

Research on the Legal Effect of Guarantee in the Contract of Sale with Guarantee

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Abstract: As a kind of guarantee, conciliation guarantee has its own advantages and is often used in social civil activities. However, as an atypical guarantee, its effectiveness has been controversial. In judicial practice, the assignment guarantee contract is often presented in the appearance of a different name, that is, the transaction mode of "called transaction, but in fact loan" appears. There are two contracts involved in such a transaction mode, namely the loan contract and the sale contract. As a creditor's right contract, loan contract has the effect of confirming creditor's right. However, there are different academic views and practice cases on the validity of sales contract, so how to view the validity of sales contract itself will become the focus of research. Along with the promulgation of relevant normative legal documents, such as "Nine People's Records" and "Civil Code", the guarantee system becomes more and more clear, and the consensus is reached on the effect of guarantee.

Keywords: Contract of sale; Security of assignment; Validity of claims; Effect of real right

1. Introduction

Assignment guarantee means that in the course of civil activities, when the creditor and debtor relationship is formed, in order to make the smooth performance of the debt, the debtor or a third party will make a joint decision to transfer the ownership of the subject matter to others. When the debt is not performed or on time, the creditor who has acquired the subject matter may be reimbursed first for the value of the subject matter. There is no clear provision in the Civil Code of guaranty of transfer, so it does not belong to the legal guaranty mode and is atypical guaranty. However, due to its many advantages, such as ease of financing, low cost in the transaction process and little influence from the third party, the non-typical guarantee method of transfer has been widely used by the parties in the practice of civil activities. However, because of its special structure, the assignment guarantee has been subject to many controversies since its existence. This paper will start from the theoretical and practical level, analyze the form structure of the transfer guarantee, and study its legal effect.

2. Grant the double effect of the existence of the guarantee

In civil practice, "borrowing act + buying and selling act" is the behavior mode of granting security. From a separate point of view, loan behavior is when the parties have reached an agreement, the contract between the two parties takes effect, so it belongs to a creditor's agreement behavior. The sale and purchase behavior includes two problems, namely the validity of the sale contract and the change of the real right, which involve both the creditor's right and the real right. From the perspective of contract, the assignment guarantee can be divided into two meanings. One is about the validity of loan contract and sale contract, mainly the validity of creditor's right contract. The other layer is about the validity of the guarantee, is about the validity of the real right. Therefore, borrowing and selling are independent but interrelated in the process of transfer and guarantee.[1]

3. The validity of a claim granted by a security

3.1. Validity of contractual obligations

There are two kinds of judicially valid theory and invalid theory for the confirmation of this kind of guaranty contract which is called "loan and sale". As for the invalid theory, its main reasons are that the contract violates the principle of legal real right, there is a false expression of intention of collusion and the target logistics pledge (pledge), so it is invalid. But the invalidity argument is weak. First, the transfer

guarantee guarantees the performance of debt in the form of transferring ownership, without creating new types and contents of real right, so it does not violate the provisions of the principle of legal real right. Second, for collusion false expression of intention, generally, the outside false expression of intention is deemed invalid, but for hidden real expression of intention, the effectiveness should be determined according to the specific situation, rather than a blanket affirmation of its invalidity. The real act hidden therein is the act of guarantee, which shall be deemed valid if it does not violate the provisions of Articles 144, 153, 154 and 155 of the Civil Code. If the provisions of Article 400 and Article 428 of the Civil Code are violated, the terms of pledge (pledge) involved in a security contract shall be invalid, but only this provision shall be invalid, which shall not affect the validity of the other parts of the contract. Finally, the transfer guarantee contract is the result of the autonomy of will between the parties, which reflects the need of this kind of mode in the society in practice. Therefore, this kind of transaction mode should not be prohibited, but should be guided to make its standardized development. To sum up, if the above two kinds of contracts are recognized as valid, the validity of the creditor's rights can be recognized within the scope of the contract.

3.2. The function of the sale contract

After determining the validity of the contract, the real right validity of the guarantee in the sales contract depends on how to understand the loan contract, the sales contract itself and the relationship between them.

3.2.1. From the perspective of formalism

Through the formalistic analysis, the sales contract should belong to the adjustment scope of Civil Code Contracts. However, according to Article 23, paragraph 1 of the Judicial Interpretation on Private lending, it should be adjusted as the scope of real right of security.

In terms of the form of the contract, the two parties signed a sales contract. Meanwhile, according to the provisions of Article 23 of the Judicial Interpretation of Private Lending, there is no invalid situation of the contract, and the contract should be performed according to the agreement. However, it is denied by false expression of intention in the judicial system. Then how to understand the provisions of Article 388 of the Civil Code and Article 23 of the Judicial Interpretation of Private Lending?

From the perspective of contract interpretation, if the parties accept the content of the contract, there will be two situations: one is to give priority to the parties' will, which is based on the autonomy of the will; The other is to test its true purpose through external expression of meaning and give priority to external aspects. Therefore, it is necessary to investigate the guarantee attribute of the contract.

As for the real right of guarantee, there are typical and atypical differences. At the same time, according to whether there is guarantee function and guarantee effect, Chinese scholars still have the distinction between the broad and narrow sense of guarantee. The broad sense of guarantee includes typical guarantee and atypical guarantee, while the narrow sense of guarantee refers to the guarantee with surety, subordination, supplementary guarantee function and guarantee effect.[2] Atypical guarantee does not belong to narrow sense because it only has guarantee function. Article 388 of the Civil Code and Article 23 of the Judicial Interpretation of Private Lending only describe the guarantee function and do not determine its priority. The sales contract plays an important role in realizing the guarantee, but its guarantee effect is not recognized in law, so it needs to obtain the guarantee effect in the legal sense through the real right relaxation. To sum up, from a strict sense, the sale contract does not have the guarantee function.

3.2.2. From the perspective of functionalism

Compared with formalism, functionalism is not restricted by legalism of type and content. In practice, the conclusion of this contract will be as follows: first, the ownership of the subject matter between the parties is transferred to the name of the creditor at the moment or within a short time after the conclusion of the contract; Second, after the sale contract is signed between debtors and debtors, it is agreed that the ownership of the subject matter shall be transferred only when the debt cannot be performed after the expiration of the performance period. In the first case, because the title of the property has been transferred, it is deemed to provide security for the debt. For the latter, the ownership of the subject matter is transferred under certain conditions. At this time, it is performed in accordance with the contract, and is not bound by the liquid contract. Therefore, under functionalism, the parties can sign the contract according to the principle of autonomy of will and do not have to be restricted by the framework of the principle of legal real right. Functionalism functionalizes ownership, and the "ownership" of the subject

matter becomes unimportant. [3] The ownership in the functional sense does not belong to the ownership in the general sense. Whether the sale contract between the parties has the guarantee function or performs the rights and obligations between the parties according to the contract depends on the specific circumstances. Therefore, it can be concluded from comparative analysis that, under formalism, the real legal effect of the parties' meaning determines the nature and validity of the contract, while under functionalism, the contract is determined by the purpose pursued by the parties rather than the contractual meaning of the parties.

4. The real right effect of the assignment

For whether the alienation guarantee has the effect of real right, according to the provisions of "Civil Code" and "Judicial interpretation of Guarantee System" of our country, it is believed that the publicity which has completed the change of property rights will produce the effect of real right. Such as real estate usually takes the form of registration, chattel is usually the form of possession, and equity is usually the form of transfer registration.

4.1. Act of real right

The change of real right based on legal action can be divided into two kinds: the change caused by the repayment of debt and the change caused by the non-repayment of debt. The former includes the most typical sale contract, the latter is gift, abandonment, etc. [4], and the expression of the guarantee is sale contract, so it belongs to the former. Real right behavior is the legal behavior of real right effect, its content is the meaning of real right change, is the core element of real right. [5]

For the theory of real right act, there are two kinds of debate: formalism and meaning. In the doctrine of meaning, the change of real right only needs the parties' meaning of creditor's right. [6] In formalism, compulsory registration and delivery of immovable property are the elements of real right change, because it believes that real right change under meaningfulism is too secret and damages transaction security.

As for the independence of the real right act, according to Article 597 of the Civil Code · Contracts, the cause and result of the change of the real right can be identified and distinguished, which is to distinguish the creditor's right act from the real right act. The affirmation of the independence of the real right act means that the consent of the creditor's right and the consent of the real right must be confirmed when the real right is changed. The transfer of ownership of the subject matter is a form of the transfer of creditor's rights, so the completion of the transfer must be made public to the change of property rights. According to Article 209 and 224 of the Civil Code, which stipulate the changes of the real right of movable property and immovable property respectively, formalism is adopted in our country. However, according to Article 32 of the Company Law, whether or not registration can only produce antagonistic effect, so it can be inferred that the shareholding change mode is meaning rather than formalism. At the same time, it can be found from Article 8 of Jiu Min Ji that the shareholding changes of limited liability companies are formalistic.

4.2. Validity recognition of real right

According to Article 68 of "Judicial Interpretation of Guarantee System" and Article 71 of "Jiumin Ji", it can be seen that the disclosure of property rights is the premise of obtaining the priority effect in the guarantee of transfer. Therefore, the change of ownership should be the constituent element in the guarantee of transfer, and the buying and selling behavior shown in the guarantee of transfer also has the characteristics of guarantee. To sum up, it can be known that the completion of the property right publicity can be recognized only if the constitutive elements of the sale contract and the guarantee are present in the assignment guarantee.

Regarding real estate, the Civil Code of our country stipulates that the formalism mode, the change of real property must be registered as the requirement. Whether it is a gift, a sale or a transfer guarantee, the real estate needs to be registered in order to be considered to have been publicized and to have real right changes.

For chattel, the general principle of publicizing the real right change of chattel is delivery, which can be divided into two situations according to whether registration is required. First of all, for the chattel that does not need to be registered, the delivery is public notice, and the real right changes after the

delivery. As for the movable property that needs to be registered, it needs to be recognized in several aspects: First, according to the provisions of Article 63 of the Judicial Interpretation of the Security Law, movable property needs to be registered in the legal registration institution before it can have the real right effect. Secondly, Article 225 of the Civil Code stipulates the public requirements for special movables such as motor vehicles, ships and aircraft. Since this article only regards registration as the antagonistic elements, and does not explicitly stipulate the occurrence elements of real right change, the general system of chattel right change can be adopted, that is, the combination of creditor's right and payment method. Title is transferred when the subject matter is delivered.

There are three approaches to concept delivery. The first is simple delivery. Since the chattel has been occupied before the change of real right, the real right will be delivered at the same time when the parties reach an agreement [7], which is also stipulated in Article 226 of the Civil Code. The second is the instruction delivery, due to the involvement of a third person, the consideration factor increases, so the third person needs to agree to deliver, to complete the publicity. Finally, it is the modification of possession. Because in the guarantee of transfer, the publicity of property rights is difficult to be known by the outside world, so the completion of the publicity cannot be recognized in this case.

4.3. Effect of real right
In the past, there was a great dispute over the contract of guarantee, which led to the phenomenon of different judgments in the same case. After the promulgation of Jiu Min Ji, Article 66 affirms the guarantee function of the conveyance guarantee contract. Later, with the promulgation of the Civil Code, Article 388 affirms the effect of conveyance guarantee from the legislative level.

The guarantee of assignment itself is not in the scope of the real right of the security, but it plays the function of the guarantee in fact through the way of transferring ownership. Based on the analysis of Articles 63 and 68 of Judicial Interpretation of Guarantee System and Article 71 of Jiumin Ji, it can be concluded that in order to realize the effect of real right of transfer of guarantee, the following contents should be satisfied: First, the guaranteed property should be transferred to the creditor's name in form. Usually, the creditor and the debtor have no real purpose of the sale, but through the sale contract, the transfer of the secured property. Generally speaking, there is no real sale intention between the parties, but only through this way for the transfer of guaranteed property. Secondly, there are generally two contracts in the guarantee of transfer, and the sale contract is subordinate to the loan contract. The sale contract plays the function of providing guarantee for the loan contract, but does not have the meaning of real ownership transfer. Since there is no real intention to transfer property ownership between the two parties, usually the two parties will agree in the contract that the creditor has the right to perform the sale contract or dispose of the guaranteed property when the debt cannot be performed. Thirdly, it has completed the publicity of property right change. It means that in the change of real right, only through a certain way of publicity can a certain legal effect be produced. Generally speaking, registration or delivery is the public way of real right change, and the formal legal real right change can only occur after the completion of the formula.

5. Conclusions

To sum up, in the judicial practice of our country, "nominally for sale, actually for loan", this is a common way to give guarantee. In the case of the relaxation of the principle of legal real right, the sale contract can be regarded as a guarantee for the debt generated by the loan contract according to its implied meaning, and play the role of guarantee. At the same time, it should be noted that in the case that there is no explicit expression of guarantee in the sales contract, the principle of differentiation should be adopted and specific analysis should be carried out, which is also a challenge for functionalism. And for formalism, it also needs to go through multi-dimensional and multi-factor consideration, and give comprehensive consideration to the contract. Therefore, the answer obtained after the above analysis is to combine formalism and functionalism, which can improve the understanding of the contract, from the form, name and other external aspects of the contract to the purpose, function and other internal aspects of the contract, so as to more accurately understand the characteristics of the sale contract with guarantee.

In terms of legal provisions, according to Article 388 of the Civil Code, it can be seen that this article recognizes the validity of creditor's rights in the contract level. At the same time, the guarantee of assignment has not only the effect of creditor's right, but also the effect of real right. According to Article 63 and 68 of Judicial Interpretation of Guarantee System and Article 71 of Jiumin Ji, it can be concluded that the transfer guarantee has the effect of real right. However, as an atypical guarantee, it can only obtain the effect of real right by referring to the way of typical guarantee to complete the publication of

the corresponding changes in real right.

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