

# *Research on the Legal Structure and Effect of Assignment Security*

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**Abstract:** In practice, given that statutory security devices are often insufficient to fully protect the interests of obligees, contracting parties have increasingly resorted to creating contractual arrangements with security functions to mitigate the risk of creditor losses. Among these non-typical security devices, the security transfer has emerged as a particularly efficient and cost-effective mechanism. In recent years, its role in market transactions has become increasingly prominent, and its use in judicial practice has grown significantly. However, the Civil Code and related judicial interpretations lack clear provisions on several contentious issues surrounding security transfers, including their legal nature, validity, potential violation of the numerus clausus principle in property law, and methods of public notice. Against this backdrop, this paper examines these unresolved questions by analyzing Article 388(1) of the Book on Real Rights in the Civil Code, Article 23 of the Judicial Interpretation on Private Lending, and Article 68 of the Judicial Interpretation on Security Systems, while also considering the current state of judicial practice in China.

## **1. Introduction**

As an atypical guarantee, as a form of atypical guarantee, transfer guarantee plays an increasingly important role in market economic activities. With the complexity and diversification of economic activities, it is difficult for traditional guarantee methods to fully protect the legitimate rights and interests of creditors. Market entities reduce the risk of creditors by creating contract arrangements with guarantee functions, and assigning guarantees come into being. Compared with traditional guarantee methods, guarantee has significant advantages of high efficiency and low cost, and is therefore widely used in judicial practice.

However, there are still many unclear aspects in the current Civil Code and relevant judicial interpretations on the transfer guarantee system. Specifically, there are great controversies in the theoretical and practical circles regarding the core issues such as the legal nature of the transfer guarantee, the determination of effectiveness, coordination with the statutory principle of property rights, and the requirements for public disclosure. This legislative ambiguity brings difficulties in application to judicial practice.

This article takes Article 388, paragraph 1 of the Property Rights Section of the Civil Code, Article 23 of the Supreme People's Court's Provisions on Several Issues Concerning the Application of Laws in the Trial of Private Lending Cases, and Article 68 of the "Interpretation of the Supreme People's Court on the Application of the Guarantee System of the Civil Code of the People's Republic of China" as the research basis, and combines typical cases in my country's current judicial practice to conduct a systematic study on disputed issues in the transfer guarantee system. Through theoretical analysis and practical investigation, we aim to provide reference for improving my country's transfer guarantee legal system.

## **2. Overview of the Theory of Assignment of Security**

### **2.1 Nature of the Assignment Guarantee**

According to different categories, guarantees can be divided into different categories. Taking whether the Civil Code explicitly stipulates as the classification standard, guarantees can be divided into typical guarantees and atypical guarantees. Article 388, paragraph 1 of the Civil Code openly stipulates other contracts with guarantee functions. With the continuous development of the market economy, in order to protect the interests of creditors, transfer guarantees with high efficiency and low cost agreed upon by the parties have appeared in the public's vision, and cases regarding the application of transfer guarantees are common in practice.

The paper Assignment and guarantee is a theoretical concept, and currently, my country's legal and judicial interpretations do not stipulate its concept. Generally speaking, the transfer guarantee is to secure the realization of the debt and the performance of the debt. It formally transfers the property owned by the debtor or owned by a third party to the creditor. When the debt is paid off, the creditor returns the transferred property to the debtor. If the debtor fails to perform the debt or other circumstances in which the debt is realized, the creditor may be given priority to repay the property after liquidation.<sup>[1]</sup> In the legal relationship between assignment and guarantee, the debtor is formally the guarantor, actually the owner of the guaranteed property, and the creditor is formally the security holder, actually the possessor and transferee of the guaranteed property. In short, the assignment guarantee called "buying and selling" is actually a "guarantee" and has a dual expression of intention. It is formally the transfer of property or rights to the creditor's name, but in fact it is to guarantee the principal creditor-debtor relationship, that is, the loan contract between the creditor and the debtor. The key point of analyzing this problem is to distinguish between the parties' true intentions and false expressions. Article 388, paragraph 1 of the Civil Code affirms the validity of an atypical guarantee contract, but there is no explicit provision on assignment guarantee. Therefore, it is of great theoretical value to clarify whether assignment guarantee violates the statutory property rights and whether assignment guarantee is a property rights guarantee.

#### **2.1.1 Is the transfer of guarantee violating the statutory statutory of property rights**

Article 116 of the Civil Code stipulates the basic principles of statutory property rights. So does the assignment guarantee not expressly stipulated by law violate this principle? Property rights must be statutory. Can the effectiveness of the assignment guarantee be recognized after it is not statutory? These two issues are a lot of discussions on transfer guarantees in the academic community, and different scholars hold different views. This article believes that transfer and guarantee does not violate the principle of statutory property rights.

First of all, the application of the principle of distinguishing between property and debt. The key to the application of this principle is to distinguish between burden behavior and disciplinary

behavior. If both parties establish, change, transfer or eliminate property rights by signing a real estate sale contract, the contract will be established and effective when it meets its valid requirements. The parties are bound by the contract, one party has an obligation, and the other party has the right to claim the performance of the obligation, that is, the act of burden. For the disciplinary act, if the property rights are not registered, the property rights will not be valid, but will not affect the validity of the contract. Therefore, the assignment guarantee contract is established and effective, and will not affect the provisions of both parties on the transfer of property or rights, and will not have the expected effect of the parties. The establishment and effective entry into force of the transfer guarantee contract is a matter of creditor's rights and has nothing to do with property rights.

Secondly, as an atypical guarantee with a guarantee function, the transfer guarantee has similar efficacy to the mortgage right stipulated in the security right in the current Civil Code compilation system. The purpose is to use the exchange value of the property to secure the realization of the debt and the performance of the debt. The statutory property rights emphasizes that parties shall not create new types of property rights without provisions, and assigning guarantees as atypical guarantees are a type of security right. Article 68 of the "Interpretation of the Guarantee System of the Civil Code" clarifies the formal and substantive characteristics of the assigning guarantee, and also stipulates the circumstances in which the right of priority compensation is applied. This clause can be considered as the relevant legal basis for the assignment of guarantee. The assignment of guarantee is only to transfer the property or rights of the debtor or third party in a formal manner, and is actually to guarantee the performance of the debt. It is a type of security right, not a new type of property right was created.

Finally, the principle of statutory property rights should be appropriately eased and applied. Laws have natural lag. At present, with the rapid development of the economy, new types of guarantee methods spontaneously formed by transaction subjects have been constantly emerging in the public's vision. If strictly abide by the principle of statutory property rights, it will hinder the emergence and application of new types of rights, and will lead to the insemmination in judicial practice that cannot be fully resolved, which is not conducive to releasing more economic vitality in the process of market transactions. Therefore, it is highly reasonable to interpret and apply transfer guarantees from the perspective of the principle of statutory easing of property rights, rather than denying its effectiveness on the grounds of strictly abiding by the principle of statutory right.

### **2.1.2 Is the transfer guarantee a property guarantee?**

Depending on the type of subject matter, guarantees can be divided into property insurance, PICC and monetary insurance. Article 395 of the Civil Code openly stipulates the scope of mortgaged property, because mortgage and transfer guarantee have certain similarities. Even if the law does not clearly stipulate the scope of property assigned to the guarantee, the provisions of the law on the scope of mortgaged property can be applied. From judicial practice, it can be seen that the scope of the transfer and guaranteed subject matter is very wide, including real estate, movable property and property rights. Therefore, transfer guarantee is a kind of property insurance.

## **2.2 Legal structure of assignment guarantee**

The legal structure of assignment guarantee determines the establishment and effectiveness of assignment guarantee. There are many theoretical views on the construction of legal structures of assignment guarantees. Overall, the legal structure of transfer guarantees is mainly divided into two categories: one is the ownership structure model and the other is the security right structure model.

### 2.2.1 Ownership construction mode

The theoretical basis of the ownership construct model originates from the trust in Roman law, which is analyzed and studied through the "assignment" of the external legal form in the transfer guarantee.<sup>[2]</sup> This theory believes that assignment guarantee is a trust act. Therefore, by reasonably drawing on the relevant content on the legal attributes of trust behavior in Roman law to study the legal structure of transfer guarantees, the ownership structure theory can be further divided into two categories: absolute ownership transfer theory and relative ownership transfer theory.

The absolute transfer of ownership claims that the guaranteed property ownership should belong to the creditor, whether in internal or external legal relations. This ensures that the ownership of the security is transferred in form and substance, but when the creditor wants to transfer or dispose of the ownership of the secured property, the creditor needs to follow the prior agreements of the two parties in the contract and be subject to certain restrictions and restrictions. That is, the "debtorative constraint" on the ownership of creditors. This theory is too stereotyped in formally following the basic principles in the traditional property rights system of "absolute ownership" and "one thing, one right". This has also led to many problems in practice. Due to excessive emphasis on the absolute transfer of ownership, attaching importance to the superficial form of assignment guarantees, and ignoring the actual purpose of guarantees, the creditor is in an advantageous position and the guarantor is in a disadvantageous position, which seriously exploits the guarantor's rights, resulting in an imbalance in interests between the two parties.

The relative ownership transfer theory claims that if the transfer of ownership of the subject matter secured by the assignee is relative, in the internal legal relationship of the assignee, there is no transfer of ownership of the secured property, but in the external legal relationship, it only has the appearance of the right, which makes the third party believe that the secured property is owned by the creditor, but in fact the owner of the secured property is still the debtor.

However, the theory advocates that the assignment of guarantees formally reflects the creditor's enjoyment of "formal ownership", while in essence reflects the guarantor's enjoyment of "substantive ownership". This is equivalent to admitting that there are two different ownership rights on the same subject matter so this violates the principle of "one thing, one right" and destroys the integrity of the object and the integrity of ownership.<sup>[3]</sup> Because this view has many controversies in the theoretical community, most of them are not recognized and adopted.

### 2.2.2 Security Right Construction Model

Compared with the ownership structure model, the security rights structure model focuses more on the true expression of intention between the two parties, emphasizing the substantive core content of the assignment of guarantees and the issue of how to realize the secured debt. This theory holds that after the assignment guarantee is established, the assignment security right enjoyed by the security holder is actually an incomplete ownership restricted by property rights. For the guarantors, they enjoy both the right to claim property rights and the right property rights.<sup>[4]</sup> Therefore, in the transfer of security, what the creditor obtains is a security right, not a security right, and the guarantor is still the owner of the subject matter. Under the specific security right construction model, different scholars have different views, such as the authorization theory, the second paragraph property rights change theory, the mortgage right theory and the security right theory.

The authorization theory claims that when establishing an assignment guarantee, the true intention of both parties is not to transfer the ownership of the subject matter, but to authorize the

exchange right of the guaranteed subject matter to the creditor, so as to guarantee the performance of the debt in this way. Under this theory, the guarantor is still the owner of the guaranteed subject matter, and the creditor is only the security holder of the property. Although this theory sees the shortcomings of the ownership structure theory, in terms of institutional design, it leads to the debtor being in an advantageous position and the creditor being in a disadvantageous position, seriously exploiting the rights of the creditors, which in turn leads to an imbalance in interests between the two parties, which is not conducive to maintaining market transaction security and social fairness and justice. Although the guarantor formally transferred the ownership of the guaranteed subject matter to the name of the security holder, there was no real expression of intention of transferring the guaranteed subject matter between the two parties, which may lead to the expression of intention between the parties to constitute a false statement of conspiracy and increase the difficulties of judicial practice. Therefore, there are not many scholars who recognize this theory.

The second paragraph of property rights change claims that there were two changes in property rights during the establishment of the transfer guarantee. The first time is that the guarantor transfers the ownership of the subject matter through the modified method of possession and the subject matter is still possessed by the guarantor. The second time is when the security holder obtains ownership of the subject matter, the creditor should deduct the security right property that matches his or her creditor's share, and then transfer the remaining property rights to the guarantor through conceptual delivery. Some property rights received by the guarantor are called the guarantor's retention. Even if there are two changes in property rights of the secured property, the subject matter is still possessed by the guarantor. There are unavoidable problems when applying this theory in specific application, namely how to determine the security rights and property that is compatible with its debt share, how to guarantee it through registration, etc. The theory has many limitations in its application.

The mortgage right theory was the first time that Japanese scholar Professor Akira Yonekura proposed a mortgage right.<sup>[4]</sup> He believed that other theories have certain limitations in the scope of application of the subject matter, but the mortgage right theory applies to both movable and real estate. Regarding the true meaning of transferring a secured property, both parties define it as "transfer of ownership for the sake of guarantee." The assignment guarantee is defined as a right similar to the mortgage right, and the true intention of both parties to establish the assignment guarantee is clarified. After the assignment guarantee is established, if the debtor repays the due debt as agreed, the creditor shall return the secured property to the debtor. At this time, the purpose of the guarantee has been completed; if the debtor fails to perform the debt or other circumstances in which the debt rights are realized occur, the creditor may be given priority to repay the property after liquidation.

The security right theory is based on the Yonekura Akira's mortgage right theory, and Japanese scholars Masumi Yoshida and Ichiro Kato proposed it.<sup>[4]</sup> Therefore, some scholars believe it is a type of mortgage right theory. A transfer of security is regarded as a special form of security rights and a way to publicize the rights changes to different types of security properties. This will solve various problems in concept delivery. Professor Yoshida Masumiya advocates making different legal composition types for different assignments and guarantees for different subject matters. Specifically, for movable property transfer guarantees, the public announcement method is to mark the subject matter of guarantee to clarify the ownership; for real estate transfer guarantees, registration should be carried out in accordance with the provisions of the "False Registration Law".

### 2.2.3 Feasibility analysis of the adoption of security rights structure in my country

First of all, compared with the ownership structure theory, the security structure theory is more in line with my country's actual needs.<sup>[5]</sup> One of the important characteristics of a security right is the right of value. The security right guarantees the performance of the debt through the exchange value of the dominant property, thereby realizing the debt. The purpose of assigning guarantee is to protect the interests of creditors. If the debtor cannot repay the debt when it is due or the circumstances for realizing the security rights agreed by the parties occur, it is still necessary to pay attention to the "form" of the ownership of the subject matter has been transferred in form, and the creditors have the right to liquidate or dispose of the secured property. Therefore, this will make full use of the exchange value of the property and thus protect the realization of the creditor's rights. Creditors enjoy the same right to control property value as the creditor's share. After liquidation, the excess property creditor shall not make any use or dispose of it at will, and shall return it to the debtor. The debtor shall request the debtor to make up for the insufficient part. Its ultimate goal is to realize the creditor's rights.<sup>[6]</sup> The value right of use of things is more in line with the theory of security right construction.

Secondly, the theory of security right construction can better reflect the true intention of both parties and safeguard the legitimate rights and interests of both parties. The theory of ownership focuses too much on the formal characteristics of transfer of ownership, too much emphasizes the transfer of ownership, and ignores the performance of its essential guarantee debt. If the theory of security right construction is adopted, the problem of ownership construction can be avoided. In the theory of security right construction, the guarantor is the owner of the transfer of the secured property and the direct possessor, and the creditor is the security holder of the secured property. Even if the malicious creditor improperly disposes the subject matter, the debtor can also seek compensation based on the identity of the owner, and then fight against any third party.<sup>[6]</sup>

Finally, the theory of security right construction echoes the guarantee system of my country's Civil Code. There is no conflict. Assignment guarantee guarantees the performance of debts by formally transferring the ownership of the subject matter. When the debtor is unable to perform the due debt, it grants the creditor the right to liquidate and independently chooses to realize the implementation of the transfer of security rights such as the ownership liquidation method or the disciplinary liquidation method. This also fully reflects the characteristics of "formally transferring ownership". In addition, the relevant provisions on contracts with guarantee functions in Article 388 of the Civil Code also provide an open path for my country's transfer of security rights to adopt the security right structure theory.

## 3. Feasibility analysis of the adoption of security rights structure in my country

### 3.1 Applicable principles for distinguishing between debt and property

In the field of guarantee law, there are two different legislative views. One is formalism, which subdivides the types of guaranteed property and formulates different guarantee rules according to different types. The second is functionalism, and there is no need to subdivided the types of guaranteed property, and unified guarantee rules are jointly applied. One of the major innovations in the field of guarantees in the Civil Code is the introduction of functionalism based on formalism.<sup>[5]</sup> Therefore, it is not comprehensive to interpret and apply transfer guarantees from the perspective of property rights or debts. When examining the application of assignment guarantees, we should follow the principle of distinction and analyze them from two different dimensions. First, the creditor's relationship is a transfer guarantee contract established by both parties to ensure the performance of the debt. That is, the "guarantee" of the substantive purpose of the assignment of



guarantee; the second is the property rights relationship. The performance of the agreement between the parties to the assignment guarantee, that is, the form of the assignment guarantee, is the purpose of the assignment guarantee.

As for its "assignment", the transfer is only for the purpose of guaranteeing the function and formally transferring the property rights of the subject matter, not completely transferring the ownership of the subject matter in the sense of property rights law. The ownership of the subject matter is still owned by the guarantor, and then the "debtor's theory" is used to explain it. Fully respect the consent of both parties, so the assignment is only a security ownership created by both parties through the creditor's rights.

As far as its "guarantees" are concerned, creditors expect to be able to protect their legitimate rights and interests by providing guarantees, and expect to be able to fight against third parties by obtaining formal ownership, thereby enjoying the right to be paid first in the change of the guaranteed property. The principle of application of the principle of distinguishing property and debt between the parties involved does not seem to have much practical significance; however, when a third party is involved, in order to ensure the safety and orderliness of the transaction, based on the principle of distinguishing property and debt, the creditor obtains priority compensation effect of property rights guarantees. Therefore, the process of realizing the right of transfer is also a process of pursuing the validity of property rights. Only after public disclosure can the third party outside the parties know it, and then generate credibility and obtain the validity of the property rights of the guarantee.

### 3.2 The effect of debt rights with autonomy as the core

According to whether the parties clearly agreed on the transfer terms of ownership of the subject matter, the transfer guarantee can be divided into two types: priority compensation type and liquid type.<sup>[5]</sup> A priority transfer guarantee refers to the right to be paid first for the discount auction of the secured property when the debt fails to perform the due debt or other circumstances when the guaranteed property is realized when the debt expires. Liquid transfer guarantee refers to the situation where the debtor fails to perform the due debt or other circumstances in which the guaranteed property is realized when the debt expires, the creditor can directly obtain the guaranteed property.

In the case of a priority transfer guarantee, the legal effect of the guarantee contract is actually equivalent to the legal effect of its claim. Therefore, it is necessary to clarify the four requirements for the establishment and effectiveness of the contract. The parties to the contract are persons with full civil capacity, and the debtor has the corresponding right to dispose of the guaranteed property. The parties have reached an agreement and meet the formal requirements stipulated by the law. If the four requirements are met, the contract is established and effective. The content of the contract is binding on both parties. In the movable property transfer guarantee, after the contract takes effect, the creditor obtains the right similar to the mortgage of the movable property. In the real estate transfer guarantee, once the registration is completed, the creditor can obtain the right similar to the mortgage of the real estate.

In the case of liquid transfer guarantee, the effect of the debt act includes two types. First, the validity of the transfer guarantee contract is the same as the priority compensation transfer guarantee, and second, the agreement to transfer ownership of the guaranteed property. Under the theory of security right construction, when the assignment contract is established and effective, the ownership of the guaranteed subject matter has not been transferred, and the debtor is still the owner. Therefore, a liquid transfer security refers to the agreement of the establishment of a security

plus the ownership transfer with the conditions for entry into force. This is similar to the establishment of a mortgage right and the liquid clause. Therefore, the rationality of the legal structure of a security right can also be derived.

### **3.3 Property rights effectiveness with the public disclosure requirements as the core**

Property rights relationship is an absolute right, exclusive, and is aimed at unspecified third parties. Therefore, changes in property rights need to be made public, resulting in public disclosure and credibility. A creditor's relationship is a kind of relative right, which is relativistic and restricts both parties. The transfer of guarantee needs to be made public to generate the effectiveness of the property right. Under the theory of security right construction, the property right effect of the transfer of guarantee can be further subdivided into priority compensation type and liquid type.

In a priority compensation-type transfer guarantee, there will be no issue of transfer of ownership of the subject matter of the transfer. The validity of the property rights is only the establishment and effectiveness of the transfer of the security right, and the provisions on the public announcement of the mortgage right can be applied. For real estate transfer guarantees, real estate transfer guarantees should be registered. If there is no registration, there will be no confrontational effect on the third party and no property rights will be generated. However, based on the principle of distinction, if there is no registration, no registration will affect the validity of the contract. Regarding the assignment of movable property or rights, once the assignment of guarantee contract begins to take effect, both parties need to register the transfer of movable property or rights and the security rights. Without registration, it cannot be used against a bona fide third party.

In liquid transfer guarantee, the property rights include two types. First, the establishment and effectiveness of the transfer of security rights. The second is the effectiveness of liquid contracts. The establishment and effectiveness of the assignment of security rights are similar to the priority compensation-type assignment of security rights. Regarding the issue of liquidity and detention, the provisions directly agreeing to obtain ownership of the guaranteed subject matter according to Article 68, paragraph 2 of the Interpretation of the Guarantee System of the Civil Code" are invalid. Therefore, even if the corresponding public announcement is made, the legal consequences that the parties intend to have cannot occur.

## **4. Methods for the public disclosure of security rights**

### **4.1 Public announcement of real estate transfer guarantee**

The Civil Code stipulates that the method of publicizing real estate property rights is registration. The method of publicizing property rights through real estate registration has strong credibility. The formal transfer of ownership of property is one of the legal effects expressed by the registration, which is consistent with the formal characteristics of "assignment" in the assignment guarantee. From the perspective of external relations, a third party has the right to believe that the creditor can fight against any third party as the owner of the assignment guarantee property, but there may also be abuse of the security owner's rights. In judicial practice, both parties rarely make public announcements through real estate registration, but mainly through two methods: pre-registration and filing registration.

#### **4.1.1 Pre-registration**

First, pre-registration. In practice, in order to avoid legal supervision, approval and other administrative procedures (such as pre-sale licenses in commercial housing sales contracts) or a



party in a strong or dominant position in the contract wants to retain a right of remorse, they often use the method of making an appointment. Appointment is a concept corresponding to this agreement. According to the provisions of the Civil Code, when the parties sign a contract for the sale of real estate or other real estate property rights, in order to ensure the realization of future property rights, they can submit an application for pre-registration to the registration department according to the prior agreement. Pre-registration plays an important role as a statutory registration form. The purpose of preview registration is to restrict the debtor from disposing of real estate and to ensure that creditors obtain the real estate in the future. The condition for enjoying the right of priority compensation is to make changes in property rights public notice after liquidation. So the following problems will arise in the preview registration: Does the preview registration have the effect and effect of public notice? Can pre-registration be regarded as the announcement of changes in property rights have been completed?

From a legal perspective, the purpose of preview registration is to protect the realization of the creditor's rights. Article 221 of the Civil Code stipulates that after the pre-registration, if the real estate is disposal without the consent of the right holder of the pre-registration, the property rights will not take effect. In other words, before the pre-registration, the buyer enjoys the right to claim the claim based on the existence of the real estate sale contract. After the pre-registration, disposal of the real estate without the consent of the pre-registration right holder will not have the corresponding property rights effect. This provision further strengthens the buyer's right to claim the claim. At the same time, some scholars pointed out that in this case, the creditor's right to claim has the effect of the property right and can be regarded as a quasi-property right.<sup>[6]</sup> According to the provisions of Article 221, paragraph 1 of the Civil Code, it can be seen that preview registration also has the effect of fighting against third parties. This is the confrontational effect generated by publicizing credibility, not the exclusive right to claim creditors. The academic community does not have a unified view on whether creditors have the right to pay first after completing the real estate preliminary registration. Article 52 of the "Judicial Interpretation of the Guarantee System" clearly stipulates that if the creditor meets the conditions for these registration and claims priority for the mortgaged property, the people's court shall support it. Both mortgage rights and assignment security rights are rights with security as the core, and their application background and purpose are similar.

This article believes that although the pre-registration of real estate will not directly lead to changes in property rights, public trust can be enhanced and credibility can be generated through public announcement. When a third party learns this information, it can be ruled out that the owner improperly disposes the subject matter of the real estate, so as to better protect the debt and give full play to the function of guarantee. Therefore, pre-registration should be considered as a means of publicity for the transfer of real estate. After pre-registration, property rights will be valid, and after meeting the conditions, the right to be paid first will be generated.

#### 4.1.2 Registration

The second is registration. Registration is an operation in order to be able to timely grasp the transaction trends of the commercial housing market and supervise and regulate the development of the market. The real estate management department requires the backup and archive of the pre-sale contracts of commercial housing. This kind of filing and registration is generally regarded as an administrative management behavior.<sup>[7]</sup> From the perspective of the legal effect of filing and registration, as a type of administrative management, filing and registration can be known to third

parties through administrative management, and will also have a certain public announcement effect. However, this situation occurs based on objective supervision needs. It has administrative binding force and is not a method of publicizing property rights. The content of the public announcement is a specific creditor-rights and debt relationship, so it does not produce property rights or quasi-property rights. Therefore, just because the registration is carried out, the real estate property rights do not mean that there is a change. In actual judicial practice, the people's courts do not regard filing and registration as a public disclosure method for real estate transfer guarantees.

This article believes that although registration has a certain degree of public disclosure, it is essentially a method in the administrative management system, not a method of publicizing property rights, and does not produce the effect of property rights. Therefore, in real estate transfer guarantee, only real estate registration will not change the property rights, nor will it enjoy the right to be given priority compensation.

#### **4.2 Public announcement of movable property and transfer of rights guarantees**

Compared with real estate assignment guarantees, the methods of assignment guarantees for movable property and rights are more diverse. According to Articles 224 and 225 of the Civil Code of my country, there are two main methods for publicizing movable property guarantees: one is the delivery method, and the other is the registration method.

In movable property transfer and guarantee transactions, the delivery of the secured property is often completed through the method of ownership modification. However, due to the change of possession, the creditor does not actually possess the subject matter, and the third party cannot know that the rights have changed, which cannot have the effect of public disclosure. This practice is essentially a compromise on the principle of public disclosure of property rights in movable property transactions.<sup>[8]</sup> The conclusion drawn in practice is that the public announcement effect of the possession modification is not ideal, and it is difficult to accurately deal with the public announcement of the assignment guarantee. Professor Gao Shengping believes that the establishment of the assignment guarantee is not the best choice. In order to better meet the actual needs of the guarantee, we need to introduce new public announcement methods to replace or supplement it.<sup>[9]</sup> If the guarantee party delivers the subject matter through actual possession, then this behavior is similar to pledge, and the relevant provisions on pledge can be applied and their effectiveness can be recognized.

The transfer of movable property can also be made public through registration, and the ownership of the subject matter is transferred in a formal manner, so that the guarantee function does not affect the use of the guarantee property. Therefore, it is more common to register the transfer guarantee of movable property. After registration, the property rights will be valid and enjoy the same evaluation criteria as other types of security rights.<sup>[10]</sup>

The situation of transfer and guarantee of rights is more complicated. Some scholars argue that before determining the method of publicity, rights and property should be divided more carefully; while others believe that no matter the classification of rights and property, the method of publicity should fully respect the consent of both parties. This article believes that movable property and transfer of rights have common features. In order to protect the interests of third parties, creditors should publicize it through registration. At the same time, the security holder of transfer of movable property enjoys the right to be given priority compensation after actually obtaining the subject matter or having completed registration in the registration system.

## **5. Rules for realizing rights of assigning security**

### **5.1 How to realize the right of assigning security**

According to whether the creditor should assume liquidation obligations, the implementation methods of transfer guarantees are divided into liquidation type and vesting type.

#### **5.1.1 The liquidation type**

The liquidation type refers to the liquidation of the guaranteed property before the debtor repays the due debts, and use this as a basis to make payments, with more refunds and less compensations. The attribute means that the debtor does not need to liquidation before the debtor repays the due debts, so that the ownership of the guaranteed property can be obtained directly. Articles 401 and 428 of my country's Civil Code clearly stipulate the liquid and liquidity clauses. Due to the existence of liquidity and liquidity clauses, creditors may harm the interests of the debtor and affect fairness in market life in order to pursue high profits. Therefore, the law clearly stipulates that liquidity and liquidity clauses are invalid. Therefore, in specific practice, both parties mainly use liquidation as a way to realize the transfer guarantee. The liquidation type is further divided into disposal liquidation type and attribution liquidation type based on whether the creditor must dispose of the guaranteed property.

#### **5.1.2 Disciplinary liquidation type**

The focus of disposal liquidation is disposal. If the debtor fails to repay the principal and interest upon maturity, the creditors will be granted the right to dispose of the guaranteed subject matter. The guarantor shall pay off the debt by auctioning or selling the secured property, and the amount of proceeds from the auction shall be refunded or compensated. There is no too much dispute over the specific application of the disciplinary liquidation type, but if the debtor's right is realized in this way, it often leads to the inability of the parties to reach an agreement, and ultimately the transfer of the security right is achieved through the intervention of public power, which has the disadvantages of consuming time and money costs.

#### **5.1.3 Attribution type liquidation**

The focus of vesting liquidation is vesting, which means that a fair valuation of the guaranteed subject matter is required. If the amount of the valuation is higher than the debt required to be performed, the excess shall be returned to the debtor or third party by the creditor, thereby allowing the creditor to obtain ownership of the security. On the contrary, if the estimated amount is not sufficient to repay the debt and the creditor is burdened with proof, then the insufficient part should be compensated by the debtor or a third party. After completing the valuation and appropriately refunding or reducing compensation, the ownership of the guaranteed subject matter will be entirely owned by the creditor. There is no specific requirement for determining the time to implement the method. Therefore, both are agreed in the transfer guarantee contract or agreed to implement the method when realizing the debt. The attribution liquidation type can effectively make up for the shortcomings of the disposal liquidation type, thereby saving a lot of time and money. In the implementation method of ownership liquidation, since the two parties have agreed in advance to transfer ownership to the creditor's name in form, and the creditor has the obligation to compulsory liquidation, etc., it is generally no longer necessary to resolve the issue through judicial means. my country's Civil Code has recognized other contracts with guarantee functions, and it can also be said that the assigning guarantee has the legality and rationality of its existence. If the same way of rights

is implemented as in the traditional way, then the assignment guarantee will not be able to play its special role. In the process of realizing rights with assignment and guarantee, the law allows the debt to be paid through liquidation when the debtor is paid off at maturity in order to realize the debt. The use of the attribution liquidation type as the transfer guarantee is conducive to reducing the time and money cost of the lawsuit. It also helps to avoid the occurrence of some unpredictable market risks.

## **5.2 The procedure for realizing rights of assigning security**

Assignment guarantee is a vivid reflection of the voluntary principle of the Civil Code. Assignment guarantee is not only the result of practical activities, but also a concrete manifestation of autonomy of will. One of the reasons why both parties choose assignment guarantee is to avoid complex and long litigation time, aiming to resolve problems through private rights. In practice, the most concerned issue of the parties is whether the value of the property assigned to the guarantee exceeds the principal and interest of the loan. The parties will choose a disposal method that is more conducive to the realization of the creditor's rights at different stages and for different guaranteed properties. Without violating the principles of public order and good customs, the parties should be fully respected, such as the two parties decide which way to implement the debt claim, how to realize the debt claim when the deadline is exceeded, etc. If both parties choose to implement the liquidation claim, they need to first change the guaranteed property and then repay; if both parties choose to implement the debt that belongs to the liquidation claim, the creditor can obtain the secured property to repay.

### **5.2.1 Creditors should be given the right to choose independently**

If the parties do not clearly agree on the specific way to realize the creditor's claim in advance, then this article believes that the creditor should be given the right to choose independently. First of all, the assignment guarantee is to transfer ownership of the subject matter "formally", and this type of guarantee has obvious appearance ambiguity. "In essence" assignment guarantee includes the expression of intention of the debtor to agree to the creditor to repay the debt by auctioning, selling or obtaining ownership of the secured property. Therefore, the creditor's choice of which way to realize the rights is within the scope of the wishes of both parties. Secondly, if both parties have not agreed on the way to realize the claim in advance, there may be situations where both parties believe that the implementation method is not important. Therefore, if the implementation method is in line with the purpose of the guarantee and does not harm the interests of both parties, it should be deemed to be a reasonable way. Finally, the creditor has the right to choose the way to realize the creditor's rights, which is conducive to respecting the creditor's true intention, protecting the creditor's rights and interests, and thus allowing the creditor to choose a more appropriate method according to the specific circumstances.

### **5.2.2 Ensure that the legitimate rights and interests of the guarantor are protected**

Regardless of which method the creditor decides to use to transfer the guarantee, it will be subject to a certain degree to ensure that the guarantor's legitimate rights and interests are protected. In order to ensure the realization of the secured debt, both parties should conduct a reasonable assessment and liquidation procedure for the value of the secured property. It is particularly important in the process of realizing the claims and performing the debt. Therefore, when the parties sign a contract, they need to evaluate the guaranteed property, and when the debt is paid off at maturity, the guaranteed property also needs to be evaluated due to the volatility of the market economy. When the value of the secured property is higher than the creditor's claim, the debtor has

the right to ask the creditor to return the excess; when the value of the secured property is lower than the creditor's claim, the creditor shall bear the burden of proof and apply for liquidation procedures, and the debtor shall be required to continue to repay the insufficient part. Assignment guarantees have many advantages in both establishment and full implementation. If the rules of typical guarantees are blindly applied, their institutional advantages will be completely exhausted.<sup>[11]</sup>

### 5.2.3 Improve the accuracy and neutrality of asset appraisal institutions

In the process of property liquidation, improving the evaluation accuracy and neutrality of asset appraisal institutions will help better protect the rights and interests of the parties. It also helps to more effectively ensure the fairness and security of transactions. Asset appraisal is currently a highly specialized industry with certain introductory requirements, which also means that reports published by the asset appraisal industry usually have high credibility. It is generally believed that reports issued by evaluation agencies entrusted by the people's courts are easier to be recognized by everyone. If such asset appraisal institution is chosen to value the guaranteed property, it can more effectively reduce liquidation disputes between the two parties. The judicial evaluation service list database established by the Supreme People's Court is divided into many different list databases according to the different scope of the appraisal company's practice. Therefore, different types of property parties can choose to provide reference. During the execution process, the choice of the asset appraisal institution is entirely decided by the parties themselves. Only when the two parties cannot reach a consensus will the people's court use a random selection method from the list of the appraisal institution.

Therefore, the true expression of intention of both parties to the choice of the method of realizing the transfer guarantee rights should be fully respected. If there is no agreement between the parties to achieve the implementation method or the agreement is unclear, the creditor shall decide independently which method of realizing the assignment and security right to apply. During the liquidation process, the parties should also independently choose the asset appraisal institution responsible for evaluating the value of the guaranteed property, and use the list of appraisal service providers established by the people's court as a reference.

## 6. Conclusions

As an atypical guarantee method, transfer guarantee plays an important role in market economic activities. Its advantages of high efficiency and low cost make it widely used in practice. However, since the Civil Code and relevant judicial interpretations did not clearly stipulate the nature of the law, the recognition of its effectiveness, the method of public disclosure, etc., it has led to many controversies in the theoretical and practical circles. By analyzing the legal structure and effectiveness of transfer guarantees, this article draws the following conclusions: First, transfer guarantees do not violate the principle of statutory property rights. Its essence is a type of security right, rather than creating a new type of property right, which complies with the open provisions of the Civil Code for atypical guarantees. The security right construction theory is more in line with my country's actual needs, respecting the parties' autonomy and ensuring transaction security. Secondly, in terms of property rights disclosure, real estate transfer guarantees can have an anti-episode effect through pre-registration, while movable property and rights transfer guarantees must be announced in combination with the ownership modification or registration method. Finally, in terms of rights realization rules, the liquidation method is more in line with the principle of fairness. Creditors should be given priority to repayment after reasonable valuation and return the debtor to

the excess to balance the interests of both parties. Future legislation should further clarify the legal status of transfer guarantees, refine public announcement rules, optimize liquidation procedures, so as to give full play to its guarantee function and promote the safety and efficiency of market transactions.

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