

Research on the Legal Issues of the Company's Ultra Vires External Guarantee

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Abstract: Guarantee refers to the guarantor's promise to the creditor to pay off the debt on behalf of the debtor or to pay off the debt with a specific value when the debtor fails or cannot pay off the debt. There are still disputes on the choice of norms, the standard of review obligation and the effect of private law in determining the validity of the legal representative's ultra vires guarantee. In the unauthorized agency system, the bona fide counterpart enjoys the right of cancellation before the act committed by the doer is ratified. The counterpart here is in a state of "malice" and naturally does not enjoy the right to cancel. On the basis of the existing minutes, we should do a good job of connecting the "Company Law", the Civil Code and relevant judicial interpretations, streamline the provisions, and accurately divide the boundary between "the goodwill of the other party" and "the content of formal examination". The author thinks that the literal interpretation of legal rules and its typological analysis are the only way to identify the effectiveness of the company's ultra vires external guarantee, but we can't draw the conclusion of the effectiveness of the guarantee behavior in one step, and we need to cooperate with other interpretation methods.

1. Introduction

The object of review by the counterpart is not limited to the company's resolutions, but also to judge whether the company's resolutions are appropriate in combination with the company's articles of association and other documents; Its review standard is "reasonable review", which is a prudent formal review. The two points of "effective" and "effectiveness to be determined" are the appearance of the effectiveness of the legal representative's ultra vires guarantee behavior [1]. If it is proved that the review obligation has been fulfilled, the ultra vires guarantee will be effective for the company, and the company will bear the guarantee responsibility; When the counterpart is "malicious", the possibility of applying unauthorized agency by analogy lies in the fact that "representative" and "agent" are essentially behavioral effect attribution norms, which are the link between the agent's behavioral effect and himself.

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2. Mechanism and characteristics of guarantee

Guarantee refers to the guarantor's promise to the creditor to pay off the debt on behalf of the debtor or to pay off the debt with a specific value when the debtor fails or cannot pay off the debt. According to the different subject matter, guarantee can be divided into credit guarantee and property guarantee. There are five kinds of guarantee methods stipulated in China's Guarantee Law: guarantee, mortgage, pledge, lien and deposit. Among them, the guarantee belongs to credit guarantee, and the rest is property guarantee. As long as the debtor fails to perform the debt at the expiration of the debt performance period stipulated in the main contract, the creditor may directly ask the guarantor to assume the guarantee responsibility within the scope of his guarantee [2].

The emergence of guarantee system is inseparable from the development of social economy, which is essentially the product of the interaction between law and economy. In the long history of human social development, productivity is the basic driving force of social development, and the development of social productivity is like an invisible hand to promote the development of the whole social economy. There are two main aspects of the value of the guarantee system, one of which is to ensure the realization of creditor's rights.

Today, with the rapid development of social economy, the guarantee system has shown a diversified trend. This ancient topic has derived many new contents. For example, the ultra vires external guarantee of listed companies is the product of its continuous derivation, so how to properly apply the guarantee system to listed companies has become a major problem to be solved in China's financial market.

3. Legal issues on determining the validity of the legal representative's ultra vires guarantee contract

3.1. Identification of the nature of legal norms

How to define the normative attribute of Article 16 of the "Company Law" has always been controversial. A few people think that Article 16 is aimed at strengthening the adjustment of the internal management relationship of the company, and it has no effect on the outside of the company, which is arbitrary, and the legal representative's violation of Article 16 does not affect the effectiveness of the company's guarantee contract [3]. In theory and practice, the most controversial issue is whether Article 16 of "Company Law" is an effective norm or a management norm in mandatory provisions. Because the judicial interpretation and guidance have discussed the influence of the effective mandatory norms and management norms on the validity of the contract, it has triggered a dispute between the practical and theoretical circles on the implication between the normative nature of Article 16 of "Company Law" and the validity of the contract.

Considering that the related party guarantee may cause more harm to the company, and in view of the fact that the internal governance structure of the company in China is still not perfect, the abuse of power by the major shareholders and actual controllers is common, the legislators have strengthened the compulsory strength of the related party guarantee and pulled away from arbitrariness. The author is more inclined to regard these two paragraphs as administrative mandatory provisions in the majority view of academic and practical circles [4].

In accordance with the existing laws and judicial interpretations, the first paragraph of Article 16 of "Company Law" is a compound norm with both "mandatory" and "arbitrariness", while the second and third paragraphs belong to the administrative mandatory norms. The mandatory color revealed in Article 16 of "Company Law" is aimed at the specification of the resolution mechanism of company guarantee, and its essence is also a corporate governance issue, mainly to rationally assign the power to decide the guarantee matters. The second positive criterion for determining

whether it is a mandatory norm of validity is whether the signed contract will cause harm to national interests and public interests if it does not follow the procedures stipulated in this norm. From the beginning, the interpretation of Article 16 of "Company Law" is to force value judgment and interest measurement into the identification of the nature of the law, without respecting the proper meaning of the law itself and the meaning expressed by legislators [5]. There is something wrong with the division and identification of administrative mandatory norms and effective mandatory norms, not to mention judging the effectiveness of ultra vires guarantee contracts.

3.2. Distribution of burden of proof

Most of the acts of the legal representative's ultra vires external guarantee will be recognized as valid, and the court judgment tends to recognize the acts as valid in the process of case integration. This is because, in terms of burden of proof, it is difficult for the company to prove that the counterpart and the legal representative colluded maliciously, or that the counterpart knew or should have known that the legal representative exceeded his authority and claimed that the guarantee was invalid in the litigation process. Specifically, when dealing with disputes over the external guarantee of the legal representative, the company should submit evidence to prove that the legal representative of the company exceeds the scope of the external guarantee stipulated by law or the articles of association, so as to prove the existence of the external guarantee beyond the authority. If both parties think that the counterpart of the ultra vires guarantor has never expressed goodwill, the ultra vires guarantor acts as an ostensible representative, and the guarantee is valid relative to the contract. Otherwise, the subjective state of the relative person is malicious.

The third paragraph of Article 61 of the Civil Code stipulates the external effect of the limitation of the legal representative's representation. According to the second paragraph of Article 61 of the Civil Code, China has adopted the "representative theory" between "representative theory" and "agency theory" on the status of the legal representative, and the legal representative's external job behavior is a legal person's behavior, and the consequences are borne by the legal person [6-7].

There may be two results due to the different degrees of proof given by the company: first, if a company cannot prove that the counterpart has known or should have known its ultra vires behavior, it should be regarded as sincere and good-natured, and the company should assume its guarantee liability and repay the debts of the counterpart according to law; Secondly, if the company has been able to confirm that the secured party has reasonable doubts about the representative's behavior, its corresponding security right will be revoked.

3.3. Duty of care of counterpart

In legal practice, there are three situations that belong to the category of knowing: first, the counterpart of the contract is the shareholder, director or senior manager of the company. Second, the legal representative has informed the counterpart of the contract that he has no right to represent [8]. Third, the counterpart of the contract learned the fact that the legal representative's rights were limited from other channels. Company affairs are divided into ordinary affairs and abnormal affairs, and the legal representative can engage in ordinary affairs on behalf of the company without special authorization; To handle abnormal affairs, the authorization of the board of directors or shareholders' meeting shall be obtained. According to the provisions of Articles 16 and 17 of China's current Guarantee Law, it can be clearly recognized that once the debtor fails to fulfill its due legal obligations, the guarantor often faces the risk of joint responsibility, whether it is a general guarantee or a joint guarantee. The contract law encourages people to put "reasonable trust" into others' promises, rather than "excessive trust". Insist that the counterpart should undertake the necessary review obligation, so as to prevent the careless third party from signing the ultra vires

guarantee contract with the legal representative. In the future guarantee contract, the probability of the legal representative's ultra vires guarantee behavior will be reduced.

The standard of formal examination is advocated by most scholars, that is, the counterpart only needs to examine whether the form of the resolution meets the formal requirements for the establishment of a resolution, such as the need to affix the company's official seal, the need for shareholders' signature, the need for a resolution on guarantee, and the need for the guaranteed shareholder to abstain from voting. For other standards, this paper thinks it can be used for reference. It is not appropriate to apply the review standard in a simple form to all kinds of cases. Because there are great differences in the difficulty of private party review due to the types of private party's identity, relationship and openness of information, it is inevitable that it is inappropriate to apply each type with only one standard. The law should not protect what the counterpart calls "reasonable trust" in this case.

China's "Negotiable Instruments Law" does not stipulate the rules of agency by estoppel, nor does it recognize the ratification rules of legal persons for unauthorized agency or ultra vires agency. Instead, it says that the unauthorized agency is not responsible for itself, and the ultra vires agency is partially invalid [9]. This paper holds that this view violates the essence of the relationship between the legal representative and the legal person, and also violates the distinction between the agreed restrictions and legal restrictions on the legal representative's representation. However, there are still cases where the legal representative will not bear the consequences of signing a contract beyond his authority. Therefore, it cannot be considered that the legal consequences of all actions of the legal representative will be borne by the legal person. Accordingly, the logical premise of the above viewpoint does not exist.

4. Responsibility allocation of the legal representative of the company's ultra vires guarantee

4.1. Clarify the definition of related concepts in existing legal norms

In terms of content, it clearly distinguishes between the resolution organs that stipulate related guarantees and unrelated guarantees. Under different circumstances, whether the ultra vires behavior of the legal representative constitutes the ultra vires representative of the company, and whether the company as a legal person can confront any third person with goodwill, and changes the unclear way of explaining the existing legal provisions. At the same time, the words "the counterpart only needs to perform the formal review obligation of ordinary people" are included in the existing provisions, and explained by judicial interpretation or other means to determine the boundary of the formal review obligation of the counterpart and the specific identification of the bona fide counterpart, so that it can be followed by laws.

The author believes that on the basis of the existing minutes, we should do a good job of connecting "Company Law", "Civil Code" and relevant judicial interpretations, simplify the contents of the provisions, and accurately divide the boundary between "the goodwill of the other party" and "the content of formal examination".

4.2. Standard and scope of review obligation

It is a game of multi-stakeholders and the key to judge the effectiveness of the contract to adopt the standard of the review obligation and determine the reasonable scope of the review obligation. As far as the resolution organ for reviewing the company's guarantee is concerned, the resolution organ for related guarantee is undoubtedly the shareholders' meeting or the shareholders' meeting, and whether the review of the resolution organ for unrelated guarantee by the counterpart is affected by the company's articles of association is controversial. As far as the standard of the private party's

review obligation is concerned, if the standard of the private party's review obligation is directly handed over to the judge for free evaluation, judges in different courts or even different trial chambers of the same court can draw different standards, then the phenomenon of different judgments in the same case is even more uncontrollable [10]. Therefore, it is more appropriate to determine the standard of private party's review obligation as the standard of formal review. In order to effectively curb the chaos of company guarantee at this stage, the author agrees that the shareholders' meeting should still be the resolution organ of company guarantee when the articles of association are not stipulated. Of course, when China's corporate governance structure is more scientific and effective in the future, and after gradually moving towards the board-centered principle, we can consider expanding the resolution organ of corporate guarantee to the board of directors.

4.3. Responsibility allocation when the ultra vires guarantee contract itself is invalid

The ultra vires guarantee contract may take effect between the company and the counterpart, or between the operator and the counterpart. When the ultra vires guarantee contract itself is found to be invalid, the relevant provisions of the Guarantee Law should be applied to the division of responsibility for the invalidity of the guarantee contract, that is, Article 388, paragraph 2 of the Civil Code and Articles 7 and 8 of the Judicial Interpretation of the Guarantee Law, so as to specifically identify the share of civil liability that the guarantor, the debtor and the secured creditor should bear under different circumstances. At this time, the counterpart may request the actor (i.e. the legal representative) to perform the contractual debts or claim compensation for the damages suffered by him. It is worth noting that in the unauthorized agency system, the bona fide counterpart enjoys the right to cancel the act committed by the perpetrator before it is ratified. The counterpart here is in a state of "malice" and naturally does not enjoy the right to cancel.

5. Conclusions

The emergence of guarantee system is inseparable from the development of social economy, which is essentially the product of the interaction between law and economy. Today, with the rapid development of social economy, the guarantee system has shown a diversified trend. Considering that the related party guarantee may cause more harm to the company, and in view of the fact that the internal governance structure of the company in China is still not perfect, the abuse of power by the major shareholders and actual controllers is common, the legislators have strengthened the compulsory strength of the related party guarantee and pulled away from arbitrariness. The effectiveness of the company's legal representative's ultra vires guarantee is a problem that comes from practice and will eventually return to practice under the guidance of legislative norms and theories. With the development of corporate governance and judicial practice in the future, the issue of corporate guarantee will inevitably lead to new discussions.

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