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The rationale of publicity in the law of corporeal movables and claims
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In this chapter, the author, being a Chinese legal scholar, examines the system of publicity in Chinese law. This appears more desirable on account of the enactment of a new Chinese Civil Code in 2020. The examination focuses on four general aspects: publicity of corporeal movables, publicity of claims, publicity of trusts, and the construction of a system of registration for corporeal movables and claims. Before doing this, a brief introduction about the new Chinese Civil Code is given.

6.1 INTRODUCTION OF THE 2020 CHINESE CIVIL CODE

The Civil Code of the People's Republic of China was enacted on 27 May 2020. This is China's first civil code and will enter into force on 1 January 2021. Before this code, China had several individual acts to regulate private law disputes. Among these individual acts, the most important are the Law of Marriage (1980), the Law of Succession (1985), the General Principles of Civil Law (1986), the Contract Law (1999), the Property Law (2007), and the Law of Tort Liabilities (2010). These individual acts form the core of the system of civil law.

Historically, the Chinese legislature had initiated creating a civil code for the People's Republic of China four times, in 1954, 1962, 1979, and 2001. However, these four attempts all failed in the end. After the third attempt and failure in 1979, the legislature decided to give up pursuing a "wholesale" strategy and decided instead to pursue a "retail" strategy: adopting individual acts rather than a civil code. This change is a result of the lack of sufficient experience and knowledge about a market economy. In 1978, China initiated the "Reform and Opening" policy and attempted to replace its planned economy by a market economy. The timing, however, was not opportune for making a civil code appropriate for a market economy since China was unfamiliar with the concept of a market economy. After 1979, the legislature began to focus on establishing individual acts. Though another attempt to enact a civil code was made in 2001 after the Contract Law of 1999 was adopted, this attempt also failed because there were too many controversies and China was not fully prepared yet.

In 2015, the legislature decided to unify the individual acts into one civil code. The codification would occur in two steps: the first step would be drafting the general part of the code, and the second step would be drafting the specific parts. In 2017, the General Part of Chinese Civil Law was completed and came into force on 1 October of the same year. During the

next three years, six specific parts were proposed, discussed, and revised. In December 2019, the General Part and the six specific parts were incorporated together in one draft, which was to be submitted to the National People's Congress that was scheduled to be held in March 2020. However, the Congress was postponed to May 2020 because of the outbreak of the coronavirus (COVID-19) epidemic. On 27 May 2020, the code was approved by the Congress.

The Chinese Civil Code (CCC) includes seven books with 1,260 provisions: General Part, Property, Contracts, Rights of Personality, Marriage and Family, Succession, and Tort Liabilities. The CCC is mainly based on the previous individual acts with some modifications and new rules. The General Part implies that the CCC follows a Pandectism approach and is influenced by the BGB. Book 2, Property, regulates ownership, property rights of use, property rights of security, and possession. Book 3, Contracts, is very important for the entire system of obligations. Section 1 of Book 3, General Rules of Contracts, applies to both contractual obligations and non-contractual obligations, thereby providing general rules of obligations. Section 3 of Book 3, Quasi-Contracts, regulates two types of non-contractual obligations: unjust enrichment and *negotiorum gestio*. Book 4, Rights of Personality, is completely new and is seen as a prominent feature of the CCC. It provides detailed and systematic rules on the protection of rights of personality in this era of the "explosion" of information and technology. Book 5 and Book 6 concern Marriage and Family and Succession respectively. Book 7 is Tort Liabilities. The main reason for providing for rules on tort in the last book of the CCC is that tort law performs a function of protecting property rights, personal rights, rights of personality, rights of status in families, and the right of succession. Tort is not only a cause of obligations, but also of liabilities. The entire CCC is designed on the basis of a "right-duty-liability" logic. Rights imply duties, and violating duties triggers liabilities.

As to Book 2, Property, the main modifications arise in two areas: one is the recognition of a new property right, the right of habitation, and the other refines the system of publicity for corporeal movables and claims. In the following discussion, I examine this system of publicity in the new Civil Code from the angle of our preceding research into the rationale of publicity in the law of corporeal movables and claims.

6.2 PUBLICITY OF CORPOREAL MOVABLES AND CLAIMS IN THE 2020 CHINESE CIVIL CODE

6.2.1 Publicity of Corporeal Movables under the Chinese Civil Code

6.2.1.1 *Description of the Status Quo*

According to art. 11 CCC, the concept of things includes corporeal movables and corporeal immovables, but the object of property rights can be a right

if the law prescribes so.¹ As we will see below, claims, as a type of right, can be an object of pledge. The Chinese law of things insists on the principle of publicity. For corporeal immovables, a comprehensive system of registration is introduced: the Immovables Register. In principle, registration is a requirement of acquisition of property rights on immovables (art. 209 (1) CCC).² Moreover, the Immovables Register is reliable, and the reliance of third parties on the register is protected by the CCC under a rule of *bona fide* acquisition (art. 311 CCC).³ The following discussion focuses on publicity of corporeal movables.

Corporeal movables are divided into two types: special corporeal movables and ordinary corporeal movables. The former type includes vessels, aircraft, and motor vehicles. They are special because the disposal of them cannot be effective against third parties acting in good faith if registration is not completed (art. 225 CCC).⁴ The register for these three kinds of special corporeal movables is managed by different public authorities: the Ministry of Transportation is responsible for the registration of vessels, the Ministry of Public Security for that of motor vehicles, and the General Administration of Civil Aviation for that of aircraft. The three registers perform not only an administrative function but also a private law function. Through these central and comprehensive registers, the property rights created on these special corporeal movables are made visible to third parties. In general, this is in line with our discussion in 5.3.2.1.E and 5.6.

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- 1 《民法典》第115条：“物包括不动产和动产。法律规定权利作为物权客体的，依照其规定。” English translation: Art. 115 CCC: “*Things include immovables and movables. If rights are an object of any property right in accordance with any laws, such laws shall apply.*”
 - 2 《民法典》第209条第1款：“不动产物权的设立、变更、转让和消灭，经依法登记，发生法律效力；未经登记，不发生法律效力，但是法律另有规定的除外。” English translation: Art. 209 (1) CCC: “*The creation, modification, transfer, or extinction of a property right on an immovable shall become valid after it is registered in accordance with the law; it does not take effect if registration is not completed, except as otherwise provided for by any law.*”
 - 3 《民法典》第311条第1款：“无处分权人将不动产或者动产转让给受让人的，所有权人有权追回；除法律另有规定外，符合下列情形的，受让人取得该不动产或者动产的所有权：（一）受让人受让该不动产或者动产时是善意；（二）以合理的价格转让；（三）转让的不动产或者动产依照法律规定应当登记的已经登记，不需要登记的已经交付给受让人。” English translation: Art. 311 (1) CCC: “*Where a person transfers an immovable or movable thing of which this person has no right to dispose, the owner has the right to recover this immovable or movable thing; except as otherwise provided for by any law, the transferee can obtain ownership of the immovable or movable thing when the following requirements are satisfied: (1) the transferee acts in good faith when acquiring the immovable or movable thing; (2) the transfer is made at a reasonable price; (3) the immovable or movable thing has been registered as stipulated by laws, or has been delivered to the transferee if registration is not required.*”
 - 4 《民法典》第225条：“船舶、航空器和机动车等的物权的设立、变更、转让和消灭，未经登记，不得对抗善意第三人。” English translation: Art. 225 CCC: “*The creation, change, transfer, or elimination of property rights on vessels, aircraft, motor vehicles and so forth may not challenge any bona fide third party, if it is not registered.*”

For ordinary corporeal movables, possession and delivery act as a means of publicity. According to art. 224 CCC, delivery is a prerequisite of the disposal of ordinary corporeal movables.⁵ In art. 226-228 CCC, three forms of fictional delivery (*traditio ficta*) are recognized: *traditio brevi manu*, *traditio longa manu*, and *traditio per constitutum possessorium*. There is no doubt that these three forms of fictional delivery temper the formality of delivery and provide more space for the autonomy of parties. In art. 429, the CCC re-confirms the requirement of delivery for the disposal of corporeal movables: pledge of corporeal movables does not become effective until delivery.⁶ The CCC is silent as to whether *traditio per constitutum possessorium* is an eligible form of delivery in the situation of pledge. The prevailing view provides a negative answer, and the Supreme Court holds that return of the collateral to the pledgor will make the right of pledge ineffective against third parties.⁷

In addition to this, possession and delivery are also involved in the situation of *bona fide* acquisition of ordinary corporeal movables (art. 311 CCC). Despite being doubted and debated, *bona fide* acquisition of corporeal movables is usually explained by resorting to the notion that possession is an external appearance of ownership of corporeal movables. For *bona fide* acquisition of corporeal movables, two amongst the requirements relate to possession: one is the transferor has possession of the object, and the other is that the object needs to be delivered to the third party. In the view of most lawyers, *traditio per constitutum possessorium* is a form of delivery that can satisfy the requirement of delivery in art. 311 CCC. This is also supported by the court in judicial practice.⁸

In order to avoid the inconvenience caused by the requirement of delivery in secured transactions concerning corporeal movables, the CCC recognizes a form of non-possessory security interest: hypothec (or charge) of corporeal movables. The collateral includes both existing and future equipment, raw materials, semi-manufactured products and products, and the security provider is limited to enterprises, individual businesses,

5 《民法典》第224条：“动产物权的设立和转让，自交付时发生法律效力，但是法律另有规定的除外。” English translation: Art. 224 CCC: “The creation or transfer of property rights in a movable thing shall become valid upon delivery, except as otherwise provided for by any law.”

6 《民法典》第429条：“质权自出质人交付质押财产时设立。” English translation: Art. 429 CCC: “Pledge is created upon delivery of the collateral by the pledgor.”

7 《最高人民法院关于适用〈中华人民共和国担保法〉若干问题的解释》第87条第1款：“出质人代质权人占有质物的，质押合同不生效；质权人将质物返还于出质人后，以其质权对抗第三人的，人民法院不予支持。” English translation: Art. 87 (1) Judicial Interpretation by the Supreme People’s Court on Some Issues Regarding the Application of Security Law of the People’s Republic of China: “Pledge will not be valid if the pledgor possesses the collateral pledged on behalf of the pledgee; the court will not support the pledgee against a third party if the pledgee returns the collateral pledged to the pledgor.”

8 See art. 18 Judicial Interpretation by the Supreme People’s Court on the Application of Property Law of the People’s Republic of China (I).

and agricultural producers (art. 396 CCC).⁹ As both existing and future corporeal movables can be charged, the distinction between fixed charge and floating charge, which was accepted by the Property Law (2007), is not included in the CCC. Both types of charge are regulated by the same rules in the CCC. For a person falling outside the three types of parties, the right of charge also needs to be registered to be effective against third parties.¹⁰ As will be seen in 6.2.4, however, the register is different from the register for the charge created according to art. 396 CCC.

The right of hypothec comes into existence upon the contract taking effect. For the purpose of publicity, the hypothec of corporeal movables needs to be registered to be effective against third parties acting in good faith (art. 403 CCC). Therefore, the registration has declaratory effect.

《民法典》第403条：“以动产抵押的，抵押权自抵押合同生效时设立；未经登记，不得对抗善意第三人。”¹¹

If a corporeal movable is charged to more than one creditor, the priority of the charges is determined according to the date of registration (art. 414 (1) CCC).¹² In art. 414 (1) CCC, a “pure race” rule is established, and good faith is not relevant. This rule is not compatible with art. 403 CCC, a provision that stipulates that registration is to make the right of charge effective against “*bona fide* third parties”. Thus, how to reconcile these two provisions through interpretation is problematic. An acceptable solution is that art. 414

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- 9 《民法典》第396条：“企业、个体工商户、农业生产经营者可以将现有的以及将有的生产设备、原材料、半成品、产品抵押，债务人不履行到期债务或者发生当事人约定的实现抵押权的情形，债权人有权就抵押财产确定时的动产优先受偿。” English translation: Art. 396 CCC: “Enterprises, individual businesses, and agricultural producers may charge its existing and anticipated production equipment, raw materials, semi-finished products, and products, and if the debtor fails to pay the due debt or falls under any circumstance where charge shall be exercised as agreed upon by the parties, the creditor shall have the priority of compensation made with the movable determined as the charged property.”
- 10 《中华人民共和国担保法》第43条第2款：“当事人未办理抵押物登记的，不得对抗第三人。当事人办理抵押物登记的，登记部门为抵押人所在地的公证部门。” English translation: Art. 43 (2) Security Law of the People’s Republic of China: “The parties who fail to complete registration cannot enforce the right against third parties. Where the parties intend to conduct registration, the registry is the notary organ located in the place of the security provider.”
- 11 English translation: Art. 403 CCC: “Where a corporeal movable is charged, the charge is established at the time when the contract of charge becomes valid; if the charge is not registered, it shall not be effective against a *bona fide* third party.”
- 12 《民法典》第414条第1款：“同一财产向两个以上债权人抵押的，拍卖、变卖抵押财产所得的价款依照下列规定清偿：（一）抵押权已经登记的，按照登记的时间先后确定清偿顺序；（二）抵押权已经登记的先于未登记的受偿；（三）抵押权未登记的，按照债权比例清偿。” English translation: Art. 414 (1) CCC: “Where the same property is charged to two or more creditors, the proceeds from the auction or sale of the charged property shall be used for payment according to the following provisions: (1) if all the charges are registered, the priority of payment is determined by the date of registration; (2) the registered charge prevails over the unregistered charge; (3) if all the charges are not registered, the payment is made in proportion to the amount of the secured claims.”

(1) CCC is a special rule (*lex specialis*) of art. 403 CCC: the latter provision only applies where a conflict arises between the chargee and parties who are not a chargee.

For the usual operation of the debtor's business, an important restriction is imposed on the legal effect of registration: the registered charge cannot bind the buyer who has paid a reasonable price and acquired the collateral in the ordinary course of business (art. 404 CCC).¹³ Notably, the rule of the "ordinary course of business" applies to both floating charge and fixed charge. As mentioned above, floating charge and fixed charge are no longer treated differently in the CCC.

In general, the rules introduced above come from the Property Law (2007), and the legislature just incorporates them in the CCC. In addition to these rules, the CCC also establishes some new provisions concerning the purchase money charge, reservation of ownership, financial lease, and factoring. These new provisions extend the scope of registration.

Inspired by the purchase money security interest (PMSI) in Article 9 UCC, the CCC introduces in art. 416 CCC a charge with super-priority: the purchase money charge (PMC).¹⁴ The PMC is created on the goods supplied to secure the payment of the purchase price by the debtor. This form of charge is recognized to guarantee that subsequent suppliers of goods will not be affected by floating charge created earlier on both existing and future assets. Art. 416 CCC prescribes a grace period of ten days for the supplier to register the charge and allows the charge registered duly to have super-priority in relation to other security interests. The PMC performs a function similar to another form of security device: reservation of ownership. Both security devices can be used to secure the payment of the purchase price by the supplier. However, they are treated with a difference in terms of registration, which will be shown in the following paragraph.

In addition to charge, reservation of ownership is also subject to registration. According to art. 641 CCC, reservation of ownership needs to be registered for legal effectiveness against third parties acting in good faith.¹⁵ In the viewpoint of the drafters, reservation of ownership is a security device that should be governed by the same rules of publicity and priori-

13 《民法典》第404条：“以动产抵押的，不得对抗正常经营活动中已经支付合理价款并取得抵押财产的买受人。” English translation: Art. 404 CCC: “Where a corporeal movable is charged, it shall not be effective against the buyer who has paid a reasonable price and obtained the property charged in the ordinary course of business.”

14 《民法典》第416条：“动产抵押担保的主债权是抵押物的价款，标的物交付后十日内办理抵押登记的，该抵押权人优先于抵押物买受人的其他担保物权人受偿，但是留置权人除外。” English translation: Art. 416 CCC: “Where corporeal movables are charged to secure the payment of the price of these collaterals, the charge holder can obtain performance in priority than other secured creditors, except the lien holder, provided that the charge is registered within ten days after delivery of the corporeal movables.”

15 《民法典》第641条第2款：“出卖人对标的物保留的所有权，未经登记，不得对抗善意第三人。” English translation: Art. 641(2) CCC: “Where the seller reserves ownership of the object, the ownership reserved is not effective against bona fide third parties in the absence of registration.”

ties as the charge of corporeal movables. This is why art. 388 CCC provides that the contract of security includes charge contracts, pledge contracts, and “other contracts having a function of security”. Moreover, the rules concerning priorities of charge are also applicable to determining the priorities of “other registerable proprietary interests of security” (art. 414 (2) CCC). In doing so, reservation of ownership and charge do not differ in the aspect of publicity: both require registration. However, different from the purchase money charge, no grace period of registration is permitted for the supplier who reserves ownership of the subject matter.

The requirement of registration of reservation of ownership indicates that the legislature intends to address the problem of invisible security interests in the field of corporeal movables. This intention is also manifested by art. 745 CCC, a provision applicable to financial lease. According to this provision, ownership enjoyed by the financial lessor cannot be effective against third parties acting in good faith if it is not registered.¹⁶ Moreover, the contract of financial lease is one of the “other contracts having a function of security” in art. 388 CCC and one of the “other registerable proprietary interests of security” in art. 414 (2) CCC. Thus, it is subject to the rules concerning priorities of the right of charge.

6.2.1.2 *A Brief Comment*

In general, the CCC takes a big step forward on the way to eliminating invisible security interests. The scope of registration is extended from hypothec (charge) to the purchase money charge, reservation of ownership, and financial lease. There is no doubt that this extension will alleviate the problem of information asymmetry significantly in a secured transaction concerning corporeal movables.

However, the CCC overlooks another two types of transactions: true lease (or operational lease) and possessory pledge. As has been argued above (see 5.3.2.3.B and 5.4.3.1), true lease and financial lease do not differ in terms of legal structure, and both give rise to a divergence between ownership and possession. Therefore, there is no reason to treat financial lease and true lease differently in the aspect of publicity. In fact, lease may perform a function of security in the form of sale and lease-back, but registration of this form of security lease is neglected by the CCC. It is not persuasive to require registration of financial lease but allow other types of lease to remain invisible. It is conceivable that differentiating between financial lease and other types of lease will be particularly problematic in the application of art. 745 CCC.

16 《民法典》第745条：“出租人对租赁物享有的所有权，未经登记，不得对抗善意第三人。”
English translation: Art. 745 CCC: “In the absence of registration, the lessor’s ownership with respect to the object cannot be enforced against third parties acting in good faith.”

In 5.4.3.2, it is argued that possessory pledge is not visible to third parties and should be included in the register for corporeal movables and claims. Possession acquired by the pledgee does not make the right of pledge visible. The recognition of possessory pledge causes “*systemic costs*”.¹⁷ The CCC follows the traditional path and continues accepting possessory pledge. Because of the possibility of a conflict between possessory pledge and registerable charge, art. 415 CCC stipulates that the ranking is determined by the date of delivery and that of registration.¹⁸ A consequence of this provision is that potential third parties have to investigate both the possessory state of the corporeal movable and the register. It violates the principle that one property should have one method of publicity (see 2.2.3.2).

In the end, the CCC recognizes the purchase money charge (PMC), a security interest able to prevail over other property rights of security when registered within ten days after the time of delivery. This form of charge performs a function similar to reservation of ownership, but they differ as to the grace period. The PMC has a grace period of ten days, while reservation of ownership has no grace period. This different treatment is not correct. In comparative law, it is a common practice to grant a grace period of registration to reservation of title (see 5.3.2.3.B). The PMC is recognized to avoid the supplier’s goods to be captured by floating charge created earlier for the benefit of the supplier-creditor or the loan-creditor who provides credit or finance for the purchase. According to art. 414 (1) CCC, the date of registration determines the priority of the right of charge. The recognition of the super-priority for the PMC allows the supplier-creditor or the loan-creditor to be not affected by the floating charge registered earlier.

6.2.2 Publicity of Claims under the Chinese Civil Code

6.2.2.1 Description of the Status Quo

Under the CCC, claims can be assigned without notifying the debtor involved. In this aspect, the CCC and the old law do not differ. According to art. 546 CCC, the formality of notification is only related to the issue of performance: the assignment cannot be invoked against the debtor who is not notified.¹⁹ Thus, notification is irrelevant to the assignment *per se*.

17 Phillips 1979 (1), p. 43.

18 《民法典》第415条：“同一财产既设立抵押权又设立质权的，拍卖、变卖该财产所得的价款按照登记、交付的时间先后确定清偿顺序。” English translation: Art. 415 CCC: “Where the same property is subject to pledge and charge, the proceeds out of auction or sale of the property shall be distributed according to the ranking determined by the time of registration and delivery.”

19 《民法典》第546条：“债权人转让债权，未通知债务人的，该转让对债务人不发生效力。” English translation: Art. 546 CCC: “If the creditor who assigns the claim does not notify the debtor, the assignment has no binding force on the debtor.”

However, the CCC follows the Property Law (2007) by providing a different rule for the pledge of receivables, i.e. the pledge of monetary claims. In art. 445 (1) CCC, pledge of receivables cannot take effect until the pledge is registered and visible to third parties.²⁰ Two things should be noted. One is that notification to debtors is irrelevant to the pledge of receivables. The other is that registration is constitutive for the pledge of receivables, and only an agreement of pledge does not suffice. Thus, the legal effect of registration here is different from the legal effect of registration of charge, financial lease, and reservation of ownership of corporeal movables. In the latter situations, registration only has declaratory effect.

In addition, registration plays an important role in a type of transaction concerning receivables: factoring. In the CCC, factoring is regulated as a specific contract in Chapter 16 of Section 2 (Specific Contracts) of Book 3 (Contracts). Factoring arises in the situation where the creditor assigns existing and/or future receivables to the factor, who in turn supplies services including provision of finance, management and collection of receivables, or provision of security for the payment by the debtor (art. 761 CCC). Factoring is necessarily connected with the assignment of claims, regardless of whether the factor has a right of recourse against the assignor (art. 766 and art. 767 CCC). The CCC establishes a completely new provision for competing factorings. If a receivable is under multiple factorings, the priority between competing factors is determined first according to registration, and, in the absence of registration, notification to the debtor involved (art. 768 CCC).

《民法典》第768条：“应收账款债权人就同一应收账款订立多个保理合同，致使多个保理人主张权利的，已经登记的先于未登记的取得应收账款；均已经登记的，按照登记时间的先后顺序取得应收账款；均未登记的，由最先到达应收账款债务人的转让通知中载明的保理人取得应收账款；既未登记也未通知的，按照保理融资款或者服务报酬的比例取得应收账款。”²¹

As a result, neither registration nor notification is relevant to the assignment of claims *per se*, but both formalities are relevant to the ranking of conflicting factorings. Art. 768 CCC is a rule to only regulate a conflict between factorings. In the situation where there is a conflict between a factoring assignment and an ordinary assignment of the same receivable, art. 768 is

20 《民法典》第445条第1款：“以应收账款出质的，质权自办理出质登记时设立。” English translation: Art. 445 (1) CCC: “Where receivables are pledged, the pledge takes effect upon the registration.”

21 English translation: Art. 768 CCC: “Where more than one factoring contract is made with respect to a receivable, and the factors all claim their right, the factor who completes registration obtains the receivable in priority to the factor who does no registration; if all the factorings are registered, the factor who completes registration earlier obtains the receivable; if all the factorings are not registered, the factor who is mentioned in the earlier notification given to the debtor of the receivable obtains the receivable; all factorings neither have registration nor notification, the factors obtain the receivable in proportion to the finance provided or the reward for the service.”

not applicable. As a result, which assignment prevails depends on which one arises earlier.

For claims embodied within securities, registration does not apply. For example, where bills of exchange, promissory notes, checks, debentures, certificates of deposit, warehouse receipts, or bills of lading are pledged, the right of pledge comes into existence on the date of delivery of the document (art. 441 CCC). As to the pledge of bills of exchange, promissory notes, and checks, a conflict exists between art. 441 CCC and art. 35 Negotiable Instruments Law of the People's Republic of China. According to the latter provision, pledge of bills of exchange needs endorsement with a mark of "pledge" on the document. The conflict has existed since the Property Law (2007) entered into force, and the CCC does not resolve this conflict. From the perspective of publicity, it is apparent that a mark of "pledge" conveys more precise information than simple delivery of the document (see 4.2.3.5).

In addition to the pledge of securities, the claim embodied can also be transferred on the basis of the document according to relevant laws. For example, bills of exchange, which have to be made to order under Chinese law, are transferred in the way of endorsement.²² Moreover, the way of endorsement is also applicable to the transfer of promissory notes and checks.²³ The right of recovery embodied within warehouse receipts can be transferred through endorsement plus the warehouseman's signature or seal (art. 910 CCC).²⁴ Bills of lading are able to be transferred in the way of endorsement or delivery of the bill, depending on whether the bill is made to order or bearer (art. 79 Maritime Law of the People's Republic of China).

6.2.2.2 *A Brief Comment*

The preceding introduction shows that notification is not treated as a means of publicity for the disposal of claims under the CCC. Registration is applied to the pledge of receivables and the assignment of receivables in the situation of factoring. In general, this is in line with our argument that notification to the debtor does not qualify as a means of publicity (see 4.1.1.2). However, the current system of publicity for claims still needs to be refined.

In practice, receivables may be assigned in many other situations than factoring. For example, securitization often involves the assignment of a bulk of receivables. As has been argued above (see 5.3.2.1.D), it is desirable to include both pledge and the assignment of receivables in the register, except for in such special situations as novation, merger or division, and

22 See art. 27 Negotiable Instruments Law of the People's Republic of China.

23 See art. 80 and art. 93 Negotiable Instruments Law of the People's Republic of China.

24 In general, there is no reason to require the warehouseman's signature or seal. Transfer of the receipt and the claim embodied has nothing to do with the warehouseman. In practice, the warehouseman only bears a liability to return the goods to the holder of the receipt.

bank accounts. Only requiring factoring of receivables to be registered does not suffice: the factor (assignee) cannot ascertain easily whether the receivable involved belongs to the assignor. It is possible that the receivable might be assigned in a way other than factoring. Art. 768 CCC is a rule applicable only to conflicting factorings. Moreover, art. 768 CCC recognizes the formality of notification as relevant in determining the ranking of competing factorings in the situation where none of them is registered. This is groundless from the perspective of publicity, since notification does not qualify as a means of publicity. It can be seen from art. 768 CCC that the legislature does not deny the publicity effect of notification completely.

The legal effect of registration for pledge receivables should be modified. Under the CCC, registration yields a constitutive effect, and the absence of registration makes the pledge of receivables invalid. This is not compatible with the rule that registration only has declaratory effect in the situation of secured transactions concerning corporeal movables. Moreover, the constitutive effect is not in line with the fact that registration does not affect the factoring assignment *per se* and is only relevant in resolving the conflict between competing factorings. As argued above (see 5.3.3.1), registration should be granted with declaratory effect.

6.2.3 Publicity of Trust on Corporeal Movables and Claims

6.2.3.1 Description of the Status Quo

Trust as a legal concept was introduced in China by the Trust Law of the People's Republic of China (Chinese Trust Law) in 2001. According to art. 10 Chinese Trust Law, registration is a condition for creating a trust on "registerable property", namely property that needs to be registered according to laws and administrative ordinances.²⁵ Lack of registration will render the trust invalid. However, no trust of registerable property has been registered after the Chinese Trust Law entered into force. This is because there is not any law or administrative ordinance indicating how to register a trust, and it is unclear which public organ is responsible for registration.²⁶ Consequently, art. 10 Chinese Trust Law is useless and has never been applied in practice to date. Moreover, coordinating the registration of trust under trust law and the registration of property rights under property law is always problematic.

25 《信托法》第10条：“设立信托，对于信托财产，有关法律、行政法规规定应当办理登记手续的，应当依法办理信托登记。未依照前款规定办理信托登记的，应当补办登记手续；不补办的，该信托不产生效力。” English translation: Art. 10 Chinese Trust Law: “Where trust property shall be registered according to laws or administrative ordinances for the establishment of a trust, such property shall be registered. If the trust fails to be registered as required in the previous paragraph, it shall be made later; the trust shall be invalid if no trust registration is made.”

26 Ji 2019, p. 110.

It is often held that a trust of immovable property should be registered in the Immovables Register.²⁷ However, the Regulation on the Registration of Immovable Property (2014) is silent about registration of trust of immovable property. Likewise, trust of special corporeal movables (vessels, aircraft, and motor vehicles) cannot be entered in the corresponding register because registrars cannot find any provision requiring them to record trusts. Corporeal movables and claims are not treated as “registerable property” under art. 10 Chinese Trust Law. As a result, a trust of corporeal movables and claims does not need to be registered.

The first step has been taken in the field of registration of investment trusts. An investment trust arises in the following situation: individual investors (settlor and beneficiary) entrust their money to the trust company (trustee) which will then invest the money entrusted in the projects designated in advance, and the benefits out of the investment will be distributed to the investors. An investment trust is often called a “trust product” because it resembles a “product” for investors to buy. In 2016, the China Trust Registration Co. Ltd was established for managing the registration of investment trusts. It should be noted that this registration only covers the “trust product” and the beneficiary’s rights.²⁸ It is a register of “trust products”, instead of a property register. From the “trust products” register, it is impossible to know whether a thing is under trust.²⁹ Therefore, the problem of information associated with trust is not addressed by the “trust products” register.

The CCC does not address the issue of how to publicize the legal relationship of trusts to third parties. The Chinese Trust Law (2001) simply requires registration as a condition of creating a trust of registerable property in art. 10. However, this provision is never applied in practice, and it remains problematic as to how to coordinate the registration of trusts and publicity of property rights.

6.2.3.2 A Brief Comment

On the basis of our research in 5.5, it is proposed that trust of corporeal movables and claims should be included in the register for corporeal movables and claims. Where immovable property is subject to a trust, this trust should be recorded in the Immovables Register. Correspondingly, trust of intellectual property should be registered in the register of patents, trade-

27 Ji 2019, p. 112; Meng 2012, p. 123-125.

28 《登记管理办法》第9条：“信托登记信息包括信托产品名称、信托类别、信托目的、信托期限、信托当事人、信托财产、信托利益分配等信托产品及其受益权信息和变动情况。” English translation: Art. 9 Regulation on Registration: “The information registered include the name of the trust product, the type of the trust, the purpose of the trust, the term of the trust, the parties of the trust, the property entrusted, the distribution of benefits, the information concerning the beneficiary’s right and the change thereof.”

29 Ji 2019, p. 111.

marks, and so on. It is time for the government to implement art. 10 Chinese Trust law and to coordinate the registration of trusts and the registration of property rights.

In accordance with art. 10 Chinese Trust Law, registration is a constitutive element for creating a trust. The absence of registration will preclude the trust from coming into existence. However, according to our discussion in 5.3.3.1, declaratory effect is more in line with the rationale of publicity, and registration should only be relevant to the legal effect against *bona fide* third parties. Thus, it is desirable to modify art. 10 by recognizing that registration only makes the legal relationship of trusts effective against third parties acting in good faith.

6.2.4 Construction of a Modern System of Registration for Corporeal Movables and Claims

The CCC not only aims to extend the scope of registration in the field of corporeal movables and claims, but also attempts to reform the old system of registration for secured transactions. On the basis of our discussion in 5.3, several proposals are raised for the future Chinese register for corporeal movables and claims.

6.2.4.1 *A Uniform and Comprehensive System*

Under the Property Law (2007), three registers are created for the publicity of charge of corporeal movables and the publicity of pledge of receivables. The first register is managed by the State Administration for Market Regulation, which is a part of the State Council. This register is applicable to the charge of corporeal movables provided by “enterprises, individual businesses, and agricultural producers”. The second register is managed by notary organs for the charge of corporeal movables provided by the other types of parties. For example, if a consumer intends to charge his or her household appliances or jewels to a creditor, the right of charge can be registered at a notary office located where the consumer resides. The third register is administered by the Credit Reference Center, an organ established by the People’s Bank of China. In reality, however, the register administered by the Credit Reference Center covers not only the pledge of receivables, but also financial lease, reservation of ownership, the assignment of receivables, trust of corporeal movables, and hire-purchase of corporeal movables. Among these types of transactions, only the registration of the pledge of receivables has a legal basis under the Property Law (2007).

Apparently, the current triple systems cause inconvenience for individuals trying to conduct registration and to obtain the proprietary information they need. For example, if an enterprise intends to pledge receivables and charge inventories, then two registrations have to be conducted: one relates to the register managed by the State Administration for Market Regulation,

and the other relates to the system administered by the Credit Reference Center. If a third party wants to know about the security right on the corporeal movables and receivables, that party needs to search the two registers. In 5.3.2.1, a comprehensive system of registration is proposed for corporeal movables and claims. For the sake of efficiency, the three registers should be unified as one system.

Drafters of the CCC are aware of the problem triggered by the triple systems and are determined to construct one comprehensive system. Unlike the Property Law (2007), the CCC intentionally does not stipulate the registry of corporeal movables and that of receivables. This leaves room for the State Council to construct a unified and comprehensive register in the future. It is more likely that the comprehensive system will be managed by the Credit Reference Center, because the current register administered by the Credit Reference Center is already available to various types of secured transactions concerning corporeal movables and receivables.

6.2.4.2 *A Self-Service and Digital System*

At present, the registration of the charge of corporeal movables provided by enterprises is governed by the Ordinance of Registration of Charge on Corporeal Movables, when the security is provided by “*enterprises, individual businesses, and agricultural producers*”. This ordinance was promulgated in 2007 and revised in 2016 by the State Administration for Market Regulation. Despite the latest modification, the system is still paper-based in some places, which is different from the digital register for the pledge of receivables administered by the Credit Reference Center.³⁰ Moreover, the system for the charge of corporeal movables is not nation-wide. Individuals have to submit the documents required to the local Administration for Market Regulation located in the county where the security provider resides.³¹ Where the security provider is another party than the “*enterprises, individual businesses, and agricultural producers*”, the right of charge needs to be entered in the register managed by notary organs. In general, this register is paper-based and decentralized.

Undoubtedly, it is desirable to replace the current paper-based and dispersive registers by a digital and nationally central system (see 5.3.1.2). Moreover, this digital and nation-wide system should also be a self-service system (see 5.3.1.3). It would allow parties to file the documents required and update the registration without having to go to the registry. Individuals would be entitled to search the system themselves without involving any registrar. In general, a self-service, fully-open, central and digital system can guarantee that the operation of the system will be fast and efficient, so that the smoothness of secured transactions will not be hampered.

30 Gao 2019, p. 204.

31 See art. 2 Ordinance of Registration of Charge on Corporeal Movables.

6.2.4.3 A Notice-Filing System

For the sake of efficiency and to avert the problem of information overload, it is necessary to restrict the information that should be filed. Under art. 5 Ordinance of Registration of Charge on Corporeal Movables, the current register for the charge of corporeal movables is, in essence, a transaction-filing system.³² The statement required to be filed has to show details of the legal relationship of charge, which affects smooth registration. For example, the statement needs to indicate the quality, location, and even ownership and the right of use of the collateral. This information is useless since the ownership of the collateral might pass to another person, the location of the collateral might change after the charge is granted, and the quality of the collateral has nothing to do with the secured transaction.³³

In this research, it is proposed that a notice-filing system should be constructed for corporeal movables and claims (see 5.3.1.4). The current register for the charge of corporeal movables should be transformed to be a notice-filing system to alleviate the impeding effect over the smooth operation of secured transactions. The notice filed only conveys a “warning” and “minimum information” to third parties. If searchers want to know more about the secured transaction, they can further inquire with the relevant parties who have a duty to disclose. A notice-filing system is necessarily associated with a duty of disclosure. Under this duty, searchers are able to obtain the detailed information they need.

6.3 CONCLUSION

Under the Property Law (2007), only the charge of corporeal movables and the pledge of receivables are included in a register. Other types of secured transactions are not visible. The CCC attempts to eliminate invisible secured transactions. It extends the scope of registration to the purchase money

32 《动产抵押登记办法》第5条：“《动产抵押登记书》应当载明下列内容：（一）抵押人、抵押权人名称（姓名）、住所地等；（二）抵押财产的名称、数量、质量、状况、所在地、所有权归属或者使用权归属；（三）被担保债权的种类和数额；（四）抵押担保的范围；（五）债务人履行债务的期限；（六）抵押合同双方指定代表或者共同委托代理人的姓名、联系方式等；（七）抵押人、抵押权人签字或者盖章；（八）抵押人、抵押权人认为其他应当登记的抵押权信息。” English translation: Art. 5 Ordinance of Registration of Charge on Corporeal Movables: “The Statement of Registration of Charge on Corporeal Movables shall record the following information: (1) the names and domiciles of the chargor and the chargee; (2) the name, quantity, quality, status, location, ownership, and the right of use of the property charged; (3) the type and amount of the secured claim; (4) the scope of the charge; (5) the term of performance by the debtor; (6) the name and the way of contact of the representative designated or the agent entrusted jointly by both parties to the contract of charge; (7) the signatures or seals of the chargor and the chargee; and (8) other information concerning the right of charge deemed by the chargor and the chargee as necessary to be registered.”

33 Gao 2019, p. 216-217.

charge, financial lease, reservation of ownership, and factoring. Nevertheless, some secured transactions and non-security rights remain outside the register, such as true lease, sale and lease-back, the assignment of receivables in other situations than factoring, and possessory pledge. Moreover, the CCC fails to afford attention to the problem of publicity of trusts of corporeal movables and claims, though trusts may perform a function of security in some situations.

In addition to extending the scope of registration, the CCC also aims to unify the current systems of registration for corporeal movables and claims. Under the Property Law (2007), three separate registers are involved in secured transactions, and some of the registers are a paper-based, decentralized, and transaction-filing system. Unification is desirable, but far from being sufficient. The future unified system should also be a self-service, digital, fully-open, and notice-filing system. Under this system, registration and search can be conducted without having to involve any registrar, minimal information is provided directly, and detailed information can be obtained by through further inquiries.