

Research on the legal preemptive right in the newly revised civil code

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Abstract: The preemptive right is an ancient legal system. The preemptive right in Western countries originated from ancient Roman law, and the preemptive right in China originated in the Middle Tang Dynasty. However, compared with other systems, in addition to a large number of detailed regulations in German civil law practice, the regulations in other countries are generally brief. Although China's current laws provide for various types of pre-emptive rights, they are quite simple and difficult to operate in practice. Here we try to systematically sort out and analyze the various pre-dispersed pre-purchase rights based on the nature and existence value of the pre-purchase rights under the background of compiling the civil code, and consider the restrictions on the scope of application of the legal pre-purchase rights. Demonstrate the necessity and legitimacy of adding general rules of preferential purchase rights in the future civil code, and corresponding system design suggestions accordingly.

1. Introduction

Private law is based on "autonomy of will". Within the scope of law, individuals can build legal relationships through legal actions according to their own will. The preemptive right is an exception to the above principles. Because of the priority purchase right, when the seller sells its subject matter, it has the right to purchase in preference to the third party under the same conditions. Generally speaking, sellers have the right to arbitrarily dispose of their belongings and have the freedom to choose counterparties¹. The right of first refusal restricts the seller's right to dispose, which is a deviation from the principle of autonomy of will. This fact must be reasonable, and such rationality either exists in the agreement between the parties in advance (the seller has recognized this right in advance), or it is stipulated by the law itself. The law requires that the reasons must be explained. In this way, the preemptive right can be intentionally and legally divided.

Priority to buy bribes in civil law has been in existence since ancient times. It can be traced back to the Byzantine period in Rome at the earliest, and then inherited by the French and German civil codes, and gradually improved and developed. It is a civil and commercial legal system with a long history and far-reaching influence². However, the choice of the scope of application of the statutory preemptive right in civil law countries is not exhaustive. The root cause lies in different policy considerations regarding the value of its existence. China's current civil legal system provides for a variety of pre-emptive rights, such as shared pre-emptive rights (Article 78 of the General Rules of the Civil Law of the People's Republic of China and Article 101 of the Property Law of the People's Republic of China), and the lessee of the house as a priority Purchase rights (Article 230 of the "Contract Law of the People's Republic of China"), preemptive rights of shareholders (Article 71 of the "Company Law of the People's Republic of China"), and preemptive rights of partners (Article 23 of the "Partnership Law of the People's Republic of China") Etc., all belong to the statutory priority purchase right granted to specific parties by the law^{3,4}. On the one hand, we should see that the pre-emptive rights currently stipulated in our country are scattered among various ministries and various legal sources, and are independent and unsystematic. Since the sharing of unified provinces says that there must be certain inter-communities, such as consistent connotation and consistent exercise rules. From the perspective of the systematization of the Civil Code, it is necessary to integrate existing laws and regulations, extract some of the common elements, and carry out

systematic and general system design. On the other hand, each of the above-mentioned pre-emptive rights provisions is relatively simple, and often only one or two clauses are used to explain that a specific person in a specific situation has priority to purchase under the same conditions, and how to define the nature of the pre-emptive rights, When the right holder can exercise the right, how to define the "equivalent conditions", what legal effect will be produced after the exercise, how to remedy the right holder when it cannot be exercised normally, there is a certain degree of disagreement between the academic theory and the trial practice, especially the judge is dealing with In specific disputes, due to the ambiguity of laws and deviations in understanding, the final entity handling results are often different.

Since the publication of the resolution of the Fourth Plenary Session of the Eighteenth Central Committee of the Communist Party of China in 2014, the academic circles have once again set off a wave of compilation of the Chinese Civil Code. Leading experts such as the China Civil Code Legislation Research Group and other authoritative experts have successively released the latest "Recommendations of Experts of the Civil Code of the People's Republic of China". The process of codification of civil law is unstoppable. So, from the perspective of the Civil Code, how should the priority purchase system be designed, where should it be placed in the legal system of good deeds, how to change the current situation of fragmentation, how to integrate the existing norms and make a system This article attempts to give the answer.

2. Preemptive right

For the preferential purchase right system, scientifically and accurately defining the nature of the preferential purchase right is the logical premise for constructing the preferential purchase right system in theory and the basis for giving full play to the role of the system in practice. The nature of the priority purchase right is directly related to the determination of the method of exercise, the effect of exercise of rights, the possibility of infringement and the method of relief. Different definitions of nature will have different analytical consequences⁵. It has been pointed out earlier that the preemption right should be divided between the rule and the intention, and the current law of our country only stipulates the statutory priority purchase right. Although the statutory pre-emptive right and the intended pre-emptive right are established in different ways, the basic nature should be the same. Therefore, the legal nature of the pre-purchase right should be explained uniformly. The general expression of the preemptive right norm is "the right holder has the right to purchase preferentially under the same conditions." Taking the lessee's preemptive right as an example, Article 230 of the Contract Law of the People's Republic of China (hereinafter referred to as Contract Law) provides If the lessor sells the leased house, it should notify the lessee within a reasonable period before the sale, and the lessee enjoys it! The right to purchase first on equal terms. The interpretation of this article by the Ministry of Legislation of our country points out that the lessee's preemptive right to purchase the leased property is limited to the house, and this right has the dual characteristics of the right to request and the right to form. Specifically, it is the lessee's claim for the lessor's sale of the house, and it cannot directly confront the third party. It does not affect the seller's negotiation with other people before it is exercised, but it is also a conditional right to form. As a premise. The right to request and the right to form are a classification under the relative right, which are different types of rights measured under the same right classification standard. Compared with the obligor, the former needs to be realized by the obligor. If the obligor fails to perform the payment, the obligee usually has to enforce it by the state organs to realize its rights. The latter has to rely on the unilateral expression of the right holder to realize the occurrence, change and elimination of the legal relationship. The difference between the two is greater than the commonality. It is impossible for the priority purchase right to combine these two rights attributes. It can be seen from this that our country's laws do not clearly define the right attribute of the right of first refusal. This theory and practice are widely disputed and controversial.

3. Types of preemptive rights

There are many categories under the system of preferential purchase rights. The laws and regulations of various countries are different, and there are different criteria for academic discussions. The current law of our country stipulates the priority purchase rights of the co-owners, the lessee priority purchase rights, the shareholder preferential purchase rights, etc. This is a classification from the perspective of the subject of the exercise of the priority purchase rights. In theory, there are usually two classification methods⁶. One is to classify the priority purchase right method according to the cause, and the other is to divide the priority bribery purchase right from the perspective of effectiveness. This will be detailed. Clarifying the types of preemptive purchase rights, systematically analyzing the respective legal characteristics and existing values of different preemptive purchase rights, and extracting commonalities on the basis of differential choices are helpful to the systematic design of the preemptive right system under the civil code system.

3.1 Academic classification

From the perspective of basic types, the general theory believes that the preemptive right can be divided into intentional preemptive right and legalized pre-purchase right according to the different causes of the right. The so-called pre-determined purchase right refers to the pre-determined purchase right that is not stipulated by law but based on the principles of private law autonomy and contract freedom. The so-called statutory pre-purchase right refers to the express purchase right that only a specific person in a specific legal relationship enjoys the subject of the sale by the seller, which is a specific right granted by the law to the right holder based on a certain value judgment standard. As with other statutory systems, as long as the conditions stipulated by law are met, the parties can enjoy the statutory priority bribery without buying.

The French Civil Code stipulates that the statutory pre-purchase right can only be applied to the common inheritance relationship and the common-use right common relationship, that is, the joint heir and the common-property right co-owner may enjoy the pre-purchase right when a party sells the inherited property or common property. The "German Civil Code", which is regarded as a model of codification, in addition to the general rules of the debt law stipulating "buy first" as a special sale, the property rights stipulation can only be applied to the right to buy first on real property. In the succession law, the pre-purchase right of the joint heirs is stipulated, and in Article 577, the pre-purchase right of the lessee, which is only applicable to residential leases, is stipulated. The Civil Code stipulates two pre-purchase rights, namely the pre-purchase right of the communal owner and the mutual pre-purchase right of the proprietor and the building owner. The Japanese Civil Code recognizes the pre-purchase rights of the joint heirs and protects the pre-purchase rights of the owners of the main land. When the right is extinguished, it shall not be refused without justifiable reasons. In contrast to China's civil law, the scope of application of the statutory pre-emptive right stipulated includes joint relationship, tenancy relationship, shareholder cooperative relationship, partner cooperative relationship, technical achievement commission development relationship, etc. Among them, the subject of the co-owner's priority purchase right is not limited to real estate. In practice, the target materialization of the lessee's priority purchase right is not limited to residential, including houses of different uses such as shops, factories, office buildings, etc. There are many types and there is a certain expansion of the scope of application. A detailed investigation and explanation of the legitimacy will provide a way of thinking for the selection of statutory priority purchase rights under the future civil code system in China.

3.2 Specific types of preferential purchase rights in China

3.2.1 Co-owner priority

The co-owner's preemptive purchase right means that when the co-owner's property is paid for transfer to the H person, the other co-owners have the right to purchase under the same conditions. "U" in China "General Regulations of the Civil Law of the People's Republic of China" (hereinafter referred to as "General Regulations of Civil Law"), paragraph 78, paragraph 3 and "Property Law of the People's Republic of China" (hereinafter referred to as the "Property Law"), stipulates the

priority of the right of purchase by the co-owner, That is, when the co-owner transfers its share, the other co-owners have the right to purchase first under the same conditions; and in the Supreme People's Court, "Opinions on Several Issues of Implementation (General Rules of Civil Law) (Trial)" (hereinafter referred to as the Civil General Comment) Article 92 refers to the pre-emptive rights of the original common co-owners. "After the common co-ownership is divided, one or several original co-owners sell their own property, if the sold property is shared with other original co-owners The property belongs to a whole or ancillary use, and other original co-owners who claim the right of first refusal should support it. "

3.2.2 Lessee's preemptive right

China's regulation on the priority purchase right of the house lessee first appeared in Article 118 of the Mintong Opinion. Purchase rights; if the lessor does not sell the house in accordance with this provision, the lessee may request the people's court to declare the house to be invalid. "Article 230 of the Contract Law follows this system, but changes "three months" to "before the sale." Reasonable period". After the introduction of the Property Law, Article 118 of the Mintong Opinion was repealed on the grounds of "conflict with relevant provisions of the Property Law". In July 2009, the Supreme People's Court promulgated the "Interpretations on Several Issues Concerning the Specific Application of Law in the Trial of Disputes in Urban Housing Lease Contracts" (hereinafter referred to as the "Judicial Interpretation of Housing Lease Contracts"). Articles 21 to 24 of the Interpretation specify the housing lease Rules on the scope of application, relief methods, etc. In addition, the Ministry of Land and Resources, "Several Opinions on Regulating State-owned Land Leases", Article 6, paragraph 5, stipulates: "Leasing state-owned land, the lessee obtains the right to use the leased land, and within the service life of the leased land, when the leased land use right is transferred, The lessee has the right of priority transfer, and the leased land terminates the lease relationship after going through the transfer procedures." From this, it can be seen that the provisions of our law on the lessee's priority purchase right are mainly limited to housing and state-owned land use rights.

3.2.3 Shareholders' preemptive right

Article 71, paragraph 3, and article 72 of the "Company Law of the People's Republic of China" clearly stipulates that shareholders of a limited liability company shall have a preemptive right to purchase other shareholders' equity under two circumstances. With the consent of the shareholders, the second is that the people's court transfers the shareholders' equity in accordance with the enforcement procedures prescribed by law. Article 34 of the Company Law also stipulates the rights of shareholders to purchase capital in priority when the company adds capital, but in this case, this right can be excluded by agreement of all shareholders. In addition, in essence, there is also a preferential bribery right of the joint management party of a Sino-foreign joint venture. According to Chinese law, the Sino-foreign equity joint venture is a limited liability company, so it is similar to the shareholder first-purchase right⁷. Paragraph 2 of Article 20 of the "Implementation Regulations of the Law of the People's Republic of China on Sino-foreign Joint Ventures" stipulates that when one party to a joint venture transfers all or part of its capital contributions, the other party to the joint venture shall have the right to purchase first⁸.

4. Proposal to amend the preemptive right in the newly revised Civil Code

Some statutory preemptive rights have no basis for existence and should be discarded. For example, the pre-emptive right of the original joint owner in the common joint, the transfer of the original joint owner's subject matter can only occur after the termination of the joint relationship. Since the joint property is converted into the individual ownership of each joint owner due to the division, each owner of course has the right to dispose of his property according to his own will. The basic relationship that other co-owners advocated for the preemptive right no longer exists, so that the preferential bribery right lacks a legal basis. And the parties "when the physical division will damage the overall effectiveness of the property, they can use other methods to distribute the

common property, or establish a shared common relationship on top of the property, so that the pre-emption right will be lost.

First, the scope of application of the legal tenant's preemptive right should be modified. China's existing tenant priority bribery system is limited to tenants of houses, but houses include business premises such as shops, office buildings, restaurants, supermarkets, etc. in addition to housing. Based on the Chinese people's special feelings about housing and the fact that housing is the most expensive necessity for human existence, China still needs to stipulate the lessee's right of first refusal to purchase. The lessee's right of first refusal only applies to residences with residential functions, while shops and business premises with commercial functions are not included in the scope of protection of the tenant's right of first refusal, but they are still protected by the principle of non-breaking leases for sale. In addition to housing, the priority purchase right in the case of lease of the right to use the main land should be increased. According to Article 29 of China's "Land Management Law", land users can obtain land use rights from land owners through leases. In this case, land users enjoy land use rights as property rights, while state-owned land. The owner or land use right holder can still transfer the land use right. When transferring the land use rights, considering that the lessee has developed and utilized the land, or even built buildings or structures on the land, in order to simplify the legal relationship and stabilize the order of the use of the property, the lessee should be given priority to the land use rights Call right. Secondly, our country's laws can increase the preemptive right to purchase the legal heir. Because there is a special relationship between the legal heir and the heir, the heir's purchase of future inheritance is not only due to the value and use value of the inheritance, but also to the special commemorative significance of the inheritance to the heir. Some heirs sell their share When inheriting, other heirs should have the right to purchase first. The laws of Germany, France and the Taiwan region of China all provide for this. As stated in Article 2034, paragraph 1, of the German Civil Code, if a joint heir sells his share to a third person, the remaining co-heirs have priority Call right. We should learn from these regulations and make provisions on the heirs' preemptive rights in law.

5. Conclusion

Although China's current laws provide for various types of pre-emptive rights, they are quite simple and difficult to operate in practice. Although there are many discussions on this in the theoretical circles, but the big "for a specific priority purchase right stipulated by the laws of our country, few scholars observe and reflect on the flaws in the design of the priority purchase right in China from a systematic perspective. However, few people are aware of the lack of general rules on preemptive rights. This article attempts to draw on the nature and value of the preemptive rights under the background of the compilation of the Civil Code, systematically sort out and analyze the various preemptive rights scattered in China, and consider the restrictions on the scope of application of the legal preemptive rights. Demonstrate the necessity and legitimacy of adding general rules of priority purchase rights in the future civil code, and give corresponding system design suggestions.

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