

Research on the Relationship between New and Old Debts and the Right of Choice in Post-Settlement Debt Settlement with Property

Mohan Tang

Xinjiang University of Finance & Economics, Urumqi, Xinjiang, China

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Abstract: Post-termination debt settlement through asset substitution, as a common type of dispute in China's civil enforcement and debt clearance practices, requires a review of the legal evolution of its rules. The core controversies revolve around the nature of the agreement, the relationship between old and new debts, and the allocation of selection rights. Research indicates that post-termination debt settlement constitutes a consensual contract; during the debt performance period, old and new debts coexist, necessitating the "coexistence theory" as the principled interpretation of the old-new debt relationship. Debtors generally lack selection rights, while creditors must first demand performance of the new debt. Selection rights may only be exercised when the debtor fails to perform despite timely notice. Creditors' selection rights are subject to reasonable time limits and the principle of good faith, along with constraints such as already accepted performance and the impossibility of fulfilling the subject matter.

1. Introduction

In the complex civil activities and judicial enforcement practices, when the deadline for debt performance expires and the debtor is unable to repay in monetary terms, "using property as collateral" has emerged as a flexible way of debt clearance. Among them, the debt to equity agreement reached after the expiration of the debt performance period (hereinafter referred to as "post term debt to equity agreement") is highly favored by the parties and judicial authorities due to its ability to quickly resolve creditor debtor relationships and save execution costs. However, this repayment method, which originates from practical wisdom, currently lacks clear and systematic norms in the contract section of the Civil Code of the People's Republic of China (hereinafter referred to as the "Civil Code"), resulting in ambiguous legal nature, inconsistent effectiveness recognition, chaotic new and old debt relationships, and further causing disorder and conflict in the exercise of the parties' right to choose, becoming a long-standing topic of debate in both theoretical and practical circles.

2. The legislative evolution of using property as collateral for debt in the future

The use of property as collateral for debt in the future is not a precise system pre designed by legislators, but a product of judicial practice in response to complex social realities. The establishment

of its legal status and the formation of its rules have gone through a gradual development process, from individual case exploration by grassroots courts to preliminary summarization by the Supreme People's Court through trial experience, and finally to finalization through judicial explanatory documents.

2.1 The use of property as collateral for debt in the future originates from judicial practice

Before the promulgation of the Contract Law of the People's Republic of China (hereinafter referred to as the "Contract Law") and even the Civil Code, the phenomenon of using property as collateral for debt had already existed extensively in debt disputes, especially in enforcement procedures. Early judicial practice was quite cautious towards it, and even had a certain tendency towards rejection. The main reason is: firstly, the concern that the parties involved may transfer their liability property through false debt to equity agreements, which may harm the legitimate interests of other creditors, especially when the debtor is insolvent; Secondly, the value assessment and ownership change process of debt collateral (especially movable and unregistered real estate) are not transparent enough, which can easily lead to new ownership disputes; Thirdly, there is a lack of clear legal guidance, and judges have different understandings of whether the nature of the agreement is to settle debts on behalf of property, renew debts, or simply guarantee.

However, the strong demand for practice has driven the emergence of institutions. In areas such as the disposal of non-performing assets in banks and the enforcement of disputes in private lending, when the debtor's monetary payment ability is exhausted but they still have property such as property, vehicles, and equipment under their name, directly using these properties to offset the debt is often the most practical solution. Avoiding lengthy and uncertain auction and sale procedures, it can quickly realize creditors' rights and reduce their losses. Grassroots courts gradually recognize this debt settlement arrangement voluntarily reached by the parties in the execution of settlements. As long as it does not violate the mandatory provisions of the law and does not harm the interests of the state, the collective, or third parties, it is allowed to have the effect of extinguishing the creditor's rights contained in the execution basis. This pragmatic approach to dispute resolution has accumulated the most primitive materials for the generation of rules in the future. Overall, the use of property as collateral for debt was not initially explicitly stipulated in legal provisions and is not a proprietary term of the law, but rather a legal issue originating from judicial practice.

2.2 Summary of the experience of using property as collateral to perfect the trial in the future

With the increasing number of disputes over using property as collateral for debt, the Supreme People's Court has begun to sort out and refine dispersed practical experience through the publication of typical cases, the publication of relevant judgment documents in the Supreme People's Court Gazette, and the formulation of internal trial guidance opinions. The summary of this stage begins to touch upon the core legal issues of using property as collateral for debt, and has initially formed a differentiated approach.

A key distinguishing point is the time when the agreement is reached - whether it is before or after the debt performance period expires. For the traditional legal principle of prohibiting the use of collateral (pledge) as collateral for debt, the court usually considers it invalid or only has a guarantee effect, and the creditor cannot directly obtain ownership of the collateral. However, the judicial attitude towards using property as collateral for debt repayment after the period is much more relaxed. The Supreme People's Court has gradually tended to believe in multiple judgments that after the expiration of the performance period, the debt has been determined, and the agreement reached at this time to use property as collateral for debt is an agreement between the parties to liquidate and modify existing debts, with the purpose of eliminating old debts rather than establishing guarantees. As long

as the expression of intention is true and the value of the collateral is equivalent to or not significantly unfair to the amount of the debt, its validity should be recognized.

For example, in the judgment (2011) Min Ti Zi No. 210, it is explicitly stated that the agreement for the settlement of property in exchange is a practical contract, and it is also believed that "if the secondary debtor fails to actually perform the agreement for the settlement of property in exchange, the original monetary debt between the secondary debtor and the debtor has not been extinguished"; In the Supreme People's Court's Judgment No. 484 (2016), the Supreme People's Court explicitly stated that a debt to equity agreement reached by the parties after the expiration of the debt repayment period may constitute a modification of the debt, that is, the establishment of a new debt and the elimination of the old debt; It may also belong to the repayment of new debts, that is, the establishment of new debts coexisting with old debts. [1] The accumulation of the essence of such judgments marks the evolution of judicial practice's understanding of using property as collateral for future debts from a simple means of execution to an independent and effective type of contract. Trial experience has injected preliminary rule connotations into it.

2.3 The use of property as collateral for debt will be finalized in judicial interpretations

The evolution of the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the General Principles of the Civil Code of the People's Republic of China on Contracts" (hereinafter referred to as the "Interpretation of the General Principles of the Civil Code on Contracts") from the "Draft for Soliciting Opinions" in November 2022 to the official text in December 2023 highlights its important changes in the core rules of debt settlement with property. This adjustment not only reflects the legislators' careful consideration in balancing the rights and interests of the parties, stabilizing legal relationships, and systematizing the connection norms, but also actively responds to the many controversies surrounding the use of property as collateral in judicial practice.

At the stage of soliciting opinions, the relevant regulations tend to give creditors a relatively broad choice: once the debtor fails to fulfill the debt to equity agreement, the creditor can choose between the old debt and the new debt. However, Article 27 (2) of the Interpretation of the General Principles of the Civil Code on Contracts introduced more operational restrictive conditions, namely, "If the debtor or a third party fails to perform the debt to equity agreement as agreed, and still fails to perform within a reasonable period after being urged, and the creditor chooses to request performance of the original debt or the debt to equity agreement, the people's court shall support it."

This modification has significant theoretical and practical implications. Firstly, while strengthening the protection of creditors, it also balances the interests of the parties involved. By setting reminders as a prerequisite procedure, a necessary buffer period is provided for the debtor to fulfill new obligations, avoiding triggering the creditor's right of choice due to minor or brief delays in the debtor's performance, thereby maintaining the stability of the transaction. Secondly, this design helps to curb the abuse of creditors' rights. The fluctuation of the market value of debt collateral may trigger opportunistic behavior among creditors - they tend to advocate for new debt when prices rise, and hope to restore old debt when prices fall. The existence of reminder programs has set a reasonable "cooling off period" for this selection process, effectively reducing moral hazard. Thirdly, this provision is in line with the general rules of selective debt and the principle of good faith reflected in Article 515 (2) of the Civil Code. Adding a reminder link before creditors formally exercise their option not only takes into account the significant impact of the final determination of the performance subject on both parties, but also ensures the internal coordination and logical consistency of the regulatory system.

The content of using property as collateral for debt in the later stage is basically consistent between

the draft for soliciting opinions and the official draft, with the following main differences: firstly, the scope of autonomy of will has been further expanded; Secondly, a reminder procedure has been added as a prerequisite for creditors to exercise their right of choice; The third is to expand the conditions for exercising the creditor's right of choice to the situation where a third party fails to fulfill the agreement of using property as collateral.

3. The nature of the post debt to equity agreement

Clarifying the legal nature of the post term debt to equity agreement is the logical starting point for resolving all subsequent derivative issues. The core of the nature dispute lies in exploring whether it is a practical contract or a contractual agreement. This definition not only concerns when the agreement is established and effective, but also profoundly affects the allocation of rights and obligations and risk burden rules of the parties involved.

3.1 Analysis of Promising Contracts and Practical Contracts

The distinction between consensual contracts and practical contracts originates from Roman law, and its standard is whether the formation of a contract requires the delivery of the subject matter, which is a "other practical requirement", in addition to the expression of intent. A consensual contract can be established and take effect solely based on the agreement of both parties, and the delivery of the subject matter is a performance obligation that arises after the contract is established, such as a sales or lease contract. In practical contracts, in addition to the contract itself, the actual delivery of the subject matter must also be completed to establish the contract. For example, in traditional custody, borrowing, and deposit contracts, delivery is a necessary condition for the establishment of the contract rather than performance.

This distinction has significant legal implications. For practical contracts, before delivery is completed, the contract has not yet been established, and the parties do not have the right to request performance of the contract, nor do they assume liability for breach of contract. At most, they may bear liability for breach of contract. The establishment of a contract and the transfer of ownership (or possession) are closely linked. For a contractual agreement, reaching a consensus creates binding force on the debt. If one party fails to fulfill the delivery obligation, the other party has the right to request performance or claim breach of contract liability, and the formation of the contract and the act of performance are clearly separated. Under the interpretation framework of the Nuocheng contract, the agreement signed by the parties to use property as collateral for debt repayment, new debt repayment, debt renewal, or debt guarantee can be interpreted. [2]

3.2 The agreement of using property as collateral for debt after the term is not a practical contract

The main reason for advocating the practical contract of using property as collateral after the claim period is twofold: firstly, to continue the path of the traditional theory of "debt settlement on behalf of property". Traditional civil law theory regards debt settlement as a contract for the acquisition of property, which requires the completion of other types of payments in reality before the original debt can be extinguished. At the same time, using property to pay off debts should not be equated with using property to repay debts. [3] Secondly, for practical policy considerations, it is believed that making delivery a prerequisite for establishment can avoid the recognition of the old debt being extinguished before the collateral is delivered, thereby preventing the debtor from using the unfulfilled collateral agreement to suspend the debt, or preventing the creditor from filing a lawsuit on the old debt after obtaining the claim for collateral, resulting in dual compensation or enforcement

conflicts. Thirdly, it facilitates the handling of the risk of damage or loss of the collateral after the agreement is signed. If the contract is not established, the risk is still borne by the original owner, and the legal relationship is relatively simple.

However, the above reasons have shown insufficient persuasiveness in modern contract law concepts and judicial practice in China. Firstly, equating the use of property as collateral for debt repayment with traditional debt repayment and inheriting its essential properties is an overly rigid theoretical application. The core function of contemporary debt settlement, which is to replace the original payment with other payments to eliminate the debt, can be fully achieved through an independent contractual agreement, without being confined to the form of the debt. The principle of freedom of contract should allow the parties to freely arrange their payment methods. Secondly, policy concerns can be addressed through other legal techniques. For example, if the agreement is interpreted as the settlement of new debts (as detailed later), the old debts will not be extinguished before the new debts are fulfilled, naturally avoiding the problem of outstanding debts. For the risk of double compensation, it can be prevented through procedural rules such as identifying the subject matter of the lawsuit and prohibiting duplicate lawsuits, and the binding force of the agreement cannot be denied out of frustration. Finally, the issue of risk burden also has mature rules within the framework of a contractual agreement, such as the basic rule of risk burden for damage or loss of the subject matter in Article 604 of the Civil Code, which can be applied and is not an unsolvable problem.

More importantly, if we insist on practicality, it will have significant drawbacks, as it will leave the agreement in a state of uncertain legal effect before delivery, and either party can retract it at will, seriously damaging the security of the transaction and the trust interests of the parties. Especially when the creditor has waived other means of recovery based on the agreement, or the debtor has prepared for the performance of the agreement, allowing the other party to claim that the agreement is not established solely on the grounds of non delivery is obviously against good faith and reduces the efficiency and reliability of using property as a means of dispute resolution.

3.3 The agreement of using property as collateral for debt in the future shall be regarded as a non binding contract

In contrast, characterizing the post term debt to equity agreement as a consensual contract is more reasonable and superior, and is in line with the legislative intent of our country. Article 27 of the Interpretation of the General Principles of the Contract Law of the Civil Code stipulates that the agreement of using property as collateral for debt in the future shall be the normative object, and it is clear that the agreement has a contractual nature and belongs to an atypical contract. [4]

Article 27, Paragraph 1 of the Interpretation of the General Principles of the Contract Series of the Civil Code stipulates that "If the debtor or a third party and the creditor reach an agreement to use property as collateral after the expiration of the debt performance period, and there is no situation that affects the effectiveness of the contract, the people's court shall determine that the agreement shall come into effect when the parties express their agreement." This article clearly states that in principle, the effective time of the contract is when the parties express their agreement, and does not require the actual delivery of the subject matter. It can be seen that the agreement to use property as collateral after the agreed period is a consensual contract. At the same time, Article 27 (3) of the interpretation also indirectly confirms that the agreement is not a practical contract. "If the agreement on using property as collateral for debt as stipulated in the preceding paragraph is confirmed by the people's court or a mediation agreement is made by the people's court based on the agreement reached by the parties, and the creditor claims that the property rights have changed or have the effect of resisting a third party in good faith since the confirmation or mediation agreement came into effect, the people's court will not support it." The change of property rights or the effect of resisting a third party in good

faith is necessary to be delivered or registered, and even if the agreement on using property as collateral for debt is confirmed by the people's court or a mediation agreement is made based on the agreement, it cannot directly have the effect of property rights change. This further explains that the agreement on using property as collateral for debt cannot directly have the effect of property rights change. It is not required to deliver the subject matter, The agreement of using property as collateral for debt is not a practical contract but a contractual agreement.

Recognizing a debt to equity agreement as a consensual contract is of great benefit to maintaining the stability of debt and legal relationships, protecting the interests of third parties in good faith, and other creditors. The qualitative nature of the agreement makes it binding on both parties from the moment it is established. The debtor has the obligation to deliver the collateral as agreed and transfer its ownership, and the creditor has corresponding claims. Any party who fails to perform without justifiable reasons shall bear the liability for breach of contract. This provides clear expectations and guarantees for the parties involved in the transaction, avoiding uncertainty in practical terms.

Although the agreement takes effect, the change of property rights still needs to follow the principle of publicity, with movable property to be delivered and immovable property to be registered. Before the delivery or registration of the debt collateral is completed, if its ownership has not changed, the general creditors of the debtor can still apply for enforcement of the property. At this time, the creditor who has obtained the agreed creditor's rights can file a lawsuit for execution objection in accordance with relevant provisions such as the "Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Execution Objections and Reconsideration Cases by People's Courts", and the court will review whether their rights are sufficient to exclude execution. This approach of balancing conflicts of interest through competition for substantive rights and procedural review is more refined and fair than the practical theory of denying the effectiveness of agreements.

4. The new and old debt relationship of using property as collateral agreement in the future

After the nature of the consensual contract is confirmed, the core issue shifts to the relationship between the agreement and the original creditor debtor. Is there a substitution, coexistence, or other relationship between new and old debts? This directly determines the fate of the old debt, the performance choices of the parties involved, and the relief path in case of default. There are two main theories in theory: the theory of debt renewal and the theory of debt coexistence.

4.1 Abandoning the Renewal of Debt

The theory of debt renewal holds that a post redemption agreement is a completely new contract, which has the effect of immediately and directly eliminating old monetary debts or other debts originally scheduled to be paid, while creating a new debt of payment based on the delivery of collateral. There is complete substitutability between new and old debts, and the old debts are extinguished from the establishment of the new agreement, and their subordinate rights are also extinguished accordingly. Creditors can only claim rights based on new debts and cannot trace back to old debts.

The theoretical advantage of the debt renewal theory is that the legal relationship is clear and it can be resolved in one go. But its drawbacks are extremely prominent in the context of using property as collateral for debt in the future: firstly, it excessively sacrifices the interests and safety of creditors. Once the agreement is established, the old debt will be extinguished. If the debtor refuses to deliver the collateral or is unable to deliver it afterwards, the creditor will be trapped in a dual dilemma of losing the old debt and being unable to realize the new debt. Although creditors may claim breach of contract liability for new debts from debtors, the scope of remedies and guarantees involved are different at this time, and creditors face significant unforeseen risks. Secondly, updates require a clear

"update intention" from the parties involved. In most debt to equity agreements, the true intention of the parties is to "use debt to equity", that is, to satisfy the old debt by fulfilling a new debt, with the core purpose of settling the debt, rather than simply replacing the old legal relationship with a new legal relationship. It is often untrue to assume that the parties involved have an intention to immediately eliminate old debts. Finally, this contradicts the basic orientation of China's judicial practice in protecting creditors' rights. The court usually tends to hold in its judgment that the old debt still exists before the new debt is fully fulfilled, and the creditor has the right to choose, which essentially denies the theory of debt renewal.

4.2 Coexistence of new and old debts during the debt repayment period

The theory of coexistence of debts, also known as new debt repayment, can be traced back to the theory of repayment substitution in German law. Article 364 (1) of the German Civil Code states: "Once the creditor receives other payments in lieu of fulfilling the debt, the debt relationship is extinguished." However, German doctrine and precedents hold that the "extinction" here is based on the creditor's actual receipt of other payments, and before receiving them, the original debt is still temporarily restricted but not extinguished. In "payment for repayment", the original creditor's right is not extinguished, and the creditor should obtain repayment from the subject matter delivered to them for the purpose of repayment. If the creditor obtains repayment, the old debt will be extinguished; If the creditor is not repaid, the creditor has the right to request repayment of the original debt. Its institutional advantages are reflected in three aspects. Firstly, granting creditors the right to exercise their choices. When the debtor fails to fulfill the new debt, the creditor may choose to request the fulfillment of the old debt or the new debt, enhancing the possibility of realizing the creditor's rights; Secondly, old debts continue to exist as rights. The rights of guarantee, security interest, etc. shall not be extinguished by the establishment of new debts, and the interests of creditors shall be fully protected; Thirdly, it is more in line with trading practices. The parties entering into a debt to equity agreement usually aim to alleviate the pressure of immediate repayment, rather than eliminate the original debt relationship.

Article 27, Paragraph 2 of the Interpretation of the General Principles of the Contract Series of the Civil Code clearly stipulates: "If the debtor or a third party fails to perform the agreement of using property as collateral as agreed, and still fails to perform within a reasonable period after being urged, and the creditor chooses to request performance of the original debt or the agreement of using property as collateral, the people's court shall support it." This article clearly states that the non performance of a new debt does not affect the effectiveness of the old debt; Creditors have the right to choose the object of performance; Old and new debts are in a coexisting state before being fulfilled. The design of this rule reflects the priority protection of creditors' interests, and is also in line with the value orientation of "repaying debts with property to ensure the realization of creditor's rights" since the "Nine People's Minutes".

The reason why the theory of "coexistence of debts" has become the dominant theory of debt to equity settlement is fundamentally because it is more in line with the value pursuit of protecting creditor's rights and encouraging transactions in China's judicial practice. Through the structural design of coexistence of new and old debts, it not only respects the autonomous arrangement of the parties to increase the repayment method through agreement, but also provides dual protection for creditors, avoiding them from being trapped in relief difficulties due to unilateral default of the debtor. In the context of the clear adoption of the coexistence theory in Article 27 of the Interpretation of the General Principles of the Contract Law of the Civil Code, judicial practice should further refine the rules for exercising the right of choice, and carefully distinguish whether the parties have an exceptional agreement for "debt renewal" in individual cases, in order to achieve the best balance

between order and freedom.

5. The Exercise and Limitations of Parties' Choice Rights

Under the framework of the coexistence of new and old debts constructed by the theory of new debt repayment, when there are obstacles or disputes in the performance of new debts, both debtors and creditors face the choice of how to exercise their rights. This right of choice is not arbitrary, and its exercise must comply with specific conditions, produce specific legal effects, and be strictly limited by the principles of good faith and prohibition of abuse of rights.

5.1 The debtor's right of choice

The debtor's right of choice is mainly reflected in whether they have the unilateral right to claim the replacement of the performance of the new debt with the performance of the old debt, that is, the "right of repentance". The mainstream view and judicial practice usually hold a negative attitude towards this, that is, the debtor has no right of choice in principle. Based on the binding force and good faith principle of a contractual agreement, once a debt to equity agreement is effectively established, the debtor has the obligation to deliver the debt to equity and complete the transfer of rights as agreed. Allowing the debtor to retract at will and demand repayment in the original manner will render the agreement meaningless and seriously damage the trust interests of creditors. The creditor agrees to accept the collateral, which may be based on their recognition of the value of the collateral, consideration of the convenience of realizing the creditor's rights, or having given up other opportunities for recourse. Allowing the debtor to unilaterally change the subject matter of performance may worsen the situation of the creditor. [5]Therefore, the debtor cannot simply "refund" the new debt based on their own wishes and demand the performance of the old debt.

The debtor's option is only considered in extremely limited exceptional circumstances. For example, if the creditor's performance of a new debt constitutes a delay in receiving it, and the debtor still does not receive it within a reasonable period of time after being urged by the debtor, the debtor may, in accordance with Article 589 of the Civil Code, extinguish the new debt through methods such as deposit. At this point, if the purpose of repaying the new debt cannot be achieved due to the creditor's reasons, whether the old debt can be revived as a result, or whether the debtor can claim that the new debt has been fulfilled through deposit, it needs to be judged based on the specific provisions of the agreement and the legal effect of the deposit. But this is not the debtor's active choice, but the passive legal effect caused by the creditor's default. Another scenario is that if the collateral is lost due to reasons not attributable to both parties before delivery, resulting in the inability to fulfill the new debt. At this point, according to the risk burden rule, the risk before the delivery of movable property is borne by the debtor, and the new debt may be extinguished. Due to the inability to achieve the purpose of repaying new debts and the elimination of obstacles to the performance of old debts, the debtor should of course continue to perform the old debts, but this is also a legal effect, rather than an option exercised by the debtor voluntarily.

5.2 Creditors' right of choice

The option of creditors is the most distinctive and important aspect of the theory of new debt repayment. When the debtor fails to fulfill the new debt as agreed, the creditor faces the choice of relief path.

The prerequisite for the emergence of the creditor's option is that the new debt has not been properly fulfilled. This includes: the debtor explicitly refusing to perform, delaying performance and failing to perform within a reasonable period after being urged, inability to perform (such as damage

or loss of the collateral, being disposed of to a third party, etc.), improper performance (such as serious quality defects or defects in the delivered subject matter that prevent the achievement of the contract purpose).

In terms of the exercise subject, creditors should be the main ones, and autonomy of will should be given priority. The exercise subject of the right of choice is generally the creditor, unless it is provided by law or agreed upon by the parties hereto. Firstly, the autonomy of the parties involved should be respected. A contract is the result of mutual agreement between the parties and is the law between the parties. The parties have the right to decide whether or not to enter into a contract, who will be the contracting party, and what the content of the contract will be based on their own choices. If the parties explicitly agree in a debt to equity agreement that the debtor or a third party has the right to choose under certain conditions, as long as the agreement does not violate mandatory legal provisions and public order and good customs, it should be respected.

In terms of the specific content of the option, at this point, the creditor has an alternative right to request. The creditor requests to fulfill the new debt. Creditors can request the court to order the debtor to deliver the debt collateral, assist in the transfer of ownership registration, and bear corresponding breach of contract liability based on a valid debt to equity agreement, which is based on the claim of the new debt itself. Creditors request to restore the performance of old debts. Creditors can claim that due to the debtor's failure to fulfill the new debt, the purpose of using the new debt to repay the old debt has been frustrated, and therefore the conditions for suspending the repayment of the old debt have not been met, and the old debt remains valid. Creditors can request the debtor to fulfill the original monetary debt and exercise their original security rights based on this. In addition, the exercise of creditors' options is also restricted. The creditor's right of choice is not unconstrained, and its exercise must follow the following principles: firstly, prohibition of abuse of power and the principle of good faith. Creditors shall not harass debtors or seek undue benefits through repeated or contradictory choices. Once the creditor has made a clear choice, they should be bound by their choice, and without justifiable reasons, if the new debt is unable to be fulfilled, it cannot be changed arbitrarily. In practice, the act of creditors filing a lawsuit with the court is usually seen as an exercise of their right of choice.

Secondly, the interests of third parties shall not be harmed. The choice of creditors, especially those who choose to fulfill new debts and may therefore obtain ownership of the collateral, shall not harm the legitimate interests of other creditors. If the debtor's property is no longer sufficient to repay all debts, the debt settlement may constitute individual repayment, and other creditors may apply to revoke the debt settlement agreement based on the revocation right stipulated in the Civil Code or the revocation right in bankruptcy law. At this point, the creditor's right to choose will lose its basis due to the revocation of the agreement.

Thirdly, given that the right of choice is a formative right, it should also be subject to limitations in its exercise period. A "reasonable period" can be determined by referring to Article 564 of the Civil Code regarding the exercise of the right of termination. The starting point of this period should be when the creditor knows or should know that they have the right to choose, that is, when the debtor fails to perform within a reasonable period after being urged. The right holder may also specify a reasonable period for exercising the option in the reminder notice. If the exercise is not made within a reasonable period of time, the right of choice shall be extinguished, and the creditor may lose the right to make an alternative request. The performance subject that the creditor can claim shall be determined based on the actual situation. Fourthly, there are restrictions on the exercise of the option by creditors during the performance process. One is that the debtor has fulfilled the obligation and the creditor has received it. Once the debtor fulfills part or all of the new or old debt and is received by the creditor, it shall be deemed that the actual choice of performance has been completed, and the legal relationship shall be determined by repayment. The creditor shall not claim the right of choice

again. The provision in the first half of the second paragraph of Article 27 of the Interpretation of the General Principles of the Contract Law of the Civil Code, which states that "after the debtor or a third party fulfills an agreement to offset the debt with property, the people's court shall determine that the corresponding original debt is extinguished at the same time," implies this principle. The second reason is that the loss of the subject matter leads to the inability to perform. If the subject matter of a new debt is lost due to reasons not attributable to both parties, resulting in the inability to perform, the creditor shall not, in principle, choose to perform the new debt unless the inability to perform is caused by the debtor. At this time, it should be handled in accordance with Article 580 of the Civil Code, and the scope of the creditor's right of choice is naturally limited to the performance of the old debt.

6. Conclusion

The clarification of legal rules for the debt repayment method of using property as collateral in the future, which is rooted in Chinese judicial practice, is an inherent requirement for promoting market integrity, ensuring transaction safety, and improving dispute resolution efficiency. In terms of legal nature, the agreement of using property as collateral for debt in the future should be firmly classified as a contractual agreement. Abandoning the outdated concept of practical contracts and recognizing that they can be established and effective solely based on the agreement of the parties is an inevitable choice to respect autonomy of will, maintain the seriousness of the agreement and the interests of trust, and is highly consistent with the current judicial policy orientation.

On the core issue of the relationship between old and new debts, the "debt renewal theory" should be abandoned due to inadequate protection of creditors and often conflicting with the true intentions of the parties involved. Adopting the "coexistence of debts" theory as the explanatory framework is more appropriate. After the agreement is established, new and old debts coexist, and the old debts are temporarily suspended for the purpose of repayment. The appropriate performance of the new debts leads to the elimination of the old debts.

Based on the theory of new debt repayment, the allocation and exercise rules of the parties' options can be clearly constructed. The debtor generally has no right to unilaterally retract the agreement and must be bound by the agreed terms. Creditors, on the other hand, have the optional right to request performance of the new debt or restoration of performance of the old debt when the new debt has not been properly fulfilled, but the exercise of this option is also restricted.

In the implementation process of the Civil Code, the Supreme People's Court can clarify and refine this rule system through guiding cases or further judicial interpretations, so as to unify the judgment scale and ensure the standardized and healthy operation of the important debt clearing mechanism of using property as collateral in the future on the track of the rule of law, better serving the high-quality development of China's economy and society.

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