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RESEARCH ON THE LITIGATION STATUS OF GUARANTOR IN GUARANTEE CONTRACT

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ABSTRACT

Due to the convenience of market transactions and economic development in our country, private lending exists in large numbers in our country. The existing lending relationship is based on transaction trust and in order to protect the interests of creditors and reduce transaction risks. Guarantee has become the important platforms and bridges to maintaining transaction security between the two parties. Disputes appear in various forms, and the forms of guarantees also change. The main forms are general guarantees and joint guarantees. Based on the different forms of guarantees, the guarantee responsibilities assumed by the guarantor are also different. The guarantor's litigation status and rights when participating in the lawsuit it will also be different. With the increasing role of guarantees in financial integration, Chinese laws have gradually refined and standardized their regulations. The Civil Code also revised a large number of guarantee contracts in the Guarantee Law. In particular, the presumption that there is no agreement is a general guarantee, which reflects our country's consideration of guarantee liability. Although it reflects the norms of our country's legislation on guarantees, there are still obvious problems. The most obvious problem is the conflict between substantive law and procedural law. According to the theoretical research of substantive law and procedural law, there will be conflicts. According to the theory of substantive law, in the general guarantee liability, when the creditor exercises the right to claim the debt against the guarantor, the debtor needs to be added as a co-defendant. However, in the litigation procedure, it does not seem to satisfy the requirement of necessary joint action for the trial of cases involving general guarantees. In joint and several joint guarantees, no distinction is made as to whether the guarantor has the same intention or not. Therefore, starting from the guarantee contract, this paper expounds the guarantee responsibility of the guarantee form, points out the conflict and the existing problems according to the theory of substantive law and procedural law, and further proposes to standardize and guarantee it from the perspective of our country's law.

Keywords: Guarantee, Guarantee Liability, Litigation Status of Guarantor

1. Introduction

In the revision process of the Civil Code, the meaning of guarantee has been revised. The Civil Code does not stipulate the meaning of guarantee, but the Guarantee Law has stipulated the meaning of guarantee: "The term "guarantee" in this law refers to the guarantor and the creditor. It is agreed that when the debtor fails to perform the debt, the guarantor performs the debt or assumes the responsibility according to the agreement." However, the "Civil Code" deletes its concept this time, considering the economic development and transaction complexity, most people will use the guarantee form of the contract, so the concept of guarantee contract is stipulated. Some scholars believe that "guarantee is the legal relationship between the guarantor, the creditor and the debtor, and it is a combination of the three groups of relationships: the main contract, the entrust contract and the guarantee contract." Some scholars believe that "guarantee is the contractual relationship between the guarantor and the creditor." But a guarantee is different from a guarantee relationship, which as a legal relationship is a contractual relationship. Guarantee is an act or a combination of the guarantor, the creditor and the debtor, and it is the combination of the guarantee contract, the entrust contract and the main contract.

To analyze the position of the guarantor in the litigation, the retrogression first needs to be based on the fact that the guarantor needs to take responsibility for the disputes over claims and debts between the creditor and the debtor. The key to the generation of guarantee responsibility and what role the guarantor is in and what kind of responsibility it undertakes is first established on the basis of the guarantee contract. The meaning of the guarantee contract is stipulated in Article 681 of the Civil Code: "The guarantee contract is to guarantee the realization of the creditor's right. The guarantor and the creditor agree that when the debtor fails to perform the due debt or the parties agree the guarantor performs the debt or assumes the responsibility of the contract.

(1) Definition of the concept of guarantor

In the guarantee contract, the guarantor is the party to the guarantee contract, who provides guarantee to the creditor and promises to provide the commitment to the debtor to perform the debt. However, in the main creditor-debt relationship, the guarantor is not the two parties to the main creditor's rights and debts, but in the position of a third party. The guarantor can be a natural person or a legal person. As far as a natural person is concerned, if the natural person does not have the ability to pay on his behalf and is also incapable of acting, he cannot engage in guaranty activities, and the guaranty contract should be invalid in this case. If a person with limited capacity for civil conduct acts as a guarantor, he needs to be ratified by a legal representative afterwards, otherwise the agency contract will be invalid. In addition to natural persons, legal persons can also act as guarantors. If the legal person has the capacity for civil rights, it can be considered that it has the capacity for civil conduct. Therefore, the guarantee provided by a legal person, except that the law prohibits the qualification of its guarantee subject (for example, state organs shall not be guarantors, non-profit legal persons and unincorporated organizations for the purpose of public welfare), the guarantee provided by legal persons shall not be based on the fact that there is no substitute for it. Solvency and void.

(2) Type of Guarantee

The guarantor's liability for and its litigious position in participating in litigation will vary depending on the type of guarantee liability it undertakes. According to the different guarantee methods, guarantees can be divided into two different types: general guarantees and joint and several liability guarantees. General guarantee means that when the principal debtor has no ability to pay off the debt after the debt repayment period, the guarantor will perform the debt or assume responsibility according to the stipulations of the guarantee contract; joint liability guarantee means that the parties agree in the guarantee contract that the guarantor and the debtor will pay the debt to the debtor Jointly and severally liable. In the joint liability guarantee, as long as the debt performance period expires and

the debt has not been paid, the creditor can choose any one of them (the debtor or the guarantor) to request it to pay off the debt.

The difference in the rights enjoyed by the guarantor is the main difference between a general guarantee and a joint and several liability guarantee. The guarantor of general guaranty has the right to refuse to assume the guaranty responsibility to the creditor before the main contract disputes have not been tried or arbitrated, and the debtor's property has been enforced according to law and still cannot perform the debt, and the general guarantor has the right of first lawsuit defense. However, if the guarantor undertakes joint and several guarantees, it cannot claim the debtor's property against the creditor if it has not been enforced and cannot be enforced through the above reasons. Other defenses other than the right to first sue the defense to oppose the creditor's request for liability. The creditor can choose the debtor, the guarantor, the debtor and the guarantor to be liable. To assume responsibility by means of joint and several liability guarantee, it must be clearly agreed; and if the guarantee method is not agreed or the agreement is not clear, it should be recognized as a joint and several liability guarantee in accordance with the previous "Guarantee Law". However, this time the Civil Code has been amended.

If the parties do not agree on the method of guarantee in the guarantee contract or the agreement is not clear, they shall bear the guarantee liability in accordance with the general guarantee. It can be seen that there is only one way to establish a joint and several guarantee, that is, the parties must make an explicit agreement in the contract; and there are two ways to establish a general guarantee: one is to explicitly agree in the contract, and the other is to make no agreement or agreement. Unknown is presumed to be a general warranty. The reason why my country's "Civil Code" should amend it should be based on the reasons for the guarantee. In our country, the guarantor's responsibility for guarantee is generally based on human mood or the family relationship between the two parties, and even the guarantor himself does not distinguish himself because of his trust in the debtor. Whether it is a general guarantee liability or a joint and several guarantee liability, if the legislation stipulates it as a joint guarantee, it can be said to be very unfair to the guarantor, and it is not conducive to the maintenance of trust interests, and the guarantor bears heavier responsibilities, thereby affecting the trading market environment. Therefore, my country's "Civil Code" has made different provisions on the way that the guarantor assumes the guaranty responsibility.

2. Relevant Provisions on the Litigation Status of Guarantors

(1) Litigation status of guarantor in general guarantee

The guarantor of the general guarantee is a supplementary liability for the main contract, and only after the main contract dispute has been tried or arbitrated, and the debtor's property is enforced according to law and still cannot perform the debt, will it bear the corresponding supplementary liability to the creditor. Except that the debtor's whereabouts are unknown and there is no property available for execution, the people's court has accepted the debtor's bankruptcy case; the creditor has evidence to prove that the debtor's property is insufficient to perform all the debts or loses the ability to perform the debts; Prior to this, it has the right of first-action defense, so from the perspective of procedural law, the creditor can only file a lawsuit against the debtor or apply for arbitration according to the previous agreement, and can only file a lawsuit against the guarantor when the property of the debtor cannot be enforced according to the law. In the process of litigation, because the court accepts the lawsuit of the parties, as long as there is a plaintiff and a clear defendant, the court should accept the specific lawsuit. However, in the general guarantee, if the creditor files a lawsuit against the guarantor alone, some courts will The plaintiff's lawsuit or claim is dismissed, and some courts add the debtor to the lawsuit as the defendant. The guarantor of the general guarantee alone cannot be the defendant, otherwise the party is ineligible.

(2) The Litigation Status of the Guarantor in the Joint and Several Liability Guarantee

The guarantor who bears joint and several liability is different from the general guarantor, and the guarantor who is jointly and severally liable can be either a defendant alone or a co-defendant. When the debtor fails to perform the debt when the debt is due or does not meet the agreement, the debtor can choose to sue the guarantor, or choose to sue the creditor, or sue the guarantor and the creditor at the same time and list him as a co-defendant.

When the creditor sues only the guarantor, the guarantor can stand alone as a defendant. Although the joint liability guarantor does not have the right of first-action defense, it enjoys the debtor's defense, that is, the defenses enjoyed by the general debtor's status and other defenses other than the right of first-action defense, to resist the creditor's request for liability. The guarantor who originally had no debt relationship with the debtor has the property of joint and several repayment. From this perspective, the guarantee liability in this situation can be understood as similar to a joint and several debt.

When the creditor is only suing the debtor, the guarantor may not be listed as a co-defendant. In the joint liability guarantee, the creditor has sufficient right of choice. When the creditor chooses to sue the debtor, the debtor can be the defendant alone. The creditor and the debtor are both parties to the main contract, so the debtor can be the defendant alone. At this time, if the creditor does not sue the guarantor, and there is no requirement for the guarantor to be added as a co-defendant, then the guarantor can temporarily not participate in the lawsuit.

When a creditor sues a guarantor and a debtor, the surety and the debtor are co-defendants. The creditor sues both the guarantor and the debtor at the same time, which is the most common way in practice. The guarantor who bears joint and several liability, when the debtor fails to perform the debt or the performance of the debt does not conform to the agreement, the guarantor has the obligation to perform the debt to the creditor based on the stipulations of the guarantee contract, and its status in performance is no different from that of the debtor. Of course, the creditor can sue both the guarantor and the debtor at the same time is a consideration from an economic point of view and to maximize the pursuit of debt fulfillment, and it is also a method that creditors choose the most in practice.

3. Legal Provisions and Problems Existing in Judicial Practice

(1) The general guarantee conflicts between the substantive law and the procedural law

From the perspective of substantive law, it is first to determine what kind of guaranty responsibility the guarantor bears, and then to talk about the litigation status. If the guarantor assumes a general guaranty, the creditor cannot file a lawsuit against the guarantor alone, nor can he act as a defendant alone. If the creditor only sues Guarantor, some courts add the debtor as a co-defendant. Therefore, from the point of view of substantive law, the general guarantee is a necessary joint action. However, the undertaking of guarantee liability not only needs to be regulated by the substantive law, but in the end, the creditor has to return to the litigation procedure to realize the creditor's right, and protect the exercise of the creditor's right through the litigation procedure. To analyze the problem from the perspective of procedural law is to first determine the party's status in the litigation, and then determine the party's legal responsibility accordingly.

Necessary joint action refers to a joint action in which one or both parties have the same subject matter, and the court must try them together and determine the unity of the subject matter in the judgment. However, the main contract and the guarantee contract are two different legal relationships, two different rights and debts, and the litigation objects are different. One is the guarantee legal relationship, and the other is the loan legal relationship. The litigation objects of the two are not the same. From the perspective of procedural law and the perspective of substantive law, there is a conflict.

(2) In the joint and several joint guarantee, there is no distinction as to whether the guarantor's intentions are the same or not

If the guarantor assumes joint and several guarantee liability, the creditor has the right to choose, and can choose the guarantor to sue, the guarantor can be the defendant alone, the guarantor can also choose the debtor to sue, and the debtor is the defendant alone; of course, the guarantor and the debtor can also sue jointly, and both parties act as joint defendant.

Whether the guarantor's intention is the same in the joint and several joint guarantee is different for what type of litigation the guarantor participates in. However, the substantive law of our country does not further distinguish whether the guarantor has the same meaning in the joint guaranty, but generally stipulates that the joint guarantors bear joint and several liability; the procedural law also does not make corresponding provisions, but the creditor is granted according to the substantive law. The right of choice determines the right of the creditor to sue. When the intentions of several guarantors to make guarantees are identical, The debt borne by the joint guarantor is a joint debt, and the litigation form of all guarantors as joint defendants is inherently necessary joint action. If the creditor only sues some guarantors, it is an omission of necessary joint litigants, and the court should add other guarantors as joint defendants. However, when the intentions of several guarantors to make guarantees are not identical, the nature of the debts borne by the guarantors is joint and several debts, and the lawsuit caused by the joint and several debts is an ordinary joint action. The creditor can sue some of the guarantors, or all co-guarantor. It is not a party ineligibility to sue a guarantor alone. Whether all guarantors have the same meaning will affect their substantive rights and litigation rights. But our country's substantive law and procedural law do not distinguish whether the guarantor's intention is the same in the joint guarantee. In judicial practice, the judge does not distinguish whether the joint guarantor directly has a common expression of intention, but directly conducts the trial according to the lack of identity of the expression of intention, and conducts the trial according to the object of the creditor's lawsuit as the defendant.

4、 The legal system related to the guarantor's litigation status is improved

(1) Issues of additional parties in general guarantees

The general guarantor bears the supplementary liability and enjoys the right of first lawsuit defense. The guarantor cannot be required to assume the guaranty responsibility until the people's court or arbitration institution cannot enforce the debtor's property. In judicial practice, when the court only sues the general guarantor, the practice of different courts is different, and confusion occurs in practice. Some courts dismissed the claims of creditors, while others added debtors as co-defendants. The fact that the debtor is added as a co-defendant also proves that the general guarantee is necessary for a co-action from the point of view of substantive law.

From the perspective of procedural law, the litigation status of the parties should be determined first and then the responsibilities of the parties should be determined. However, the main contract dispute and the guarantee contract relationship belong to different legal relations and are not the same litigation object, and the litigation form is obviously not necessary for joint litigation. There is no need to determine the unity between the guarantor and the creditor or between the debtor and the creditor, and there is no need for a joint lawsuit. The litigation form of debt disputes in the case of general guaranty should be an ordinary joint lawsuit, and the court may rule that the principal debtor loses the lawsuit and the general guarantor wins's judgment.

If the general guarantor gives up exercising the right of first-action defense, the status of the general guarantor is equivalent to that of the joint and several liability guarantor, and there is no chronological restriction on the repayment, and the creditor can ask it to bear the responsibility for repayment. The object of the indictment is listed as the defendant in the trial case. However, if the

general guarantor exercises the right of defense first, it cannot add a guarantor when the creditor sues the debtor. Therefore, the same normative operation is required in judicial practice. If the creditor only sues the general guarantor, the lawsuit is uniformly dismissed, and it is explained to the creditor that the lack of necessary co-litigants cannot proceed, the guarantor and the debtor are sued as co-defendants, and the creditor is informed that he can apply for additional guarantors as co-defendants.

(2) Whether the joint and several joint guarantees have the same intention of the guarantor

Judgment is made according to whether the guarantor's intention is the same in the joint and several joint guarantee. In the state of litigation, the guarantor's litigation status is different. When the guarantors of the joint guaranty have the same direct intention, when the creditor sues some of the guarantors, other joint guarantors should be added as co-defendants, otherwise, the parties are not eligible. The litigation arising from this situation is an inherently necessary class action. However, if the joint and several joint guarantors have different expressions of intent and are in an independent relationship, the creditor has the full right to choose and sue several guarantors, and the parties are eligible.

This is an ordinary class action. However, in our country's law and judicial practice, there is no stipulation on whether the guarantor has the same intention in joint and several joint guaranty, so that in judicial practice, judges do not consider the litigation status of the joint guarantor with the same intention. For the joint and several joint guarantee of the sameness of meaning, there is only one guarantee of intention between the joint guarantors, the guarantors bear a common debt, the guarantors have common rights and obligations, and are inseparable. Therefore, the form of litigation between creditors and guarantors is inherently necessary for joint litigation, and creditors must sue all joint guarantors together. A clear distinction is also conducive to saving judicial resources and better realizing procedural justice.

5、 Conclusion

Guarantee liability is both a substantive issue and a procedural issue. The guarantor's liability and the guarantor's litigation status are studied from the perspective of substantive law and procedural law, and the problems existing in joint and several joint guarantees are analyzed. Combined together to study the issue of the litigation status of the responsible person. By pointing out the different handling situations in judicial practice when the creditor only sues the guarantor in the general guarantee, and whether the expression of intention in the joint guarantee is the same, it points out some problems and deficiencies in our legal system, and furthermore It is regulated through the legal system and refined and implemented through judicial practice.

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