

The new regulatory and contractual paradigms of banking, financial and securities law at present



Essay

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ABSTRACT

This essay analyzes the current orientations and future developments of banking, financial, and securities law; it also highlights their notable complementarity and the connection between the different regulatory and contractual paradigms. Monetary and financial stability is essential for the development of business financing within the financial system and the securities market, which require clear rules, continuity in macroeconomic policies, and support for private investment. The State's financial policy, through the Ministry of Economy and Finance, integrates sound fiscal, budgetary, debt, and public investment policies, which contribute to greater tax collection, thereby enabling the financing of education, health, security, justice, employment promotion, and public services. The Superintendency of Banking, Insurance and AFP (SBS) on behalf of the State, oversees the companies within the financial and pension system, ensuring that their organizers meet the legal solvency requirements for their operation. These entities must operate in accordance with the Constitution, national banking legislation, and the Basel Accord, respecting banking secrecy, credit guarantees, consumer protection in financial services, risk management, and transparency in their activities. Likewise, the SBS regulates and supervises pension fund administrators (AFP), ensuring adequate conditions for their clients.

Keywords: banking; securities market; finance; contracting; regulation; consumer.

Los nuevos paradigmas regulatorios y contractuales del derecho bancario, financiero y bursátil en la actualidad

RESUMEN

El presente ensayo analiza las orientaciones actuales y los futuros desarrollos del derecho bancario, financiero y bursátil; así mismo, subraya su complementariedad notoria y la vinculación existente entre los distintos paradigmas regulatorios y contractuales. La estabilidad monetaria y financiera es esencial para el desarrollo del financiamiento empresarial en el sistema financiero y el mercado de valores, que requieren reglas claras, continuidad de políticas macroeconómicas y apoyo a la inversión privada. La política financiera del Estado, a través del Ministerio de Economía y Finanzas, integra una buena política fiscal, presupuestal, de endeudamiento e inversión pública, que contribuyen una mayor recaudación tributaria, la cual permite financiar la educación, salud, seguridad, justicia, promoción del empleo y los servicios públicos. La Superintendencia de Banca, Seguros y AFP (SBS) ejerce, en representación al Estado, el control de las empresas del sistema financiero y previsional, asegurando que sus organizadores reúnan los requisitos legales de solvencia para su funcionamiento. Estas entidades deben operar conforme a la constitución, la legislación bancaria nacional y al Convenio de Basilea, respetando el secreto bancario, las garantías crediticias, la protección del consumidor financiero, la gestión del riesgo y la transparencia de sus actividades. Del mismo modo, la SBS regula y supervisa a las administradoras de fondos de pensiones (AFP), garantizando condiciones adecuadas para sus clientes.

Palabras clave: banca; bolsa; finanzas; contratación; regulación; consumido.

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INTRODUCTION

It is pertinent to analyze the main innovations and orientations of banking, financial, and stock market law, seeking to highlight their main characteristics, approaches, and the linkages they maintain among themselves, with the purpose of understanding holistically and systematically their emblematic institutions, contributions, and relationships.

Public finances in Peru have acquired, since 1991, an important distinction for their contribution to the financial balance between public revenues and expenditures, which has allowed contributing to the achievement of adequate macroeconomic performance and the dynamization of the productive activity of goods and services.

The financial solidity provided by higher tax collection, budgetary balance, public debt, and feasible and sustainable public investment generates a functional order that is reinforced by the sound monetary policies established by the Central Reserve Bank of Peru (BCRP, 2022), which regulates the amount of money issued responsibly, guaranteeing monetary stability that will benefit investors and economic agents participating in the market, by generating a virtuous circle for savings and investment.

Monetary policy has made it possible to guarantee the fulfillment of the economic and legal functions of money as a medium of exchange, store of value, unit, and account; but also as a credit instrument and means of payment to settle monetary obligations, being applied over the instruments of monetary policy, such as interest rates, reserve requirements, rediscounting, credit limits, and open market operations with the money issued by the BCRP. Through financial intermediation, companies in the financial system capture the public's money and, together with their capital, allocate it to credit and investment modalities, in a financial intermediation activity that allows the transfer of financial resources from surplus economic units to deficit economic units.

This financial intermediation is indirect, since submitting a credit application does not necessarily mean it will be approved—there is a prior analysis of the credit guarantees and the quality of the credit applicant—and also because it is very difficult to determine from which source the funds for granting the credit come among that immense monetary mass managed by the bank.

The current financial system is characterized by multiple banking, financial liberalization, the massiveness of its banking operations, risk diversification, internationalization of its activities, broad consumer financial protection, adhesion contracts, and contracts with general clauses.

On the other hand, the contribution of modern banking contracts such as *leasing*, *factoring*, *trust*, *underwriting*, *project finance*, and *forfeiting*, which are important sources of business financing, must also be highlighted. Likewise, the regulation of banking secrecy, which protects the confidentiality of clients' deposit operations, requiring the consent of the holder, except in the exceptional cases provided in banking legislation, to authorize its lifting, is very relevant.

Similarly, the regulation of credit guarantees is important, such as mortgages, movable guarantees, antichresis, lien, the novel figure of trust as collateral, and traditional personal guarantees, such as surety and guarantee. Furthermore, the classification of financial assets according to their risk level, the criteria of consolidated financial supervision for the entire financial business group, and the disciplinary powers of the SBS to impose a regime of supervision, intervention, or dissolution and liquidation of the respective company, are also relevant.

The internationalization of banking law must also be highlighted, expressed in the strong linkage between national financial system companies and major international financial centers, as well as the significant influence of the rules contained in the Basel Convention, approved by the Basel Committee, which regulate international financial regulation for the proper functioning of the financial system. Similarly, it is important to highlight financial consumer protection, which seeks to establish: the rights to truthful, sufficient, and timely information; the suitability of financial products and services; the right to report and sue the bad provider before the National Institute for the Defense of Competition and Protection of Intellectual Property and before the Judiciary, respectively.

DEVELOPMENT

The existence of a competitive and reliable financial system, the development of financial liberalization, the existence of multiple banking, the diversification of credit risk, the social function of banking activity—regardless of its nature as a commercial activity—represent the major objectives of national and comparative banking law (Figuerola Bustamante, 2009).

In this regard, a notable alignment is perceived between the objectives of the General Law of the Financial System and Insurance System and the Organic Law of the Superintendency of Banking and Insurance, Law No. 26702 (2011), with the major postulates and principles of the Basel regulations; for example, consolidated banking supervision, the comprehensive treatment of operational and market financial risk, the concern for the solvency of the organizers of financial system companies, the need to provide solidity and continuity to the effective equity of banks, the proper treatment of financial groups, the protection of banking secrecy—with the grounds in which its lifting is justified—, deposit insurance funds, as well as the respect and compliance with the instruments of monetary policy. In this orientation, the requirement of academic, professional, and managerial solvency, which organizers of companies must meet to obtain the organization authorization, as well as the operating authorization, must be highlighted.

Likewise, the registration of shares representing the companies' capital stock in the stock exchange is important, as it promotes greater linkage between the financial system and the securities market. In this sense, it is important to form financial groups integrated by banking companies, insurance financial companies, brokerage firms, and general warehouses, which provide a very wide coverage of multiple banking activities and operations to ensure better service to consumers and users.

On the other hand, the execution of international operations, as Villegas (1998) states, “allows the financing of foreign trade operations, integrating the activities of an international financial system” (p. 185). It should be highlighted that banking law implies an international and interdisciplinary conceptualization, since it combines regulatory entities and international financial institutions.

Now, leasing operations, also known as financial leasing, *factoring*, trust, and *project finance* make an important contribution to industrial activity, as well as to the recovery of credits.

Delving into these contractual modalities, in the leasing contract, as Barreira Delfino (1996) points out, “the acquisition of durable consumer movable and immovable goods—mainly industrial—through a special initial leasing modality that contemplates the exercise of a purchase option for these at the end of the payment of consecutive monthly installments or rents” (p. 76).

In the leasing contract, various types or modalities can also be distinguished, as follows:

- a) *Financial leasing*: with the participation of the bank, financial company, or *leasing* company, since the lessee and the supplier company of the good agree on the possibility of exercising a purchase option to become the owner from lessee.
- b) *Operational leasing*: the bank, financial company, or *leasing* company directly leases the movable or immovable good to the lessee. Similarly, regarding the type of good, there is a distinction between real estate *leasing* and movable *leasing*, as well as between national *leasing* and international *leasing*, which in turn have their own particularities.

On the other hand, the *factoring* contract, according to Barbieri (1998), “aims for banking financial companies to acquire invoices and bills of exchange issued by client companies and that have been accepted by various buyers” (pp. 247-248).

In this way, business financing and the reduction of heavy or delinquent portfolios are contributed. It also allows generally a small or microenterprise to have sources of bank financing for its economic activity through the sale to a *factoring* company, which may be a bank, a financial company, or a factoring company, of the securities accepted by its clients at the moment of acquiring goods. In turn, this contract allows, due to its nature as a legal act, offering other services by the financial system company to contribute to the attention of its delinquent credit portfolio, as well as in the financial and administrative advice of the business developed by the SME.

Regarding the *underwriting* contract, according to Arias Schreiber (1995), “the bank or financial company places on the market shares representing the capital stock or bonds they want to constitute through the modality of offer to third parties, which constitutes an important source of business financing through the Securities Market” (p. 118).

Similarly, in this type of contract, the banking or financial company contributes to the issuance and placement of securities that enable the constitution of the corporation or the increase of its capital stock through the placement of bonds and shares in the securities market. It is convenient to clarify that the bank or financial company regularly engages in financial intermediation operations, and if any of them acquires shares of the company it helps to constitute through an offer to third parties, it must proceed to sell those shares within no more than 18 months, because the bank has carried out those operations with public money. In any case, if after 18 months it has not transferred them, it must constitute accounting provisions with its own equity, which represents an important financial cost that must be considered before participating as a financial agent in these operations.

In the case of the trust contract, it is a legal relationship between the owner of the entrusted assets, called the trustor, who transfers them to a bank or financial trustee company for it to manage in favor of a third party, called the beneficiary, under different modalities and purposes. In this sense, there is a development of a trilateral legal relationship. The trustor, who owns a trust estate, transfers it in fiduciary domain to a banking or financial trustee company, for it to manage it for the benefit of the trustor, or a third party called beneficiary or beneficiary of the trustor itself.

The object of the contract, as Arias Schreiber (1995) points out, is for the financial system company to manage such assets for administration, investment, or cultural activities, to constitute guarantees, provide community support, or carry out philanthropic activities in favor of vulnerable people, real estate projects, protection of the testator's will, and succession

purposes, among others. It is convenient to clarify that the legal nature of the trust underlies three aspects: the trust as a legal business, the trust contract, and the fiduciary or trust legal business.

In the *project finance* contract, the bank provides financial resources so that investors can develop projects of considerable magnitude. Regarding securities contracts, these are agreements of wills, aimed at obtaining corporate business financing through the public offering of securities, futures, and options contracts on commodities, interest rates, and stock indices.

Furthermore, the company that obtains financial support complies with payment according to a schedule of flexible and variable installments in accordance with the development of the investment project and the generation of financial flows in large projects, such as infrastructure projects, constituting an important financial incentive due to the characteristics of the contract.

Regarding this review of *underwriting*, *project finance*, and *factoring* contracts, these should have clear and precise regulation that provides legal certainty to banking companies and consumers regarding the scope of rights and obligations.

On the other hand, the function of banks must be highlighted, as they provide financial advice as well as support business restructuring for the recovery of companies in crisis within the bankruptcy process. Likewise, the development of modern, massive, standardized, internationalized banking contracting is verified, with important rights recognized for the consumer, with general and measured regulation, since these provide mechanisms for the public to perceive security when depositing or lending their money.

It should be noted that the participation of banks through subsidiaries in the securities market has allowed an important dynamization of the stock market, participating with assets different from those used for the development of their daily financial intermediation operations.

In the banking and stock sectors, much of the international consultation among banking regulatory entities in recent years has been effectively managed through the Basel Convention. This Convention seeks the greatest guarantee in credit operations and that, in turn, banking operations are guided by credit limits according to the effective equity of the financial institution, as well as the grounds for inclusion, intervention, dissolution, and liquidation of companies due to insufficient capital or non-compliance with reserve requirements.

In banking legislation, it is important to promote the existence of a solid, competitive, and reliable financial system, since compliance with such important norms and principles helps achieve its objectives and reduce credit risk.

On the other hand, it is important to regulate in Peruvian national legislation defective financial products and services that do not meet the suitability criteria and the binding nature of the offer, causing harm to consumers and investors, which would be achieved by establishing the civil liability of banking companies.

In this regard, the national and international financial system has fulfilled an important social function in favor of the economy of clients and financial consumers, allowing the financing of various development projects, the improvement of living conditions, and greater economic and social integration and inclusion.

CONCLUSIONS

Financial, banking, and stock market policies complement each other to strengthen macroeconomic stability and thus promote the development of the financial system and the securities market as sources of financing. Banking law provides solidity and confidence by guaranteeing compliance with national and international regulations, and its linkage with securities markets. Likewise, banking activity is of public interest, since it manages public funds and must be administered with functional and operational responsibility, complying with regulations on credit limits, legal reserves, banking supervision, and credit risk diversification. Financial intermediation is authorized, habitual, professional, and regulated; characteristics that provide security to users, the State, and society.

It is very important to highlight modern financial contracts, such as leasing, *factoring*, *underwriting*, trust, and *project finance*, which provide contributions for the acquisition of durable consumer goods, securities issued by SMEs, the constitution of corporations, asset management, and infrastructure financing.

Financial balance is supported by factors such as the relationship between active and passive interest rates, the minimum legal reserve, legal reserves, effective equity, the compensation of creditor and debtor balances in customer accounts, of entities such as the Central Reserve Bank, the ASBS, as well as the Superintendency of the Securities Market, which contribute with adequate regulation and supervision of the financial system, thus guaranteeing proper monetary management, which is key to protecting mass contracting, free competition, and the consumer.

Due to their legal and economic importance, *factoring*, *underwriting*, and *project finance* contracts should have specific regulation in the General Law of the Financial and Insurance System, Law 26702 (2011), strengthening legal certainty and the full exercise of constitutional freedoms that support the financial system and the securities market.

Recommendations

The relationship between monetary stability, financial stability, and the profitability of the securities market must be preserved, which is key to constituting solid, competitive, and reliable Financial Systems under banking law regulation. The social function of banking is guaranteed with the development of operations, products, and services that satisfy consumers and users, thus guaranteeing their right to truthful and timely information.

Technological advancement influences financial and monetary transactions, promoting new forms of money, such as cryptocurrencies, which must be duly regulated. Likewise, shareholders, directors, and managers of companies and financial entities must perform their duties, as engaging in fraud, gross negligence, or abuse of powers implies joint liability and could influence the financial institution under a regime of supervision, intervention, or dissolution and liquidation, for which a new Basel Convention should be approved to regulate and support the development of financial systems and adapt their activities to the pandemic situation. A regulation on civil liability of financial system companies for defective financial products should also be promoted through a reform of the General Law of the Financial System and complementary SBS regulations.

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