

## Equity Transfer Guarantee under the Civil Code

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### Abstract

Equity transfer guarantee is the frustration cost generated by the principle of numerus clausus of real rights. Because the legal types of guarantees cannot meet the needs of the parties, it is a product generated by practice. Before the promulgation of the Civil Code, scholars believed that "transfer guarantee" was invalid because it violated the "principle of numerus clausus of real rights" and the "principle of prohibition of liquidation". However, Article 388 of the Civil Code provides a "new life" for (equity) transfer guarantee. Whether adopting the "ownership structure theory" or the "guarantee right structure theory", the exercise of the rights of the transferee in equity transfer guarantee should be restricted by the parties' agreement and the purpose of guarantee. When the debtor is unable to pay off the debt, the creditor can realize the guarantee by adopting the "attribution liquidation type" method.

**Keywords:** equity transfer guarantee; realization of equity transfer guarantee; Civil Code

### 1. Introduction

The promulgation of the Civil Code of the People's Republic of China (hereinafter referred to as the "Civil Code") is a summary of China's previous legal construction in line with the development of the times. Some of its new changes not only have an impact on civil judicial practice but also have a lot of impacts on commercial judicial practice due to China's legal structure of "integration of civil and commercial laws". For example, equity transfer guarantee is a typical example. First of all, before the promulgation of the Civil Code, transfer guarantee had already become a thorny problem in the field of civil law, and its judicial handling methods and legal consequences have aroused extensive controversy and discussion. With the official implementation of the Civil Code, how to properly solve the historical problems left by transfer guarantee and explore its specific application approaches in real life has become the focus of widespread attention in the industry. Secondly, equity transfer guarantee shows certain particularities because the subject matter of transfer is equity. Equity is different from the subject matter of other transfer guarantees. It is a comprehensive right with property rights and personal rights. In addition, the publicity method of equity is also different from that of general movable property, which further increases its complexity.

Therefore, under the macro framework of the Civil Code, what position should equity transfer guarantee occupy? What new problems may emerge? How to effectively solve these prominent problems in commercial law practice? In response to these questions, the author analyzes the causes of the emergence of (equity) transfer guarantee, studies the legal effect of (equity) transfer guarantee and the problems in the exercise of (equity) transfer guarantee equity, and finally puts forward his own opinions on the realization of (equity) transfer guarantee. The specific analysis is as follows:

### 2. (Equity) Transfer Guarantee and Its Causes of Emergence

Transfer guarantee is not a guarantee method explicitly stipulated by law. As a kind of "atypical guarantee" due to its convenience in judicial practice, it is widely used. Generally, it refers to a guarantee method in which the debtor (or a third party) transfers the ownership of the collateral to the creditor to guarantee the performance of the debt; when the debt cannot be fulfilled, the creditor can be compensated by this collateral. If the transferred subject matter is equity, it is equity transfer guarantee.

#### 2.1 Analysis of the Causes of The Emergence of (Equity) Transfer Guarantee

Transfer guarantee is a kind of atypical guarantee developed in judicial practice. The reason for this phenomenon lies in the frustration cost generated by the principle of numerus clausus of real rights(Su,2012). That is, the typical security real rights stipulated by law cannot meet the needs of parties in judicial practice. On the one hand, statutory guarantee

needs to meet certain conditions. The debtor needs to meet certain thresholds to establish a guarantee: for example, mortgage right can only be established on real estate and specific movable property. Pledge right can only be exercised on movable property and specific rights (excluding equity). And if there is no corresponding collateral or guarantor, real estate mortgage and movable property mortgage or guarantee cannot be carried out. On the other hand, the realization cost of typical guarantee is often too high and a series of litigation and execution procedures need to be performed. Therefore, parties often adopt a series of tortuous creditor-debtor relationships to realize their will to freely establish real rights.

Compared with mortgage, "transfer guarantee" has stronger control over the "transferred object (equity)" in name for creditors because it separates equity from liability property in advance. With the "transfer of ownership", creditors have a stronger sense of security for debt guarantee. And through "equity transfer guarantee", the same legal effect as establishing pledge right is achieved, so it is widely applied in financing practice.

## *2.2 Equity Transfer and Equity Transfer Guarantee*

Equity transfer guarantee realizes the function and purpose of guaranteeing creditor's rights through the original loan contract, equity transfer contract, usually also equity repurchase contract and other supplementary agreements (Jia, 2023). The act of "transfer" is actually "guarantee". Therefore, equity transfer guarantee and equity transfer have certain similarities in form.

Equity transfer refers to the legal act in which a shareholder transfers all his equity in the company to the transferee, and the transferee succeeds in obtaining the equity and becomes a new shareholder of the company (Shi 2018). The equity transfer contract is the true intention of the parties to transfer equity. Equity transfer is often completed through "equity transfer contract" and "equity change registration". After the completion of equity transfer, all the rights of the selling shareholder should be transferred to the transferee. Therefore, the real purpose and intention of equity transfer are to realize the "transfer of equity ownership".

Equity transfer guarantee, although its name is "equity transfer", is actually aimed at achieving the purpose of "guarantee". In practice, this mechanism often presents in the form of an equity sales contract, resulting in a blurred boundary between equity transfer guarantee and real equity transfer. However, the significant differences in legal effects between the two often lead to disputes between the parties. Therefore, it is particularly important to clearly distinguish equity transfer from "equity transfer guarantee". First of all, as an atypical guarantee method, "equity transfer guarantee" often has a core main debt contract behind it. This characteristic makes "equity transfer guarantee" essentially different from general "equity transfer". Secondly, "equity transfer guarantee" does not involve the comprehensive transfer of property rights or membership rights of equity. In most cases, the transferor of equity still retains and enjoys the membership rights conferred by equity, including but not limited to participating in company management, exercising decision-making power, and even enjoying the right to request profit distribution. This characteristic further highlights the difference between "equity transfer guarantee" and real "equity transfer". Finally, as for whether to carry out the change registration of equity, the author believes that this cannot be used as a decisive basis for distinguishing the two. Because in actual operation, whether to register may be affected by various factors, such as the will of the parties, the legal environment, etc. Therefore, when judging equity transfer and equity transfer guarantee, various factors should be considered comprehensively rather than making judgments solely based on whether there is registration.

## **3. Legal Effect of (Equity) Transfer Guarantee**

Before the introduction of the Civil Code, there was great controversy in judicial practice and theoretical research regarding the effectiveness of equity transfer guarantee. After the introduction of the Civil Code, the legal basis of transfer guarantee has been somewhat improved.

As mentioned above, equity transfer guarantee is usually composed of loan contracts, equity transfer agreements and other supplementary agreements, and there is no document independently named "equity transfer guarantee". Therefore, the discussion on the effectiveness of equity transfer guarantee is divided into two levels: first, the discussion on the effectiveness of the direct equity transfer contract; second, the discussion on the legal effect of equity transfer guarantee.

### *3.1 Effectiveness of (Equity) Transfer Guarantee Contracts*

Regarding the judgment of the validity of equity transfer contracts, courts have two logics: One holds the separation theory. That is, loan contracts, equity transfer contracts, repurchase contracts, etc. are evaluated as independent legal acts respectively. Another view favors the comprehensive theory. It is believed that relevant contracts should be judged as a whole, and the validity of the equity transfer guarantee contract depends on the validity of the loan contract. The author agrees with the latter view. (Yao, 2023) The main reasons are as follows: First, the separation theory will lead to different results in the judgment of contract validity, and this contradiction is difficult to eliminate. Second, the equity

transfer guarantee contract is to achieve the purpose of guarantee. If the main debt contract is invalid, the equity transfer guarantee contract should also be invalid.(Cai, 2018)

Secondly, due to whether the equity transfer contract is effective, viewpoints have changed. Before the Civil Code came into effect, some scholars believed that the equity transfer contract was invalid and did not have the natural effect of equity transfer. (Xie,1999) Since the parties did not have the true intention of equity transfer, it belonged to a false expression of intention made through collusion between both parties, and the contract should be invalid. Now Article 68 of the Judicial Interpretation of the Civil Code's Guarantee System has determined that the "liquidity clause" agreed in the contract is invalid, rather than the entire transfer guarantee contract being invalid. That is, the clause that "equity belongs to the creditor" when the debtor cannot pay off the debt is invalid. However, "it does not affect the parties' intention to provide guarantee."

### *3.2 Effectiveness of (Equity) Transfer Guarantee*

As for whether equity transfer guarantee, as an "atypical guarantee method", is effective, there are also two viewpoints: the negative view and the affirmative view. Scholars who hold the "negative view" believe that transfer guarantee is not a guarantee method explicitly stipulated by law and violates the provisions of "principle of numerus clausus of real rights" and "prohibition of flowage clause"(Gao, 2021) ; Moreover, transfer guarantee is suspected of false expression of intention and evasion of law due to the deviation between form and purpose. Therefore, its guarantee effectiveness cannot be recognized. Scholars who hold the "affirmative view" believe that for reasons such as "there is no prohibition in law", "transfer guarantee as a special real right guarantee does not violate the mandatory provisions of laws and administrative regulations"(Wang,2020), and "transfer guarantee with liquidation clause does not violate flowage clause", transfer guarantee as an atypical guarantee should be effective.

The author believes that (equity) transfer guarantee is an effective guarantee method. First, Article 388 of the Civil Code states that "guarantee contracts include mortgage contracts, pledge contracts and other contracts with guarantee functions", confirming the negotiability of guarantee methods. As an atypical guarantee contract, the transfer guarantee contract has the same function of guaranteeing creditor's rights as typical guarantee acts such as mortgage and pledge. Legal changes provide a theoretical basis for "transfer guarantee". Second, the "violation of the principle of numerus clausus of real rights" proposed by the opposition is also unfounded. Article 68 of the Interpretation of the Civil Code Guarantee System recognizes transfer guarantee at the level of "law".

Therefore, as long as the transfer guarantee contract meets the effective requirements of legal acts, it will produce the legal effect of guaranteeing debts. In conclusion, it is speculated that in future judicial practice, due to the systemic effect produced by Article 388 of the Civil Code, more agreements directly named "equity transfer guarantee" or "transfer guarantee" will appear in the future, making the intention expression of equity transfer or guaranteeing creditor's rights clearer and the legal relationship more clear.

## **4. Issues on the Exercise of Equity in Equity Transfer Guarantee under the Civil Code**

The legal constitution of transfer guarantee determines the internal legal relationship between the parties and also determines the internal validity against third parties. Regarding the legal structure of transfer guarantee, there are mainly two doctrines: "ownership structure theory" and "guarantee right structure doctrine". The author has made a preliminary collation of the impacts of these two doctrines on equity transfer guarantee.

### *4.1 Legal Structure of Transfer Guarantee*

The "ownership structure theory" focuses on the formal level of transfer guarantee, that is, the transfer of ownership (Xiang, 2014) .This doctrine holds that the settlor transfers the subject matter he owns to the creditor in a trust manner for the purpose of guaranteeing the performance of debts, but the creditor may not dispose of it beyond the guarantee purpose. To prevent the guarantor from exercising ownership beyond the economic purpose, the parties usually agree on a series of restrictive conditions for the exercise of ownership. This arrangement is similar to the role of the trustee in trust acts, that is, the trustee can only exercise ownership based on economic purposes. Therefore, transfer guarantee is also regarded as a form of transfer guarantee in trust to some extent (Harry, Peter, Gursky, &Eickmann, 1998). However, if the transferee disposes of the subject matter without authorization in violation of the agreement, the disposition act is still regarded as valid in law. In this case, the transferee needs to bear corresponding liability for breach of contract to the transferor.

The "guarantee right structure theory" focuses on the purpose of behavior and is currently the mainstream view in academic circles (Wang, 2024). This doctrine advocates that the creditor obtains the security right to dominate the value of the subject matter within the limit of the amount of creditor's rights, while the settlor still retains ownership. The basis of this view mainly includes three aspects: First, the true intention of the debtor in transferring the subject matter to the creditor is only to provide guarantee for the debt. Therefore, the creditor only obtains the guarantee value, not the

complete ownership of the subject matter. Second, in the case where the debt is not repaid, the creditor does not directly obtain the ownership of the transferred object. The restriction by the "liquidation clause" also shows that the transferee only enjoys the value right of the transferred object. Third, the "value right" is only one of the functions of the "complete ownership right". This also shows from the side that the parties have a restricted ownership, that is, the value function in ownership, not the direct "complete" ownership.

The author believes that the "ownership structure theory" takes care of the form of ownership transfer, but it is not enough to protect the transferor (debtor). The "guarantee right structure theory" conforms to the true intention expression of the parties, and the author expresses agreement. However, after transferring ownership and making public announcements, in terms of legal structure, it is considered that the transferee only obtains the "value right", which is not conducive to the protection of third parties. Therefore, how to correctly make public announcements becomes a difficult problem in (equity) transfer guarantee.

#### *4.2 Exercise of Equity in Equity Transfer Guarantee*

Who is the shareholder between the equity transferor (guarantor) and the transferee (creditor)? How are shareholder rights exercised? The above are issues that need to be resolved in judicial practice of transfer guarantee. Although in theoretical research, the "constructive theory of security right" and the "ownership structure theory" have different focuses, they have one thing in common, that is, the exercise of ownership by the transferee is restricted by purpose. Specific analysis is as follows:

There are two types of equity transfer and guarantee: first, there is only an equity transfer contract, and there is no change in the equity registration; second, there is already a change in the equity registration. For the first situation, the real meaning of the equity transfer contract signed by the equity transferor is not in the transfer of equity, but with the transfer of equity to facilitate the financing. And did not carry out the change of equity registration, therefore, the nominal holder and the actual holder of equity are the transferor of equity. The transferee is not qualified to make equity exercise, the equity behavior is invalid. Judicial practice is more common for the second situation. At this time, how to exercise the rights of shareholders, the author believes that should be discussed in different situations. First, the equity transfer and security parties on the exercise of equity agreement, can be in accordance with the agreement. In violation of the agreement, the behavior is invalid. As stated in yancheng city intermediate people's court of jiangsu province (2015) yancheng final word no. 00093 civil judgment, the parties to the creditor's exercise of shareholders' rights has a specific agreement, but the creditor violated the agreement, in the name of the shareholders convened the shareholders' meeting and changed the company's senior management and legal agent. The court held that the creditor's breach of the contractual agreement was invalid, and therefore the resolution made at the shareholders' meeting was also invalid. The creditor, as the transferee of the equity, was not a real shareholder of the company, and did not actually acquire the equity or acquired the rights agreed upon by the parties, rather than the full rights. Therefore, the violation of the agreement for the behavior is invalid. Second, the parties to the exercise of equity did not make a specific agreement or agreement is not clear. The transferee of a security right is only a nominal shareholder and does not actually enjoy all the rights of a shareholder. The transferee of the equity may claim security rights in accordance with the agreement, but does not acquire the real equity. (Wang, 2022) See, for example, Supreme People's Court (2015) Civil Decision No. 3620.

In summary, even if a change in equity registration has been made, the terms "nominal shareholders" and "actual shareholders" should be used to limit the rights of the "nominal shareholders". In an equity transfer guarantee, the transferee (creditor) is a nominal shareholder, does not acquire a complete equity stake, does not actually enjoy all the rights of shareholders, and therefore can only exercise the equity stake within the scope of the guarantee and in accordance with the agreement of the contract. Equity transferee exceeds the scope of the guarantee or the contract agreement, exercise of equity resulting from the behavior is generally invalid or pending. If the contract of transfer of equity does not contain any special agreement or is unclear as to the transferee's exercise of equity or assumption of obligations, the transferee should exercise its equity in accordance with the scope of the purpose of the guarantee in a reasonable manner.

In fact, the author believes that it is correct to incorporate the new issue of "exercise of equity" in judicial practice into the long-discussed cases of nominee shareholding agreements and hidden shareholders in the field of equity transfer and guarantee. It is undoubtedly a wise strategy to channel a new issue into a familiar field.

In addition, at the level of external relations of equity cession and guarantee, we should not only focus on the exercise of equity, but also need to examine the issue of creditor's cession of equity to a third party at the same time. In the author's view, we can draw on the response method of the nominal shareholder's transfer of equity in the equity cession to provide a useful reference for the solution of the problem. Specifically, if the creditor transfers the equity interest in the cession security, according to the established judicial precedents, the bona fide third party can fully claim the bona

fide acquisition of the equity interest based on the publicity effect of the equity transfer. For example, the Supreme People's Court (2016) Supreme Court Civil Shen 3132 Decision. This provision ensures the security and stability of the transaction and provides market participants with clear legal expectations.

## **5. Realization of the Civil Code's Equity Cession Security**

One of the important reasons for the popularity of the cession and guarantee system in practice is the convenience of realization, but it has also been criticized for the violation of the "liquidity prohibition" due to the "direct acquisition of ownership by the creditor". Therefore, it is necessary to explore how to realize the security of transfer in order to balance the interests of creditors and debtors and to realize fairness and justice.

### *5.1 Realization of Cession Security*

Compared with the provision in Article 211 of the Property Law that "it is not allowed to stipulate that the pledged property shall belong to the creditor when the debtor fails to perform the due debt", Articles 401 and 428 of the Civil Code have been adjusted to "only be entitled to priority compensation for the mortgaged property in accordance with the law." The "in accordance with the law" here means referring to the realization methods of mortgage rights and pledge rights, and it is necessary to perform the "liquidation obligation"(Zhu&Ma, 2021).This also means that the agreement that "the creditor obtains ownership when the debt cannot be repaid" between the parties is not absolutely invalid. In order to balance the interests between the parties, specifically, the parties can agree on discounting, auctioning and selling the mortgaged property, or they can request the court to conduct auctioning and selling.

For the "liquidation" method of transfer guarantee, there are two different views: "attribution liquidation" and "disposal liquidation" (Gao,2018). "Attribution liquidation" means that when the conditions for realizing the security right are met, after the security right holder fulfills the liquidation obligation between the value of the collateral and the creditor's rights, it definitely obtains the ownership of the collateral. And "disposal liquidation" means that when the conditions for realizing the security right are met, the security right holder needs to dispose of the collateral by changing its price and only has priority in being compensated for its price (Liu, 2022).

The author believes that for the realization of transfer guarantee, if the parties have an agreement or make a separate agreement when the conditions for exercising the security right are established, of course, the agreement shall prevail. When the agreement is ambiguous, the transfer guarantee should be realized in the "attribution liquidation type". The main reasons are as follows:

First, although the "disposition liquidation type" is more neutral due to the bidding of third parties and can also meet the purpose of guarantee, it also has the following drawbacks: First, there may be a situation of malicious collusion between the creditor and the third party, which damages the interests of the debtor. In addition, "disposition liquidation" will generate costs and increase the burden on the debtor. Finally, "disposition liquidation" may not meet the requirements of efficiency in modern transactions (Tang, 2024). Under disposition liquidation, the creditor needs to wait for the completion of the auction before obtaining the value of the collateral.

Second, the "attribution liquidation type" has advantages. It is mainly manifested in two aspects: First, it meets the expectations and psychological expectations of the parties. For creditors, when liquidation is impossible, using the collateral for debt repayment after liquidation meets expectations. For debtors, losing the ownership of the collateral when unable to pay off the debt also has a certain psychological expectation. Secondly, the "attribution liquidation type" retains the advantages of transfer guarantee and avoids cumbersome price change procedures. Otherwise, compared with typical guarantees for equity transfer, there is no advantage. Thirdly, respect the will of the parties to realize the guarantee right. When the creditor requests the transfer of the collateral, the collateral can be transferred to the creditor; and the parties can have full autonomy in pricing the subject matter, which can balance the interests of the parties.

### *5.2 Realization of Equity Transfer Security*

As can be seen from the above, in equity transfer guarantee, when the debtor cannot repay the debt, the creditor can use the transferred equity to repay the debt after liquidation according to the agreement or supplementary agreement. When there is no agreement, according to the "attribution liquidation type", the creditor can request the debtor to attribute the transferred creditor's rights to himself/herself. And conduct "refunding for excess and making up for deficiency" according to the difference between the stock price and the debt at the time when the security right is realized, so as to achieve a balance of interests between the parties.

## **6. Conclusion**

As a "title Finance" in which practice promotes legislation, transfer guarantee has shed the questioning and torture and shown strong practical prospects under the legal framework of the Civil Code. However, equity transfer guarantee has

become a difficult problem in judicial practice due to its involvement in the cross-field of civil law and commercial law and the particularity of equity that has both personal rights and property rights.

Through the research on equity transfer guarantee in the new regulations and existing theories, the author draws the following conclusions: First, the emergence of equity transfer guarantee is an atypical guarantee generated because the legal guarantee types cannot meet the needs of practice. Second, in the system of the Civil Code, as an atypical guarantee, transfer guarantee is an effective guarantee method. Article 488 of the Civil Code and Article 68 of the Judicial Interpretation of the Civil Code's Guarantee System provide the basis for interpretation. Third, in equity transfer guarantee, the exercise of equity should be restricted. Ensure that the transferee exercises only within the agreed scope or within the framework of the guarantee purpose. Fourth, the realization method of equity transfer guarantee should adopt the "attribution liquidation type", which balances the interests of both parties and shows the institutional advantages.

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