau, which is a government financial institution engaged in financial management activities; (2) banks, and enterprises whose main business includes credit granting services, and which own capital contribution and financial investment or engage in intermediary activities in the monetary, financial or foreign exchange markets; (3) non-bank credit institutions whose business includes acceptance of public deposits or other repayments, and granting of loans at their own risk and for their own interests to enterprises; (4) financial intermediaries, that is, any natural or legal persons engaged in trading in negotiable securities or negotiable instruments in the monetary, financial and foreign exchange markets for a third person in a customary and profit-making manner, or that only accept investors' instructions on such negotiable securities; and (5) insurance companies and intermediary institutions.

Section 3 provides a detailed examination of the regulation of financial activities in Macau and the Financial System Act, which is divided into four titles: the first title regulates general financial activities; the second regulates credit institutions; the third regulates financial intermediaries and other financial institutions; and the fourth regulates illegal activities. However, the Financial System Act does not make a complete and systematic classification of all institutions engaged in financial activities.

Finally, in section 4, the chapter looks at new developments in the financial law, and describes the relaxing of financial leasing regulations as well as the new fence for anti-money laundering activities and the key regulatory challenges for the twenty-first century.

## 1. MACAO FINANCIAL SERVICE SYSTEM

## 1.1 Historical Periods

In Macao, the reform of the financial system can be divided into three phases: (1) the initial phase; (2) the sprout phase; and (3) the improvement phase. The 'initial phase' is the period prior to the establishment of the Banco Nacional Ultramarino (BNU) in Macao. That is, before 1902, the financial activities in Macao were basically conducted by 'cambistas'.<sup>1</sup> These cambistas are commonly known as 'old-style Chinese private banks' (foreigners call them 'Chinese banks');<sup>2</sup> they are exchange shops in the airports, wharfs, casinos and streets and alleys of Macao in current days. The exchange business is the oldest financial industry in Macao.<sup>3</sup>

The 'sprout phase' is the period before 1902 when Macao's society was still largely dominated by customs. It belonged to the period of Macao's restoration and revolution, starting 2 August 1902 and lasting until 26 August 1970, when the Macao government issued the Portuguese Decree-Law No. 411/70, namely the Banking Act.

On 2 August 1902, the Macao branch of the Portuguese BNU began as a business, operating a general commercial banking business. BNU had been engaged in currency issuance in Portuguese colonies. In 1905, it negotiated and reached a patent agreement with the Macao government that the bank should issue the Macao currency, pataca, on behalf of the Macao government and have the privilege of issuing and managing the currency. From 1902 to the 1970s, BNU was the only bank of the Macao government. Commercial financial institutions coexisting with BNU were various types of unincorporated banks and old-style Chinese private banks.<sup>4</sup>

Unincorporated banks were commercial and financial institutions in Macao that operated deposit and loan business. With the increase of business dealings between Macao and the Mainland, credit institutions became indispensable. Unincorporated banks played this role and they were only financial institutions in the initial phase. With the expansion of the trade between Macao and the Mainland, the development of industry and commerce increased. The operation means and methods of such credit institutions as unincorporated banks had been unable to adapt to the needs of the development of the situation, so old-style Chinese private banks took over, and in business activities performed the functions of media financial activities such as financing, trust, currency exchange and account transfer. These unincorporated banks and old-style Chinese private banks were imported from the Mainland and were mainly operated and managed with Chinese capital. Before 1937, there were more than ten large or small old-style Chinese private banks in Macao.

On 7 July 1937, the War of Resistance against Japan broke out. Shortly afterwards, Guangzhou and Hong Kong were occupied by the Japanese. The old-style Chinese private

<sup>1</sup> Ouyang Qi, *The Legal Regime of Finance in Macau*, (Macao Foundation, Social Sciences Academic Press (China) 2016) 1.

<sup>2</sup> Bancos Chineses in Portuguese, reproduced in Qi *ibid* 1 n 2.

<sup>3</sup> *ibid* I.

<sup>4</sup> See Chen Yushu (ed), *Macao Social Code*, (Com-United International Publications 1999) 119.

banks from these two places moved to Macao. The population of Macao rose rapidly and the capital increased. The previously tranquil financial market in Macao became extremely active. The financial industry activities could be described as unprecedented. In addition to old-style Chinese private banks, old-style Mainland and Hong Kong private banks, money warehouses and exchange shops mushroomed. At most, there were more than 300 in Macao, including more than 100 old-style Chinese private banks and money warehouses.

During this period, in addition to the operation of deposit and loan business, old-style Chinese private banks had a large number of activities in gold and foreign currency trading. As the quantities of gold, silver, silver coins and other foreign currencies rose sharply in Macao at this time, old-style Chinese private banks used the opportunity of market price fluctuations to buy and sell in order to earn the difference. At the same time, old-style Chinese private banks established the Association of Banks and opened a gold and silver trading market. Only members of the association could participate in buying and selling activities. The trading of gold contracts in this market could be regarded as a prototype of the futures market.<sup>5</sup>

The so-called old-style Mainland (China) and Hong Kong private banks are the old-style Chinese private banks which moved from the Mainland and Hong Kong during the war. They were a type of financial institution generated under special circumstances and did not have signboards on their facades; most of them had an office on the second floor for business operations.

Although exchange shops could join the Association of Banks organized by old-style Chinese private banks, due to their low capital and turnover difficulties, they could only operate currency exchange business.

After the victory of the War of Resistance against Japan, old-style Chinese private banks, old-style Mainland and Hong Kong private banks, and those that had escaped to Macao during wartime returned to their places of origin and the gold and currency flowed accordingly. The once-prosperous financial industry reverted to the calm of the past. There were only a dozen or so of old-style Chinese private banks in Macao. The financial trading market gradually shrank.<sup>6</sup> In the late 1960s, due to the political turmoil in the surrounding areas, the population of immigrants to Macao began to increase again. The immigration brought capital, which promoted the development of the handicraft industry, light industry and residential construction industry in Macao, and increased the financing of industrial and commercial construction activities.

Although the financial business in Macao in this phase still retained the norms of customs, it was also regulated by the contracts signed between the Portuguese government and BNU and by the regulations of the Postal Savings Office. After the establishment of the Postal Savings Office<sup>7</sup> in 1935, it played an important role in providing certain banking services, especially in providing banking services for civil servants.<sup>8</sup>

<sup>5</sup> *ibid*.

<sup>6</sup> *ibid*.

<sup>7</sup> It is now Macau Postal Savings. It is a credit institution that can engage in banking business and is regulated by the current Financial System Act, Decree-Law No. 32/93/M and its own regulation Decree-Law No. 24/85/M.

<sup>8</sup> See Qi (n 1) 2.



The 'improvement phase' is the period roughly from the date of implementation of the Banking Act of 1970 to the Decree-Law No. 35/82/M, Credit System and Financial Institution Control Act (New Banking Act) promulgated by the Macao government on 2 August 1982. With the increase of modern factories in Macao and the development of foreign trade, the financial industry in Macao also developed and modern banks began to be established. The earliest bank established in Macao was the Macao branch of BNU of Caixa Geral de Depósitos (CGD) and it was the only formal bank in Macao at the time. For a long time, Macao had deposited a lot of money with old unincorporated banks, exchange shops, etc.<sup>9</sup> After the 1970s, the financial industry in Macao developed significantly.<sup>10</sup> On 23 October 1971, a Chinese-funded Tai Fung Bank, mainly invested in by the Ho Yin Group, a wealthy businessman in Macao, and the Fu Tak Iam Family,<sup>11</sup> a casino operator, was officially registered as a bank with registered capital of 5 million Macau pataca (MOP). By 1975, deposits with the bank had reached MOP 94.3 million. In 1972, more banks were established in Macao, including Hong Kong HSBC, Overseas Trust Bank, Seng Heng Bank, Hang Seng Bank, Wing Hang Bank and Bank of Canton. In 1973, Portuguese-funded Banco Comercial de Macau (BCM), Daito Bank and Chinese-funded Bank of the Pacific were established successively. Among them, Wing Hang Bank had the most deposits. At the end of 1975, the amount of deposits reached MOP 100 million, and the issuance of MOP increased sharply, making the capital market in Macao active.<sup>12</sup>

In January 1980, the Macao government established the Instituto Emissor de Macau, E.P. (IEM) to improve and strengthen the supervision and management of banks. After the establishment of IEM, it acquired the right to issue currency and managed the currency issuance in Macao; it also replaced the Banking Supervision Office established by the Macao government in 1964, and eventually developed to become the official institution managing the financial industry in Macao. The establishment of IEM indicated that the new phase of development of the banking industry in Macao had arrived.<sup>13</sup>

The second banking act of Macao was Decree-Law No. 35/82/M, Operation of Banking and Credit Activities, promulgated by the Macao government on 3 August 1982. This banking Act lasted for 11 years and was repealed by the third banking Act; the current Financial System Act of Macao, promulgated by the Macao government on 5 July 1993 through Decree-Law No. 32/93/M.<sup>14</sup> This Act is still in use today.

## 1.2 Current Period

The total output value of Macao's financial sector accounts for 6.3 per cent of Macao's gross domestic product, while the number of employees in the financial sector accounts

<sup>9</sup> Su Dongbin and Li Peiran (eds) *A Brief Economic History of Taiwan, Hong Kong and Macau* (Guangdong Economic Publishing House 2002) 733; Feng Bangyan, *An Introduction to Macau*, (Joint Publishing (Hong Kong) Co Ltd 1999) 169.

<sup>10</sup> Yao Sui, *Financial History of China* (Higher Education Press 2007) 595.

<sup>11</sup> Qin Chijiang and Zhang Lizhong (eds) *Encyclopedia of Chinese Finance* (China Materials Publishing House 1999) 382.

<sup>12</sup> Yuan Bangjian, *A Brief History of Macau* (Zhongliu Publishing Co Lt 1988) 203–04.

<sup>13</sup> See Yushu (n 4) 119.

<sup>14</sup> Macau Communique, Communique No. 27/1993, published on July 5, 1993, edn: 3612.

for about 3 per cent<sup>15</sup> of the total number of employees in Macao. Macao financial institutions include:

- (1) The Monetary Authority of Macao, formerly known as the Monetary and Foreign Exchange Authority of Macao (Portuguese: *Autoridade Monetária e Cambial de Macau*, or AMCM),<sup>16</sup> which is a government financial institution engaged in financial management activities;
- (2) banks, and enterprises whose main business includes credit granting services, and which own capital contribution and financial investment or engage in intermediary activities in the monetary, financial or foreign exchange markets;
- (3) non-bank credit institutions whose business includes acceptance of public deposits or other repayments, and granting of loans at their own risk and for their own interests to enterprises;
- (4) financial intermediaries, that is, any natural or legal persons that engage in trading in negotiable securities or negotiable instruments in the monetary, financial and foreign exchange markets for a third person in a customary and profit-making manner, or that only accept investors' instructions on such negotiable securities;
- (5) insurance companies and intermediary institutions.

The financial system of Macao mainly follows the Portuguese native system. The lending market, foreign exchange market, currency exchange and issuance market, insurance market and other markets of Macao are relatively simple. The proportion of Macao's tourism and gaming industries in the local gross domestic product has exceeded the sum of proportions of its manufacturing, financial and real estate industries.<sup>17</sup> The financial industry in Macao has entered a period of rapid development since the late 1980s. After nearly three decades of improvement, the financial system of Macao has become a modern system with its own characteristics; the Monetary Authority of Macao plays an important regulatory role in it.

The financial industry (in a broad sense) includes two parts: finance (in a narrow sense) and insurance.<sup>18</sup> The regulation of financial activities is conducted by the Monetary Authority of Macau. Providers of financial services (in a narrow sense) in Macao mainly include banks, exchange shops, financial companies, cash express companies (Portuguese: *Sociedade de Entrega de Valores*, abbr. as SEV), financial intermediary companies, credit card companies, investment fund management companies, venture capital companies, financial leasing companies and property management companies.<sup>19</sup> Providers of

<sup>15</sup> See the research report submitted by the Macau University of Science and Technology to the Macao Talents Development Committee: 2017–2019 'Future Talent Demand Survey of the Macao Financial Sector' Report, 2017.

<sup>16</sup> New general rules of AMCM approved by Decree-Law No. 14/96/M of Macau (Official Gazette of the Macau Government of March 11, 1996); Administrative Regulation No. 18/2000 of Macau (Official Gazette of the Macau SAR of February 21, 2000) changed the name to the Monetary Authority of Macau.

<sup>17</sup> See 2012 *Macau Yearbook*, 170 <<http://yearbook.gcs.gov.mo/>> accessed 25 August 2019.

<sup>18</sup> The Portuguese name is *Autoridade Monetária de Macau*, AMCM. Its predecessor was *Instituto Emissor de Macau, E.P.* and *Autoridade Monetária e Cambial de Macau*. It is now the Monetary Authority of Macau.

<sup>19</sup> See Qi (n 1) 3.

insurance services mainly include insurance companies, insurance agencies (including insurance salespersons, insurance agents and insurance brokers) and private pension fund management companies,<sup>20</sup> and banks also provide insurance services.

In addition, there is also a government agency, the Macau Institute of Financial Services.<sup>21</sup> Founded in March 2002, this institute is a non-profit organization whose founding members are the Monetary Authority of Macao, the Macau Association of Banks, the Macau Insurers' Association and the Federation of Macau Professional Insurance Intermediaries. Its purpose is to enhance the professional skills, professionalism and performance of Macao financial practitioners by providing professional training and qualification examinations and promote the long-term development of the financial industry in Macao.

## 2. FINANCIAL LEGAL SYSTEM FRAMEWORK

### 2.1 Legislative Form

The legislative form of financial regulation in Macao are:<sup>22</sup>

- (1) law or decree;<sup>23</sup>
- (2) administrative regulation;<sup>24</sup>
- (3) executive order or order;<sup>25</sup>
- (4) instruction of the Chief Executive;
- (5) instruction of the Secretary for Economy and Finance or the Secretariat for Economic Coordination;<sup>26</sup> and
- (6) Provisions of the Monetary Authority of Macao (including notices and circulation papers).

The legal hierarchy of the financial legal system of Macao can be generally divided into three major parts: first, financial regulations (regulating financial systems, credit institutions, other financial activities other than insurance activities and financial intermediary activities); second, insurance activity regulations (regulating activities of insurance,

<sup>20</sup> *ibid.*

<sup>21</sup> The Macau Institute of Financial Services (IFS) was established in March 2002 as a non-profit organization. Its founding members are the Monetary Authority of Macao, the Macau Association of Banks, the Macau Insurers' Association and the Macau Insurance Agents and Brokers Association.

<sup>22</sup> *ibid.* 8.

<sup>23</sup> The legislative form of 'decree-law' was used only before the establishment of the Macau Special Administrative Region in 1999.

<sup>24</sup> Only after the establishment of the Macau Special Administrative Region in 1999 did "administrative regulation" become a statutory legislative form.

<sup>25</sup> The legislative form of 'order' was used only before the establishment of the Macau Special Administrative Region in 1999.

<sup>26</sup> The 'Secretariat for Economic Coordination' was a title before the establishment of the Macau Special Administrative Region in 1999. After the establishment of the Macau Special Administrative Region, it was renamed the 'Secretary for Economy and Finance'.

insurance intermediaries and pension funds); and third, monetary system and exchange system regulations.

The 'Financial System Act of Macau' promulgated in 1993 is the basic regulation in the financial system of Macao. Based on this law, there are a number of special regulations specifically for different types of financial institutions. For example, there are special regulations concerning cash express companies, financial companies and financial leasing.

The current monetary system and exchange system in Macao were established in 1995 and there are corresponding regulations to regulate them.

In addition, the 'Commercial Code of Macao' and the 'Commercial Registration Code' both regulate commercial activities and are applicable to individuals and entities of various financial insurance activities. However, if there are specific laws regulating a type of commercial activity, the specific law shall prevail. The Commercial Code of Macao specifically regulates banking contracts, insurance contracts, financial leases, security contracts, bond securities, etc.,<sup>27</sup> which apply to relevant financial activities.

Decree-Law No. 3/2013 promulgated in 2013 sets out the basic regulations that the laws of the Macao Special Administrative Region shall apply to the new campus of the University of Macau on Hengqin Island in Zhuhai. According to the effectiveness of the application of the law, the campus is deemed as an area within the Taipa Island of the Macao Special Administrative Region. Therefore, the financial legal system of Macao also applies to the new campus of the University of Macau.

### 2.2 Major Legislation

The laws regulating the financial industry in Macao are composed of framework regulations and a series of special laws.

#### 2.2.1 Regulations of the Monetary Authority of Macao

General Rules of the Monetary Authority of Macao (Decree-Law No. 14/96/M of March 11).

#### 2.2.2 Banking and other financial activities

- Financial System Act (Decree-Law 32/93/M of July 5);
- Financial Company Act (Decree-Law 15/83/M of February 26);
- Financial Leasing Company Act (Decree-Law 51/93/M of September 20) and arts 889–910 of Chapter VIII, Title XVI, Volume III of the Commercial Code;
- Venture Capital Company Act (Decree-Law No. 54/95/M of October 16);
- Cash Express Company Act (Decree-Law No. 15/97/M of May 5);
- Property Management Company Act (Decree-Law 25/99/M of June 28);
- Investment Fund and Investment Fund Management Company Act (Decree-Law No. 83/99/M of November 22);
- Offshore Business Act (Decree-Law No. 58/99/M of October 18); and
- Document Storage System for Financial Entities Except Insurance Circle (Administrative Regulation No. 7/2003).

<sup>27</sup> See Commercial Code of Macau 6/2000, arts 840–910, 1064–1268, 820–820, and 831–839.

### 2.2.3 Other regulations

- Merger and Division Act for Financial and Insurance Institutions (Law No. 3/95/M);
- Deposit Guarantee Scheme (Law No. 9/2012);
- Compensation Limit of Deposit Guarantee Scheme (Administrative Regulation No. 23/2012);
- Deposit Guarantee Fund (Administrative Regulation No. 24/2012);
- Prevention and Suppression of Crime of Money Laundering (Law No. 2/2006);
- Prevention and Suppression of Crimes of Terrorism (Law No. 3/2006); and
- Preventive Measures on Anti-Money Laundering and Combating the Financing of Terrorism (Administrative Regulation No. 7/2006).

### 2.3 The Monetary Authority of Macao

The Monetary Authority of Macao, which is equivalent to the 'Central Bank' of the Macao Special Administrative Region, is a public legal person with administrative, financial and property autonomy under the supervision of the Chief Executive.<sup>28</sup> The predecessor of the Monetary Authority of Macao was IEM. IEM was later replaced by AMCM. After the return of Macao, AMCM was renamed the Monetary Authority of Macao. The current General Rules of the Monetary Authority of Macao originate from the organization charter of AMCM, the vast majority of which is still in use today.

According to the general rules approved by the Monetary Authority of Macao under Decree-Law No. 14/96/M, the authority to prosecute the financial and insurance activities in Macao belongs to the Chief Executive of the Macao Special Administrative Region, and the government department that exercises specific regulation is the Monetary Authority of Macao.

The functions of the Monetary Authority of Macao are mainly to guide, coordinate and supervise the markets in accordance with the laws and regulations regulating the currency, financial, foreign exchange and insurance activity markets, ensure their normal operations, and regulate the operators of these markets in order to ensure the stability of the financial system.

## 3. REGULATIONS ON FINANCIAL ACTIVITIES IN MACAO

### 3.1 Financial System Act 1993

#### 3.1.1 Decree-Law No. 32/93/M of July 5

The current Financial System Act approved by Decree-Law No. 32/93/M of July 5, sets out the general legal framework applicable to financial activities in the Macao region and is the basic legal system regulating the financial institutions and financial activities. The decree was promulgated on 5 July 1993 and entered into force on 1 September 1993.

<sup>28</sup> See Qi (n 1) 14 and 16.

Prior to Decree-Law No. 32/93/M, the financial system of Macao was regulated by Decree-Law No. 35/82/M of August 3 and Decree-Law No. 59/83/M. The former regulated the operation of banking and credit activities in the Macao region. The latter regulated the special circumstances of banking and credit business in the Macao region (namely intervention measures and exception policies).

Decree-Law No. 35/82/M stipulates that in the Macao region, the establishment of any credit institution and the establishment of any credit institution whose main office is out of the region, and the opening of its branches, sub-branches, agencies or offices must be permitted through an order by the then Governor after opinions of the then IEM were obtained; the Governor should set any requirements or specific conditions that the credit institution should abide by in the license document, especially imposing restrictions on the sources of its available resources and the investment and use forms of its resources, and so on. The necessity for the approval authority of the Governor has been retained but transferred to the authority of the Chief Executive after the return of Macao.

There is a total of ten articles in Decree-Law No. 32/93/M of July 5 that approved the current Financial System Act. In addition to approving the Financial System Act, it also stipulates that the Financial System Act does not apply to:

- (1) financial activities undertaken by the government;
- (2) financial activities of international institutions joined by Macao or international institutions related to Macao or chartered financial activities;
- (3) insurance activities and pension fund activities; and
- (4) pawn shop activities.

Article 7 of the decree has been repealed by Decree-Law No. 58/99/M, Offshore Business Act and Article 8 of the decree has been impliedly repealed by Decree-Law No. 54/95/M, Venture Capital Company Act.

The current Financial System Act of Macao adopts the Basel banking rules and guiding principles of the Management Committee on banking supervision, the experience of the European Community (now European Union) and the experience of neighbouring regions. The Financial System Act mainly regulates preventive measures, with particular emphasis on prudential requirements to control employment conditions, supervise the suitability of major shareholders and managers, supervise new operational risks, and introduce combined supervision based on financial groups.

The Act mainly regulates the establishment, operation and supervision of credit institutions in detail, and is at the same time the basis for special legal systems for other specific financial activities such as financial companies, exchange activities, PATACA use, financial leasing companies, cash express companies, exchange shops, investment funds, property management companies and venture capital companies. Such special laws apply the provisions of the Financial System Act as a supplementary system in certain matters, in particular the establishment application of companies, the composition and violation punishment of company management institutions, and so on.

The Act is divided into four titles: the first title regulates general financial activities; the second regulates credit institutions; the third regulates financial intermediaries and other financial institutions; and the fourth regulates illegal activities.

### 3.1.2 Financial activities

The main content of general financial activities includes two chapters: 'General Provisions' and 'Discipline and Protection of Financial Activities'. The definitions of financial institutions, credit institutions, financial intermediaries, subsidiaries, sub-branches, branches and agency offices are set out in the first chapter. However, the Financial System Act does not make a complete and systematic classification of all institutions engaged in financial activities.

Currently the main operators of financial activities in Macao are banks, Postal Savings Office, financial companies, value card issuing companies and other credit institutions, financial intermediary companies, exchange shops, exchange counters of gaming companies with lucky gambling licenses that are established within casinos, cash express companies and other financial institutions (such as credit card issuing companies).<sup>29</sup> Among the financial institutions in Macao, banks can engage in the most extensive range of financial activities and can operate all business listed in the first paragraph of Article 17 of the Financial System Act, including: acceptance of deposits; granting of loans; provision of security and commitments; payment activities; issuance and management of payment instruments (credit cards, debit cards, traveller's checks and letters of credit, etc.); financial intermediary activities; financial investment activities; intermediary activities in the interbank market; property management; financial advisory services; safe deposit services; insurance intermediary activities, etc.

The Commercial Code of Macao also stipulates the following banking activities in the part on banking contracts:

- (1) storage at banks (including deposits, securities custody and so on);
- (2) safe deposit box leasing;
- (3) bank credit;
- (4) bank prepayment;
- (5) bank operations of current accounts;
- (6) bank discounting;
- (7) factoring contract; and
- (8) financial leasing.

### 3.1.3 Credit institutions

The second title of the Financial System Act has formulated a set of legal systems for credit institutions (mainly banks). In addition, the provisions of the Commercial Code of Macao relating to bank contracts and debt securities are also legal regulations relating to financial activities. This includes types of credit institutions; business acquisition; activities and licenses; registration; corporate forms and capital; local and foreign institutions; establishment of branch offices; materials and terms of registration; shareholders; institution heads and managers, etc.

Because of the 'basic law' status of the Financial System Act in the financial laws of Macao, on the one hand, although the provisions of the second title of the Financial

<sup>29</sup> *ibid* 36.

System Act are applicable to all credit institutions, most of its provisions are for business licensing and operation of banks; on the other hand, although many types of financial institutions have not been classified as credit institutions, many special laws governing such types of financial institutions have cited the provisions of the Financial System Act as supplementary applicable legal provisions.

Credit institutions in Macao refer to banks, Postal Savings Office, financial leasing companies and other companies that are legally classified as equivalent to the credit institutions stipulated in Clause b of Article 1 of the Financial System Act. Now in Macao they mainly include financial companies and value card issuing companies.

*Credit institutions established in Macao* A credit institution whose corporate address is located in Macao refers to a credit institution registered in Macao, whose corporate form must be a company limited by shares and relevant stocks must be registered stocks, but if it is otherwise stipulated in the special laws regulating various credit institutions, such special laws shall prevail.

If for a bank established in Macao, there is a corporate capital requirement of MOP100 million, this amount must be fully subscribed to; otherwise, it may not be established; for other credit institutions whose addresses are located in Macao, the corporate capital requirements set within the provisions of special laws or relevant licensing regulations shall be complied with. At the time of establishment, corporate capital shall be fully subscribed to and paid in cash, and an amount equivalent to at least half of the corporate capital must be deposited into the Monetary Authority of Macao or its designated institution for disposal by the Monetary Authority of Macao. A credit institution may withdraw the deposit after conducting business.

*Branches or sub-branches established in Macao* In case of a branch of a foreign credit institution licensed to operate in Macao, an amount equivalent to 50 per cent of the minimum capital required for the establishment of a similar institution in Macao shall be used for a long term for a certain type of asset stipulated by a Monetary Authority of Macao notification. Foreign credit institutions must be responsible for the business activities that are licensed to be conducted by their branches in Macao. The assets allocated by a foreign credit institution to its Macao branch shall be first used to repay the debts owed to Macao. If the assets of the Macao branch are insufficient, the foreign credit institution must be responsible for the repayment of the remaining debts.

Foreign credit institutions may also open sub-branches in Macao, that is, institutions subordinate to branches. If a sub-branch is opened to provide services to the public, it must obtain the permission of the Monetary Authority of Macao in advance. Where the sub-branch is to be relocated must also be approved by the Monetary Authority of Macao in advance; if the sub-branch is not open to the public, there is no need to obtain permission, but the relevant institution shall inform the Monetary Authority of Macao of the location, purpose and any changes in advance.

### 3.1.4 Deposit Guarantee Scheme

The Deposit Guarantee Scheme was formulated according to Law No. 9/2012. In conjunction with the law, the government has also issued the following supplementary regulations:

- (1) Administrative Regulation No. 23/2012, setting the compensation limit for the deposit guarantee scheme;
- (2) Administrative Regulation No. 24/2012, establishing and regulating the deposit guarantee fund;
- (3) Chief Executive Instruction No. 304/2012, appointing chairman and two members of the Deposit Guarantee Fund Supervisory Committee;
- (4) Chief Executive Instruction No. 305/2012, appointing members of the Deposit Guarantee Fund Advisory Committee;
- (5) Chief Executive Instruction No. 50/2013, permitting the deposit guarantee fund to adopt an accrual accounting system; and
- (6) Secretary for Economy and Finance Instruction No. 56/2013, approving the exclusive accounting format of the deposit guarantee fund.

The Deposit Guarantee Scheme aims to guarantee compensation within the limit and scope set by the law for deposits in MOP or other foreign currencies of depositors in Macao. Such a compensation guarantee is achieved through the establishment of the deposit guarantee fund. The deposit guarantee fund has a legal personality and enjoys autonomy in administrative, financial and property matters. The Monetary Authority of Macao provides technical and administrative assistance. The organization, management and operation of the deposit guarantee fund are set through supplementary administrative regulations (Administrative Regulation No. 24/2012).

The participating institutions of the deposit guarantee fund include banks with addresses located in the Macao Special Administrative Region, branches of banks that are located in other regions and licensed to operate in the Macao Special Administrative Region, and the Macao Postal Savings. The above institutions will automatically become participating institutions of the deposit guarantee fund from the date of business commencement as set out in the special registration of the Monetary Authority of Macau. In Macao, guaranteed deposits in principle cover all bank deposits, except for the following:

- (1) Deposits established by any bank;
- (2) Deposits established by public entities;
- (3) Deposits with the participating institutions by enterprises where the participating institutions have more than 50 per cent of the voting rights, or which can have a significant impact on management;
- (4) Deposits with the participating institutions by the main shareholders of the participating institutions stipulated in Clause 2 of Article 40 of the Financial System Act approved by Decree-Law No. 32/93/M of July 5;
- (5) Deposits with the participating institutions referred to in the preceding paragraph by enterprises where the shareholders referred to in the preceding paragraph have more than 50 per cent of the voting rights, or which can have a significant impact on management;
- (6) Deposits with the participating institutions by the administrative and supervisory organ members of the participating institutions and by enterprises where such members have more than 50 per cent of the voting rights, or which can have a significant impact on management;
- (7) Deposits where the return depends on the value of any stocks, bonds, investment

- fund contribution units, precious metals or other financial products, movable property or real estate and other valuables; and
- (8) Bearer certificates of deposit.

The laws of Macao stipulate that the compensation amount is equal to the actual deposit amount of a credit institution on the day when the depositor starts the deposit guarantee, but in no case may it exceed a cap set by supplementary administrative regulations. At present, the cap is set by the Administrative Regulation No. 23/2012, and the amount is MOP500 000. That is, the cap of the compensation amount for each depositor of each participating institution is MOP500 000, and the compensation is paid in MOP.

### 3.2 Protection of Financial System of Macau with a Multi-layered Approach

#### 3.2.1 Background

Macao's financial system does not have a full and comprehensive code which comprises all the financial regulations and decrees. Conversely, Macau has adopted a multi-layered legal framework in which the financial system is protected in a thematic (and multi-level) approach, which can be summarized as follows: (1) Commercial Code of Macau; (2) offshore business Acts; and (3) decrees enacted on the scope of money laundering criminality.

Aimed at the standardization of commercial activities and financial activities rising out of the breadth of commercial contracts, Macau lawmakers have decided to insert those financial activities into the scope of Commercial Code of Macau. Further to Macau's fast-paced economic growth experienced in the late 1980s, lawmakers have enacted a legal framework aimed at covering financial activities, in which not only credit institutions are permitted to engage in businesses conducted in a sought-after international trade centre. In order to prevent (and foremost) pre-empt the circulation of ill-gotten funds in Macau (enabled to a certain extent by the opaqueness of the junket system that underpins the world's gaming hub), legislators did not forsake the opportunity to protect Macau's legal framework from a criminal standpoint.

This multi-layered<sup>30</sup> protection of Macau's financial legal framework has paved the way to shaping a functional and first-rate system in which criminals have no room (and thus

<sup>30</sup> This multi-layered protection bears a striking resemblance to the Portuguese legal inheritance (and foremost) with the EU legislative technique of protection of fundamental rights in a multi-layered fashion. Refer in Italian doctrine to: Silvia Sonelli, *La CEDU nel quadro di una tutela multilivello dei diritti e il suo impatto sul diritto italiano: Diretrici di un dibattito, La Convenzione Europea dei Diritti dell'Uomo e l'Ordinamento Italiano. Problematiche attuali e prospettive per il futuro* (a cura di Silvia Sonelli), G. Giappichelli editore, (Torino, 2015) 1–27; similarly in Spanish doctrine, refer to: Santiago Muñoz Machado, 'Los tres niveles de garantías de los derechos fundamentales en la Unión Europea: Problemas de articulación', in: *Revista de Derecho Comunitario Europeo* (enero-abril 2015), n.º 50, 195–230; in Belgian doctrine, about the pivotal role played by the European Court of Human Rights in protecting those fundamental rights, refer to: J Meyer-Ladewig, 'The European Court of Human Rights as European Constitutional Court', in: *Liber Amicorum Peter Leuprecht*, (Bruylant, Bruxelles 2012) 183–210. In view of this, Macau is (in a certain way) attaining to an atypical interpretation of its internal laws according to the EU laws, in German doctrine about the *konforme Auslegung*, refer to: Konrad Hesse, *Grundzüge des*

scarce incentive) to perpetrate financial misdeeds through commercial activities and/or banking services.

### 3.2.2 Commercial Code of Macao 1999

Prior to the entry into force of the Commercial Code of Macao in 1999, Macao was using the Portuguese Commercial Code promulgated in 1888 by Portugal. The Government of Portuguese Macao formulated a new Commercial Code before the handover of Macao to China and carried out various reforms in the standardization of commercial activities.

Those related to financial activities are mainly various commercial contracts in the 'External Enterprise Activities' in the third volume of the Commercial Code of Macao. The most closely related to the financial industry are bank contracts, security contracts, insurance contracts, and so on. The fourth volume of the Commercial Code of Macao, 'Bond Securities', has separate provisions for bills of exchange, promissory notes and checks, and is also closely related to the business of banks.

### 3.2.3 Offshore Business Act 1999

The current Offshore Business Act (Decree-Law No. 59/99/M) of Macao, which was promulgated on October 18, 1999, replaced the basic system established by Decree-Law No. 25/87/M and remains in use. The reasons for setting a new offshore business act were stated in the preamble of Decree-Law No. 58/99/M:

In view of the natural trend of the economic development of Macao into the tertiary industry and the improvement of local infrastructure, especially infrastructure in terms of transportation and communications, it is advisable to establish an international trade centre in the region to develop the original model set by Decree 25/87/M of May 4.

Therefore, in respect of financial activities, not only credit institutions are permitted to engage in business conducted in the above-mentioned international trade centre, but also other financial institutions, financial intermediaries and insurers are allowed to engage in this business; so that economic participants can apply for the establishment of offices in the region and specialize in offshore operations in Macao; enterprises whose addresses are located in the region are allowed to operate through their affiliates in the offshore sector in Macao.

At the same time, property management with a form of trust management has also been incorporated into the field of 'trust'. This property management method has been widely developed in other jurisdictions.

In addition, the forms of commercial service institutions and ancillary service institutions are also regulated, and the latter are generally associated with what are commonly referred to as 'call centre' and 'back office'.<sup>31</sup>

Although Macao has a typical micro-economy, it also has a highly liberal market economy. In terms of financial system, Macao is an area where capital flows freely with no foreign exchange controls. These are very important conditions for the development of offshore financial business. The most typical features of offshore finance are the non-residential property of traded items of financial institutions and the non-local currency property of the pricing and settlement currencies.

Verfassungsrechts der Bundesrepublik Deutschland, 20. Auflage, Heidelberg, C. F. Müller, 1999, passim.

<sup>31</sup> Decree-Law No. 58/99/M.

Therefore, the Offshore Business Act also stipulates that offshore institutions must not conduct transactions with Macao residents and private institutions, nor can they use MOP as a transaction currency, but the relevant trust regulations are also inconsistent with the local legal system in Macao to some extent. Therefore, for the time being, the development of offshore finance in Macao is subject to certain limitations.

### 3.2.4 Anti-money laundering and anti-terrorist financing

The legal provisions concerning anti-money laundering in Macao were initially only embodied in certain special laws and there was no specific law to regulate anti-money laundering. Early special laws concerning anti-money laundering include:

- (1) The Criminal Code of Macao promulgated in 1995 provides for the seizure of assets arising from criminal activities.
- (2) Law No. 6/97/M effective from 30 July 1997, the Legal Framework against Organized Crime, further combats the criminal acts of converting, transferring or disguising illegal assets or articles in organized crime. Article 10 of the law provides that the conversion, transfer or disguise of illegal assets or articles is a crime, what we now call the crime of money laundering.
- (3) Decree-Law No. 24/98/M of 1 June 1998, in conjunction with Law 6/97/M, introduces precautionary measures and sets out obligations for notification of suspicious activities. The decree mandates that reporting is required when suspicious transactions are discovered, laying the groundwork for financial institutions and other commercial activity institutions to report suspicious transactions.
- (4) In 2006, Macao enacted Law No. 2/2006, the Prevention and Suppression of Crime of Money Laundering, and Law No. 3/2006, the Prevention and Suppression of Crimes of Terrorism and the Administrative Regulation No. 7/2006 supporting the two laws, the Preventive Measures on Anti-Money Laundering and Combating the Financing of Terrorism, covering financial institutions, non-financial business activities and professionals, implementing customer due diligence measures and reporting transactions suspected of involving money laundering or terrorist financing.

The government of the Macao Special Administrative Region established the Financial Intelligence Office in 2006 to coordinate the anti-money laundering and counter-terrorism efforts. It is responsible for collecting, analysing and providing law enforcement organs with information on transactions that are suspected to be related to crimes of money laundering and terrorist financing.

## 4. NEW DEVELOPMENTS IN MACAO'S FINANCIAL LAW

### 4.1 Relaxation of Financial Leasing Regulations

#### 4.1.1 Legal framework and proposals

In Macao, the financial leasing business once could only be operated by a credit institution (usually a bank or a financial leasing company specializing in such business), and the

corporate capital of a financial leasing company could not be less than MOP 30 million. An application had to be submitted to the Monetary Authority of Macao and a financial leasing company could be established only with approval from the Chief Executive. Macao's financial leasing law had a high threshold and did not have a large competitive advantage.

The Legislative Assembly of Macao is discussing a new Legal Regime of Financial Leasing Companies,<sup>32</sup> which will re-regulate the definition of a financial leasing company and turn its credit institution nature to a financial institution nature. Since public deposits are not absorbed, regulatory requirements are relaxed compared to the old law, with the aim of promoting the development of the financial leasing sector in Macao.

Although financial leasing companies will still be subject to regulation by the Monetary Authority of Macao, a relatively loose set of regulatory requirements will be applied. For example, it is not mandatory to set up a financial leasing company in the form of a company limited by shares; the minimum corporate capital requirement is reduced from MOP30 million to MOP10 million; and the number of corporate administration organ members is reduced to one.

The bill aims to regulate the establishment and operation of financial leasing companies and financial leasing project subsidiaries. The main contents of this legal revision include:

*Redefining a financial leasing company* The concept of financial leasing project subsidiary is added. It is proposed in the bill that a financial leasing company should be a financial institution whose business is financial leasing activities; a financial leasing project subsidiary should be a financial institution wholly owned by a bank or financial leasing company licensed to do business in Macao, whose purpose is purely holding and management of individual financial leasing projects.

*Changes to permissible financial activities* The bill stipulates that financial leasing companies and financial leasing project subsidiaries may only engage in financial leasing, transfer and acceptance of leasing assets, management of leaseholds, sale and disposal of leaseholds, and so on, and may not accept public deposits or other repayables. In addition, no entity may, without permission, add to its name or use during business words that indicate, either expressly or impliedly, that the business of the company is financial leasing business.

*Relaxation of conditions for the establishment of financial leasing companies* It is proposed in the bill that the establishment of a financial leasing company in Macao must be pre-approved by an executive order issued by the Chief Executive after listening to the advice of the Monetary Authority of Macao. A financial leasing company must be a company limited by shares or a limited company, and the corporate capital must not be less than MOP 10 million. In addition, in order to prevent a financial leasing company from becoming a pure 'shell company', the bill requires at least one member of its administration organ to reside in Macao.

<sup>32</sup> Legislative Assembly of Macao <[www.al.gov.mo/zh/](http://www.al.gov.mo/zh/)> accessed 15 January 2019.

*Establishment of financial leasing project subsidiaries* It is proposed in the bill that when a bank or financial leasing company licensed to do business in Macao sets up a financial leasing project subsidiary in Macao, it is only required to give a written advance notice to the Monetary Authority of Macao.

*Penalties and transitional provisions* The bill re-establishes the penalties system for financial leasing companies and financial leasing project subsidiaries, and ranks the fines for various administrative violations based on the seriousness of the illegal acts. It is proposed in the bill that a financial leasing company established before the bill enters into force should continue to hold its license, but this will not affect the requirement that the company must comply with the bill.

#### 4.1.2 Purpose of legal revision

The main purposes of this legal revision are to implement the moderately diversified administrative policies of the Macao economy, actively promote the development of the characteristic financial sector in Macao, attract more high-quality financial leasing companies to settle in Macao, and provide greater development space for Macao's financial leasing sector in terms of law.

The relaxation of the financial leasing law is an important step in Macao's financial development.

First, the Macao region is unique: it faces Portuguese-speaking countries externally and faces the Guangdong-Hong Kong-Macao Greater Bay Area internally. Second, the development of Macao differs from those of its surrounding financial cities of large size. For example, the development of the Hong Kong stock market is relatively sound – Macao lags behind and needs to activate its market through financial leasing.

The current development of the financial leasing law will make the legal environment more conducive to the settlement of financial institutions in Macao. Because banks need to absorb public funds, they are managed strictly considering that they have a great impact on society. Now, the relaxation of financial leasing regulation, the reduction of capital requirements, and the permission of project subsidiary establishments are all conducive to investors setting up financial leasing companies in Macao to engage in business in the Mainland and overseas.

It is hoped that this legal revision will enable financial leasing to form a new industrial chain in the future, which will affect the development of Macao's economic structure.

The difficulties now faced are mainly international real rights registration, investment attraction, and so on, and it takes a process to implement everything.

#### 4.2 New Fence for Anti-money Laundering

Financial innovation and financial risk accompany one another. One of the purposes of financial regulation is to prevent the occurrence of financial systemic risks, to play a role in financial innovation, and to meet the needs of financial services in the real economy. Nowadays, the use of new technologies in the financial sector has resulted in new financial products and financial services. In the near future, various technologies will be widespread and applied to financial products or service processes. The application of innovative technologies will make the financial risks brought by financial technologies more complicated

and more unique. Once problems arise, they will occur faster than in the traditional financial system, with a wider range of influences and more subjects involved. In the entry into the innovation process, effective financial regulation is required for safety.

Regarding the regulation of the gaming sector, Macao has been using anti-money laundering and counter-terrorist financing precautions for many years, such as the inclusion of junkets and their partners in the regulation and licensing system,<sup>33</sup> which is designed to address the risks inherent in the gaming sector. At present, the government has set double checks on the entry threshold for junkets. Apart from the independent and strict qualification examination of junkets by the Gaming Inspection and Coordination Bureau, gaming concessionaires and sub-concessionaires will also have to take due diligence measures before establishing business relationships with junkets.

First, the problem of industrial imbalance is caused by the monopoly of the gaming sector. If this monopoly is to be weakened, legal reform is indispensable, and the legal reform of the financial sector is promising in Macao's special cultural and geographical environment. Therefore, the Macao government started with the financial leasing law and gave more and more freedom to special finance in order to promote the development of the financial sector in Macao.

Second, the monopoly of the gaming sector has enabled Macao to continuously develop a defence and regulation system against money laundering. The increasingly rigorous policies related to money laundering are another important direction for the development of Macao's financial sector. When the control becomes stricter, Macao's financial market will be more open, and at the same time, the economy will develop healthily, and will be able to adapt to the global trend.

Since the entry into force of the Law No. 2/2006 on Prevention and Suppression of Crime of Money Laundering in 2006, gaming concessionaires/sub-concessionaires and junkets have been strictly supervised by the Gaming Inspection and Coordination Bureau. Since 2007, the Gaming Inspection and Coordination Bureau has carried out risk regulation on gaming concessionaires/sub-concessionaires and junkets, including the requirement for Customer Due Diligence (CDD) measures and mandatory reporting for all large-value transactions. Prior to the adoption of the amendments to Law No. 2/2006 on Prevention and Suppression of Crime of Money Laundering and Law No. 3/2006 on Prevention and Suppression of Crime of Terrorism in 2017, the Gaming Inspection and Coordination Bureau had taken new measures, including the amendment to the anti-money laundering and counter-terrorist financing guidelines in 2016, and the requirement for all gaming operators to conduct risk assessments and carry out CDD measures for all financial transactions.

As an entity that regulates the financial and insurance sectors, the Monetary Authority of Macao has been conducting regulation through a risk-based approach. The anti-money laundering and counter-terrorist financing guidelines for the financial and insurance sectors already contain the requirements set out in the Financial Action Task Force (FATF) recommendations and methods, and are constantly updated, which was also the usual practice before the 2016 Asia/Pacific Group (APG) on Money Laundering mutual assessment. The Authority effectively ensures that financial and insurance institutions

<sup>33</sup> Administrative Regulation No. 6/2002.

comply with international standards through on-site and off-site reviews, thematic assessments and cross-border reviews. A sound licensing system for newcomers to the financial market is also the key to effective regulation.

In addition to regulation of the financial and gaming sectors, Macao has been closely monitoring designated non-financial businesses and professions (DNFBPs). In fact, Macao is one of the few jurisdictions that conduct the most extensive anti-money laundering and counter-terrorist financing regulation for DNFBPs. The regulation subjects include real estate agents and brokers, precious metal and gemstone merchants, pawn shops, car dealers, notaries, and professionals such as accountants, auditors and lawyers. The Housing Bureau, the Economic Bureau, the Legal Affairs Bureau, the Financial Services Bureau, the Macao Trade and Investment Promotion Institute and the Macao Lawyers Association have also made great efforts to ensure compliance of their regulated sectors.

The long-term vision of Macao's anti-money laundering/counter-terrorist financing strategy is to protect financial stability with appropriate preventive measures and to reduce the risk of the financial system being used for the transfer of proceeds of crimes. The government prioritizes the allocation of resources to strengthen the regulatory framework while gradually increasing the capacity of law enforcement organs in financial investigations.

The economy of Macao is dominated by the gaming sector, and the government's fiscal revenue is also heavily dependent on gaming duties. In the international community, it is common to regard casinos and criminal activities such as drug trafficking as the main field of money laundering. It is because of this that both United Nations international conventions against money laundering or corruption and terrorism, and international or regional organizations that combat money laundering, corruption or terrorism, regard casinos as their main target of work.

Since Macao started to issue gaming licenses, the revenue of the gaming sector has been rising feverishly and soon surpassed Las Vegas, becoming the city with the highest gaming revenue in the world, which would inevitably attract the attention of international anti-money laundering and anti-corruption and anti-terrorism organizations; who wonder if the casinos in Macao will become the 'capital of money laundering'. In particular, after the legislation on the legalization of casino lending, there is the question of whether 'the legal protection of money laundering activities' has been even provoked.

Now, through the active efforts of the government and its relevant departments, Macao continuously signs cooperation agreements with overseas financial intelligence organizations on anti-money laundering and counter-terrorist financing, and introduces or amends a series of laws and regulations related to anti-money laundering and counter-terrorist financing, such as the 'Implementation of Asset Freezing Regime', the 'Law on Prevention and Suppression of Crime of Money Laundering' and the 'Law on Prevention and Suppression of Crime of Terrorism', in order to expand the definition of the upstream crime of money laundering, strengthen customer due diligence measures, identify ultimate beneficial owners, adopt risk-based internal control measures, and expand the definition of terrorist activities and terrorist financing to comply with international standards so as to ensure that the Macao's economic system will not be used as a place for illegal activities and fund transfer. The new 'Legal Regime of Taxation Information



Exchange<sup>34</sup> will also help to crack down on international tax evasion activities and the resulting money laundering crime. The 'Control of Cross-border Transportation of Cash and Bearer Negotiable Instruments'<sup>35</sup> is more effective in reducing the risk of money laundering caused by cross-border transportation of large amounts of cash. In order to make the relevant legal framework of Macao sounder and comply with international standards, Macao has also adopted a series of specific measures including the requirement for declaration of entry carrying cash of MOP120 000 and above.<sup>36</sup> These proactive and high-quality actions have impressed international anti-money laundering organizations and won high evaluations from them.

#### 4.3 Key Regulatory Challenges in Macau: The Interplay Between Cyber-criminality and Financial Criminality

As this convoluted and fast-paced world evolves, an urgent need of legislative reforms looms on the horizon. With the breadth of a data-driven (and digital) world, the discussion about the newest forms of cyber-criminality are ripe. While a common 'white collar' criminal can commit a financial crime through (but not only) a regular 'bricks and mortar' bank or financial enterprise, a cyber-criminal can perpetrate an heinous financial crime without leaving the comfort of his/her house. A conduct of a given cyber-criminal can impact the whole financial system, sending ripples across a region or (to a certain extent) worldwide. If I had to make an educated guess about the candent challenges that Macau's financial system will face in the near future, I would definitely highlight that the interplay between cyber-criminality and financial crimes will attract the lawmakers' undivided attention. When it comes to the interplay between cyber-criminality and 'white collar crimes' the time is now. Legislative reforms are duly needed in this regard. Corporate criminal liability, as it is inextricably linked to 'white collar crimes', is no exception. One can easily see the grounds for those concerns: cyber-criminals often hide their criminal activities under the cloak of a corporation or set of enterprises, rendering fruitless law enforcement agencies' efforts when it comes to bringing them to justice and prosecuting them to the fullest extent of the law. A reality – an unfortunate one – that the prospective lawmakers in Macau ought to bear very firmly in mind. Both realities (law enforcement agencies efforts to curb cyber-criminality and the proper exercise of regulatory oversight) are intrinsically intertwined: the more law enforcement agencies struggle to curtail the criminal activity of cyber-criminals, the less effective will be regulators' oversight of the financial system of Macau. In this regard, more is more. More success in tackling criminal

<sup>34</sup> Law No. 5/2017 Legal Regime of Taxation Information Exchange.

<sup>35</sup> Law No. 6/2017 Control of Cross-border Transportation of Cash and Bearer Negotiable Instruments

<sup>36</sup> Refer to Law No. 6/2017 Control of Cross-border Transportation of Cash and Bearer Negotiable Instruments. According to the law, those who enter Macao carrying cash or bearer negotiable instruments with a total value of MOP 120 000 or above, such as traveller's checks, checks, drafts, payment orders, promissory notes, etc., shall make a declaration to the customs officers, and fill out a declaration form and choose the red channel for customs clearance; for those who exit Macao, if questioned by any customs officers, they shall also make a truthful declaration, or they may be imposed a fine from MOP1000 to MOP 500 000. Transit visitors who stay in the Macao for a short time are not required to make a declaration.

activities will equate to more (and better) regulatory oversight.<sup>37</sup> This is a challenge that the Macau authorities should definitely embrace.

## CONCLUSION

Since the Portuguese came to Macau, Macau's financial system has grown. At the beginning of the twentieth century, Macau had its own currency. A series of financial laws and correlated regulations were successively promulgated, and an open financial system with Macau's own development characteristics was gradually formed. However, the development of the financial system in Macau cannot be separated from the changes and influences of the international financial market. Therefore, in the current process of economic globalization and financial integration, systematically reviewing the development of Macau's financial industry and its legal norms will play an important role in promoting the sustainable development of the local financial industry and even the Macau economy.

From the regulations on Financial Activities in Macau standpoint, one can assert that the Decree-Law No. 32/93/M, is the basic legal system regulating the financial institutions and financial activities in Macau. In recent years, Macao has strengthened its efforts to combat terrorist financing. In order to further strengthen relevant laws and regulations, the government introduced the 'Implementation of Asset Freezing Regime'<sup>38</sup> in 2016. The Legislative Assembly also passed a law on cross-border cash declaration systems. Although the law was passed after the Asia/Pacific Group on Money Laundering (APG) field review, it still shows the government's determination to combat money laundering and terrorist financing.

The financial sector in Macao is not large at the current time, but for Macao, the financial sector is one of the important paths for its industrial structure optimization. In Macao, there is an imbalance in the industrial structure, which is dominated by the gaming sector. The Macao government has tried many methods but the problem has still not been effectively resolved; this has also resulted in the unique financial development direction of Macao.

In this fast-paced and data-driven world, Macau's financial system must seek to keep up with the newest forms of cyber-criminality and the challenges arising with the scope of corporate criminal liability.

<sup>37</sup> This represents a connection between law and economics. Further remarks go beyond the scope of this chapter. For further reading, see R Posner, *Economic Analysis of Law* (7th ed, Aspen Publishers 2007), passim.

<sup>38</sup> Law No. 6/2016 Implementation of Asset Freezing Regime.