

On The Object of Floating Guarantee

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Abstract

The object of rights is the element of rights and the basis of the nature of rights. As a floating guarantee system aimed at solving the financing difficulties of small and micro enterprises, its object is physical assets such as production equipment, raw materials, semi-finished products and products, with floating, aggregation and non-transfer of management rights. The particularity of floating guarantee object meets the financing needs of enterprises, especially small and micro enterprises, and has advantages over traditional guarantee system in solving the financing difficulties of small and micro enterprises. Limiting the object of floating charge to "entity" assets for mortgage is conducive to protecting the interests of creditors, but the scope of the subject matter is too narrow, which severely limits the use of floating charge by small and micro enterprises in financing, thus affecting the full play of the advantages of floating charge system in the financing of small and micro enterprises. According to the actual situation of our country, our country should appropriately expand the scope of the object of floating charge and regard the property right as the object of floating charge, while based on theoretical and practical considerations, real estate should not be the object of floating charge.

Keywords

Floating guarantee, object, particularity, advantage.

1. Introduction

Floating charge system is an important and special guarantee system created by the British court of equity, which is "one of the most delicate structures of equity". The industrial revolution in the 19th century made the British economy develop rapidly. With the increase of the number and scale of enterprises, financing is particularly important for enterprises. The traditional mortgage and pledge recognized by English common law can no longer meet the needs of financing. Floating charge came into being and has been continuously developed. Complying with the requirements of the continuous development of the modern market economy and drawing on the advanced experience of other countries, in order to solve the financing difficulties of small and micro enterprises, China's "Property Law" stipulates floating guarantee as a new type of guarantee. The establishment of floating guarantee system provides a new way to solve the financing problems of enterprises, especially small and micro enterprises, and is conducive to the sustainable and healthy development of small and micro enterprises. However, since the promulgation and implementation of the Property Law, the application of floating guarantee system in practice is not ideal. The main reason is the insufficient supply of relevant systems, especially the narrow provisions on the object of floating guarantee system. To discuss the object of floating guarantee is of great significance to break through the difficulties in the application of floating charge system in our country and to really play the role of floating guarantee system in the financing of small and micro enterprises.

2. Characteristics of the Object of Floating Guarantee

Floating guarantee means that the guarantor guarantees his debts with all or part of the existing and future property, and the guarantor still possesses and manages the property that has been set up with floating security. Once the debt settlement period expires or the parties agree to realize the mortgage, the secured property is determined and the creditor has the right to a priority for the secured property. The object of floating guarantee is the object of the rights and obligations of the mortgagee, that is, the subject of the mortgage. With regard to the scope of the subject matter of floating charge, Article 181 of the Property Law strictly limits the object of the subject matter of floating charge to movable property, which is specific to the production equipment, raw materials for production, semi-finished products that need further processing and products that can be supplied to the market. These movable assets can be either existing or acquired in the future. From the definition of floating guarantee, we can see that the object characteristics of floating guarantee are mainly embodied in the particularity of collateral compared with general mortgage.

2.1. Floating Nature of Collateral

The floating nature of collateral is the most important feature of floating guarantee and the essence of floating guarantee. In floating guarantee, the property that the mortgagor sets up floating charge can be existing property and future property, can be production equipment and raw materials, can also be finished and semi-finished products, not fixed on specific property. Before crystallization, the value of the collateral is "hovering over the property" and it is floating. The floating nature of collateral in floating guarantee is reflected not only in the increase or decrease of the number of collateral, but also in the change of the form of collateral. Reflected in the increase or decrease of the amount of collateral, the collateral will be in an increasing or decreasing floating state with the floating mortgager's transaction in production and operation; reflected in the change of the form of collateral, the form of collateral will continue to change with the floating mortgager's transaction in production and operation, such as raw materials into semi-finished products, semi-finished products into products, products sold and then purchased the original materials and so on. It is precisely because of the floating nature of the collateral that floating mortgage does not point to a specific mortgaged property, but to a constantly changing property scope. The wider the property scope, the stronger the ability of floating charge to guarantee the realization of creditor's rights. On the contrary, the smaller the property scope, the weaker the ability of floating charge to guarantee the realization of creditor's rights.

2.2. Collectivity of Collateral

The aggregation of collateral is another significant feature of floating guarantee, which makes the overall value of mortgaged property prominent. In the process of the development of the security interest system, the aggregates have the advantage of not being able to obtain or gain more exchange value when they enter the exchange field in a holistic manner. Therefore, the collective property is guaranteed more than the individual property. Guarantees are more efficient, and collective guarantees are increasingly used in secured transactions and are increasingly being valued. It can be said that the establishment of guarantees by collectives represents the future development trend of the guarantee law, and floating guarantee are an important manifestation. A floating guarantee is not set on a particular property, and the mortgaged property is an unspecified collection of existing and future property. The floating guarantee object may be real property such as land and factory owned by the floating mortgagor, or movable property such as machinery and equipment, inventory materials, products, semi-finished products, etc. It may be the property owned by the floating mortgagor when signing the mortgage contract, or it is the property acquired by the mortgagor in the production and operation after signing the mortgage contract.

2.3. Non-Transferability of the Right to Administer Collateral

The failure to transfer the management rights of collateral, does not affect the full utilization and independent control of collateral, is the biggest feature of floating guarantees, and is also the key to the difference between floating guarantees and fixed mortgages. In traditional mortgage, the mortgagor can only possess and use the mortgaged property after setting the mortgage on the specific property, and can't dispose of the mortgaged property freely. Unlike traditional mortgage, in floating guarantee, the mortgagor can not only possess the floating charge, but also continue to use the floating charge in production and operation. More importantly, the mortgagor retains the right of free disposal of the mortgaged property until the mortgaged property is specific. That is to say, in floating charge, the mortgagor sets up floating charge on all or part of his property, which has no substantial impact on his normal production and business activities, and disposes of the mortgaged property according to the needs of the actual business activities. The mortgaged property can be disposed of by means of sale, transfer and debt settlement, regardless of whether it is within the scope of the mortgaged property or not. This feature has both advantages and disadvantages. From the point of view of the mortgagor, without affecting the normal business activities of the enterprise, it can greatly benefit the financing of the enterprise, thus providing financial support for its development. From the point of view of the mortgagee, because of the uncertainty of the security property, if the mortgagor has serious difficulties in operation or other circumstances lead to the mortgaged property. If the quantity of production is obviously reduced, the purpose of guaranteeing creditor's rights by setting up floating charge will be greatly discounted, which is not conducive to protecting creditor's interests.

3. The Advantages of the Particularity of Floating Guarantee Object in Solving the Financing Difficulties of Small and Micro Enterprises

After more than one hundred years of development, floating guarantee system step by step formed and continuously mature, accepted by the law of many countries and regions in the world, and obtain "very beneficial", "extremely convenient" guarantee form praise, it must have other systems irreplaceable advantages. The particularity of floating guarantee object fits the financing needs of enterprises, especially small and micro enterprises. It has advantages that traditional guarantee system does not have in solving the financing difficulties of small and micro enterprises.

3.1. The Floating Nature of Collateral Expands the Financing Capacity of Small and Micro Enterprises

Small and micro enterprises need continuous input of outside capital in their continuous business activities. In this case, investors will generally ask borrowers to provide mortgage guarantee for them. In reality, small and micro enterprises generally have the characteristics of small business scale, less fixed assets, less collateral, and so on. In addition, most of the subject matter required by mortgage is real estate, while most of the property of small and micro enterprises is liquid property (such as inventory, receivable arrears, etc.), which causes the difficult financing dilemma of small and micro enterprises. In order to avoid the loss of the target value of the mortgage guarantee, the effect of the guarantee should touch the property acquired by the expected development of the enterprise. The most essential feature of floating guarantees is the floatability of collateral. The collateral in the floating guarantee does not point to a specific property, but grasps the total value of the mortgaged property as a whole, pointing to a constantly changing range of property. According to the provisions of Article 181 of the Property Law, the mortgagor to set up the floating mortgage of property can be the property of the existing and future property, which not only covers the small micro enterprise existing assets, including all assets it expects to acquire in the future, thus expanding the scope of setting

the mortgaged property, small micro enterprise can get more capital, which helps to expand the financing ability of small enterprises, making it a further development. Enterprises get more capital through financing, which promotes the sustainable and benign development of enterprises and the continuous development of the whole society and economy. Floating guarantee is particularly important for some enterprises with small existing capital but considerable expected income and small and medium-sized enterprises with high technical content and good development prospects to obtain financing and promote their development.

3.2. The Aggregation of Collateral Exerts the Whole Guarantee Value of Small and Micro Enterprises

In real economic activities, for most small and micro-enterprises, most of their assets are liquid property, generally lack of effective collateral, and it is difficult to provide a second repayment guarantee, which is an important reason for their financing difficulties. Floating guarantee can give full play to the whole guarantee value of small and micro enterprises when it is set up and realized. At the time of establishment, small and micro enterprises use all or one kind of movable property as collateral. When the floating guarantee is realized, all chattels owned by the enterprise at that time shall be taken as collateral. The advantage of doing so is that small and micro enterprises are an organic organization composed of various types of property. Because of the complementary characteristics of property, the total value of combining all property is higher than the sum of the value of a single property. Therefore, floating guarantee is mostly set on the whole property of small and micro enterprises (in some cases, it can also be a certain kind of property), which makes full use of the guarantee value of movable property of small and micro enterprises. When floating guarantee is realized, the security holder can sell the whole enterprise or take over the management of the enterprise through the property manager. Compared with the way of selling individual secured property sporadically, this way is more scientific.

The Non-Transferability of the Right to Administer Collateral Gives Small and Micro Enterprises Great Freedom of Operation

From the perspective of the value orientation of mortgage development, promoting the financing, making the best use of security goods, improving economic circulation and promoting economic development are the goals that they pursue diligently. In the case of general mortgage, the dominance of real right is prominent. Mortgagor can not only possess the mortgage, but also use the mortgage, and enjoy the income of the mortgage. However, its defect lies in the strict restriction of the disposition of the mortgage. In floating guarantee, the management right of collateral does not transfer, which is the key difference between floating guarantee and other guarantee methods. After setting up floating guarantee, small and micro enterprises retain the right of free disposal of mortgaged property until the mortgaged property is specified. That is to say, in floating guarantee, small and micro enterprises set up floating charge with all or part of their property, which has no substantial impact on their normal production and business activities, and can dispose of the mortgaged property according to the needs of actual business activities. They can dispose of their property by means of sale, transfer and debt settlement, regardless of whether they are within the scope of the mortgaged property or not. Neither does it require the consent of the holder of the security interest. For small and micro enterprises, floating guarantee gives them great freedom of operation. Without affecting normal business activities, they can get more financing, so as to provide more financial support for their development, and then promote the healthy, benign and orderly development of social economy.

4. Suggestions on Improving the Object Of Floating Guarantee

The scope of the object of floating charge is proportional to the guarantee ability of the floating mortgager. In order to promote the financing of small and micro enterprises and give full play to the advantages of the floating charge system, in other countries and regions, the scope of the object of floating mortgage has been stipulated quite extensively. For example, the object scope of floating mortgage in Britain is extremely wide, including chattel, real estate, intangible assets, external creditor's rights, etc. ; Japan's provisions on the scope of floating charge objects are the company's "total property", including movable property, real estate, concessions, etc., and have further expanded to goodwill, customer relationships and so on. Throughout China's Property Law, it only allows floating mortgage to be set up on four kinds of movable property subject matter, and these four kinds of subject matter are "entity" assets, without fully considering the intangible assets of enterprises is very important intellectual property rights, marketable securities and various rights and interests receivable. In floating guarantee, it is beneficial to protect creditors' interests to mortgage "entity" assets, but the scope of subject matter is too narrow. Small and micro enterprises can only set up floating charge with their production equipment, raw materials, semi-finished products and products, which severely restricts the use of floating charge in financing of small and micro enterprises, and makes them in a passive position most of the time, thus affecting floating. The advantages of the movable mortgage system can be brought into full play in the financing of small and micro enterprises. And in practice, on the one hand, different types of enterprises have different types of assets; on the other hand, with the continuous development and innovation of enterprises themselves, the types and quantities of assets they own are constantly changing, even for small and micro enterprises. Considering the actual situation of our country, we should expand the object scope of floating charge appropriately, and regard property rights as the object of floating charge. Based on theoretical and practical considerations, real estate should not be the object of floating charge.

4.1. Including Property Rights in the Object Scope of Floating Charge

Article 181 of the Property Law of our country does not provide for the object of floating charge, which is a closed legislative provision. That is to say, the object of floating charge is limited to the existing and future chattels such as production equipment, raw materials, semi-finished products and products. This is contrary to the legislative purpose of floating charge system to facilitate the financing of economic subjects in economic activities. It restricts the application of floating charge in practice and weakens the financing ability of economic subjects. The author believes that the scope of the object of floating charge in China should be expanded appropriately, and property rights should also be taken as the object of floating charge. The main reasons are as follows:

Firstly, property rights correspond to personal rights, mainly including intellectual property rights, non-patented technology in production and business activities, business secrets and accounts receivable enjoyed by the obligee, etc. These rights fully conform to the basic characteristics of the aforementioned floating charge, which not only conforms to the most important feature of the floating charge property, but also meets the floating charge. The prominent feature of "collectivity" of property is disposable, which can be used for sale, transfer, liquidation and so on.

Secondly, in today's era, China has raised intellectual property rights to the level of national strategy. With more and more attention paid to the development of intellectual property rights in China, under the guidance of national strategy, enterprises will undoubtedly follow the pace of national strategy and pay more and more attention to the development of their own intellectual property rights. In terms of rights, some countries have recognized that the rights of enterprises such as accounts receivable and bills of lading have become the object of floating

charge. Although the floating charge system in China started late, it can learn from other countries and make corresponding provisions to expand the scope of the subject matter of floating charge, so that the mortgagor can make appropriate choices according to his own actual situation when setting up floating charge. In order to enable the parties to have a greater choice when setting up floating charge and better guarantee the realization of creditor's rights.

Furthermore, with the development of social economy, property rights are becoming more and more important in property, and the property rights will be used as the subject matter of floating collateral together with the production equipment of enterprises, the raw materials for production, the semi-finished products that need to be further processed, and those that can supply the market, such as existing or will movable property. Avoiding the artificial separation of all the overall property of floating mortgagor, the overall value of the organic combination of various types of property will greatly exceed the sum of the value of the simple addition of each property, which greatly increases the overall value of floating charge property, better reflects the "best use" of the effect, it improves the ability of floating mortgagor to finance capital in economic activities, and more convenient for floating mortgagor to realize mortgage benefit.

4.2. Real Property Should Not Be Used as An Object of Floating Charge

The expansion of the object range of floating collateral in China should be carried out according to the actual situation, and real estate should not be the object of floating charge. The main reason is that the conditions for the establishment of real estate mortgages and floating charges are not the same. According to the provisions of article 187th of the Property Law of our country, the real estate mortgage implements the entry into force doctrine, that is, the real estate mortgage right is established from the time of registration, not registered, the real estate mortgage does not have the legal effect. According to the provisions of article 189th of the Property Law of our country, floating charge is the registration of antagonism, that is, the mortgage of floating charge is established from the time the written agreement signed by the parties enters into force, and non-registration is only not against bona fide third party. One of the advantages of floating charge system is to make it easier for market subjects to use the "aggregate" of mortgaged property to finance, to include real estate in the object range of floating charge, and the formalities that floating collateral needs to be handled when it is set up will be very cumbersome, which is contrary to the legislative purpose of floating charge system in China's Property Law. In fact, in other countries and regions where real estate is included in the object of floating collateral, its drawbacks have been more and more exposed in practice, and these drawbacks have not only been theoretically self-consistent, but also have various contradictions in reality. In Scotland, for example, the object range of floating charges includes real estate, but is widely criticized by academics and is considered by the academic community to be the foundation of the Scottish Property Law. In this way, the Property Law of our country excludes real estate from the object range of floating charge, which is reasonable.

References

- [1] Re Panama, New Zealand and Australian Royal Mint Company (1870) 5 Ch App P318.
- [2] L. S. Sealy. Cases and Materials in Company Law[M]. Butterworths 1985, P372.
- [3] Xu Jianping, Shi Ke: "A tentative discussion on the application of floating mortgage in the financing guarantee of individual industrial and commercial households," Journal of Yunnan University (legal edition), 5rd ed, 2016. (In Chinese)
- [4] Zou Hailin, Chang Min: "The manner and application of the guarantee of creditor's rights," Law Press, Beijing, 1998, pp.208. (In Chinese)
- [5] Li Linqi, Yin Fengli: "On the advantages of floating guarantee in solving the financing difficulty of small and micro enterprises," Journal of Jiamus Vocational College, 4rd ed, 2017. (In Chinese)

- [6] Xu Donggen, "Comparative study on the legal problems of floating guarantee," Shanghai Jiaotong University Press, Shanghai, 2007, pp.75. (In Chinese)
- [7] Li Linqi, Fu Qiqi: "Perfection of floating guarantee system in the financing of small and micro enterprises under the new economic normal," Journal of Xinxiang College, 7rd ed, 2017. (In Chinese)
- [8] Wo Qirong, "The superior position of creditor's rights in modern Law, "Wang Shujiang, Zhang Lei translation. China Encyclopedia publishing House, Beijing, 1999, pp.180. (In Chinese)
- [9] Pen Gui, "Study on the British floating charge system, "Law Press, Beijing, 2008, pp.232. (In Chinese)