



Study on the Guarantee Function Path of Ship Financial Lease

Wen Tan

School of Law, Shanghai Maritime University, Shanghai, China

whenbin@126.com

Abstract. Navigation power of ship financing lease is the rules say in the international arena, in this paper, through demonstrating the legitimacy of ship financing lease guarantee function, and then analyzed, guarantee function of shipping financing lease guarantee real right the problem of effective competition, and the path is to build, how to accurately grasp the guarantee function of ship financing lease, With the help of the civil Code and the corresponding interpretation of the new security law and the new interpretation of the financial leasing contract, the security rules of financial leasing transactions are determined to better protect the rights of lessors, improve China's economic benefits in the ship financial leasing market, and maintain China's image as a big country.

Keywords: Ship financing lease, Guarantee function, Ship lessor, Priority effect.

1 Introduction

According to the data of the first three quarters of 2023, the international market share of China's three major shipbuilding indexes remains the world's leading by deadweight tons. Six companies entered the top 10 in shipbuilding completed / new orders and handheld orders. In terms of industrial concentration degree, China maintains a relatively high level. This means that since 2009, China's first 10,000-ton bulk carrier (CCS class) - built in financial leasing, China's ship financial leasing market presents a blue ocean.

As the civil code promulgated in 2020, implemented on January 1,2021, the Supreme People's Court about applicable <the civil code of the Republic of the People's Republic of China> the interpretation of the guarantee system (hereinafter referred to as the new guarantee interpretation), on January 1,2021, the Supreme People's Court on trial of financing lease contract dispute cases of applicable legal issues (hereinafter referred to as the new financing lease contract judicial interpretation) fully shows that the national legislative level of the financial leasing market in our country. In view of this, ship finance lease is the most important means of financing in the market, and ship finance lease guarantee has become its top priority. However, due to the reservation of the legislation of Maritime Law in China, which cannot solve the practical dilemma of ship finance lease guarantee, the author re-examines the related issues of

ship finance lease guarantee in the era of civil code from the perspective of guarantee function. [1]

2 The Legal Basis of Ship Finance Lease Guarantee

Finance lease guarantee, as a guarantee of debt, by strengthening the debtor's ability to pay off a specific debt, stipulates the performance of the debtor with the credit of a third party or specific property, so that the specific creditor can have priority over other general creditors or get compensation from a third party. Finance lease guarantee can break the principle of equality of creditors and ensure the realization of the interests of specific creditors in the financial lease relationship or transaction. It is the supplement and strengthening of the effectiveness of creditor's rights in the financial lease relationship. However, ship finance lease guarantee is the guarantee of ownership retention, ship mortgage, floating mortgage and other guarantee methods in the ship finance lease transaction with the intersection of multiple ship finance lease credit providers and huge amounts.

The operation process of ship financial leasing is a series of market transactions, such as the ship lessor obtaining the ship from the ship supplier, leasing the ship to the charterer and collecting rent from the charterer according to the choice of the ship. After the expiration of the lease term, the charterer has the option to renew the lease, purchase or return the ship. The lease term of the ship should be long-term, and the rent payable according to the lease agreement is fixed, and the amortization of all or part of the ship cost shall be considered.

From the above operation process, the ship financing transaction has the dual functions of financing and financing, the former is the purpose and the latter as the means. The form of expression is: the lessor as the lessee and the ship supplier intermediate bridge, frame connected two contracts, respectively is the ship sale contract and the ship lease contract. The ship sale contract involves the ownership of the ownership of the ship, while the ship lease contract involves the transfer of the ownership of the subject ship by the contract debt. This binary expression form reflects that the core purpose of ship financial leasing is to maximize the financing benefit and promote the prosperity of market transaction activities. To solve the financial pressure of the charterer who cannot directly purchase the ship, release the financing of the lessor, and realize the demand of the lessor to expect the outward investment. [2]

3 A Comparative Legal Measure of the Traditional Security Right of Ships

3.1 Comparative Analysis of the Nature of Traditional Security Property Law

The According to the previous part, the most functional correlation in the ship financial leasing market is the security real right under the restricted property right system. What the ship lessor has the right to classify "ship", and the charterer enjoys the right to regulate the order of "ship". However, in the practice of shipping, the lessee often gains

more than the interests of the lessor, and the lessor has greater risks. What is more regrettable is that China's current Maritime Law and Contract Law do not make detailed provisions on ship finance lease guarantee. Therefore, the civil code and the corresponding "new guarantee interpretation" the new financing lease contract judicial interpretation for ship financing lease real right has become particularly important, this part mainly through the new legal provisions, using legal interpretation of the technology, to ship financing lease practice find breakthrough, for the ship financing lease legislation provide personal shallow insights in the future.

In legal relationship of ship financial lease, the guarantee function from the perspective of property rights mainly adjusts the security real right of the ship leased by the subject matter. The occurrence of such security interest is based on the maritime creditor under the law or agreement and associated with the occurrence of the debt. The ship used for financial leasing has huge investment and high income, so it is a reliable and sufficient collateral. All kinds of guarantee rights can preferentially dominate the exchange value of the collateral ship and ensure the repayment of debts.^[3]The effective competition and conflict between the rights. the most common guarantee right of financial leasing ships is the priority of the ship, the ship's lien and the mortgage of the ship.

Ship priority, is a special kind of maritime claims to give special protection. It is the security right directly enjoyed by the specific creditor for the debtor or the specific property. The purpose of ship priority is to improve the safety and efficiency of ship operation and protect the victims. Article 21 of China's Maritime Law defines the ship priority: ship priority means that the maritime claimant claims to the owner of ships, the maritime operator in accordance with the provisions of Article 22 of this Law, and has the right to receive priority in compensation for the ship that produces the maritime claim. Ship financing lease priority, is the special real right of the maritime law, as long as there is a corresponding maritime claim, the real right of security is produced without the public, can be established without registration or possession, ship priority is not only superior to unsecured general creditor's rights, and priority ship mortgage, ship lien secured creditor's rights. Once produced, it is attached to the ship and transferred with the transfer of the ship. In the ship finance lease, the ownership of the leased ship is the most important guarantee of the lessor's creditor's right. When the lessor takes back the ship, if the ship has the ship priority, it will hinder the lessor's disposal of the ship and seriously affect the interests of the lessor. Therefore, the law is intended to protect ship owners and ship creditors, and then to take into account the public welfare needs such as national construction and the maintenance of navigation facilities.

China does not directly specify the ship's lien. In legal theory, the creditor occupies another person's ship and enjoys the creditor's rights generated by the ship. Before the creditor pays off the debt, the ship as the real right of security. China's Maritime Law determines the subject of ship lien as ship builder and ship repairman. However, there is no provision that the compulsory salvage person shall have a lien on the wreck under certain conditions. The lien of the ship is the legal security right, in which the "expenditure" standard of the cost " is adopted. The guaranteed creditor's right is the expenditure of the subject matter of the guarantee, which is called the expense security

right. From the perspective of law, the protection is the rights and interests of the shipbuilders and the ship builders, and balance the relationship with the mortgagee.^[4]

Ship mortgage, along with the emergence of ship finance lease, is a means for ship owners to obtain loans, which is mainly used for financing guarantee. Because of its huge value, ships can be used as collateral, providing reliable material guarantee for financial lease creditors. Ship because the value is larger in many ways of real estate system, but as a maritime mobile device, nature is movable property, set the mortgage in order to apply the construction of the ship of the transfer, the operation of the owner cannot use ship operating profits to repay loans, and pay the cost of custody ship necessary costs of the creditors.

3.2 The Solution of the Priority Effect of Traditional Security Right

Therefore, when the occurrence of ship security real right priority effect (ship priority, ship lien, ship mortgage) right can produce competition, how to solve?

Before the introduction of the civil Code and its corresponding judicial interpretation, the academic discussion of the priority effect of the ship security right is as follows: when the ship priority and the ship lien compete, how to solve the problem? The scholars suggest that the creditor's right of the ship repairman in the Maritime Law should be regarded as the ship priority item and guaranteed by the ship priority, so that it is in the same order of compensation as the rescue remuneration, and the principle of reverse order should be applied. In this way, the ship lien is regarded as a special provision of the general lien of civil law, that is, the maritime creditor retains the ship on the ship when the debtor fails to pay the contract or the law, so as to guarantee the repayment of the expenses. When the ship lien and the ship mortgage produce competition, how to solve? One is the legal real right of security, the other is the real right of security as the intended real right to obtain financing. Some scholars believe that according to the natural interpretation of "light to light": the legislative lien is only to give special protection to the rights of the ship builders and shipbuilders. This is certainly the case with the meaning of the interpretation. However, some scholars hold different views, believing that "no escape to the general provisions" should be legal priority, more than the intention, otherwise it cannot play the function of lien system, and the priority exercise of lien actually protects the interests of creditors, and preserves and restores the navigation ability of the ship. If, after the value of the ship is restored, the encouraging function of social welfare cannot be repaid in time, and the interests of the mortgagee who obtains huge profits by leasing the ship are unbalanced. When the ship priority right and the ship mortgage right compete, how to solve the problem? Since neither priority nor mortgage are conditioned on possession, it is highly likely that the two security rights will compete and cooperate. From the perspective of practical conflict, the creditor's rights of the mortgagee of the ship cannot be fully paid off, and the law stipulates that the priority items have a wide range, and the secret nature affects the exercise of the mortgagee. Some scholars believe that the quasi-law law of ship priority is the court law in most countries. If the transnational litigation will infringe on the interests of our creditors, the number of ship priority items should be limited. Some scholars advocate the establishment of the public registration system of ship priority.

From the academic research achievements and progress before the introduction of the Civil Code, there is no same legal provision on a clear operational path to guide the priority effect of ship security right. [5]

3.3 Correction of the Traditional Security Right of Ships: Introducing the Guarantee Function of Financial Lease

After the issuance of the Civil Code and the corresponding judicial interpretation, how to accurately grasp the guarantee function of ship financial lease?

According to the interpretation of the People's Court, the guarantee function of ship finance lease is to meet the substantive justice, that is, maintain the freedom of contract in the market economy, protect all transactions with guarantee function, and take the registration priority, apply the same establishment, publicity, priority and implementation rules for the guarantee.

The New Guarantee Interpretation reflects the further aspects of functionalism, which is embodied in the following three aspects:

First, it has clarified the essential characteristics of functionalism. On the one hand, on the basis of Article 388 of the Civil Code extending the scope of guarantee contracts to all "contracts with guarantee function", The judicial interpretation of the guarantee system clearly includes the disputes involving the guarantee function, such as the sale of ownership retention, financial lease, transfer and guarantee, into the scope of adjustment, And in many places on its constitutive elements, legal effect and other issues have made detailed provisions; On the other hand, the civil Code adopts the legislative principle of opposing the registration and determining the priority according to the real right of security, The judicial interpretation of the guarantee system further clarified the scope of application of this rank principle, If the contract disputes such as ownership retention sale, financial lease and so on should refer to the confrontation rules of chattel mortgage, If there are multiple price priorities on a movable property, or the simultaneous factoring, receivables pledge and transfer of creditor's rights in the same accounts receivable, Or the pledgor pledged either with a warehouse list, Set up a guarantee by the warehouse goods, The same rank rules shall all apply.

The second is to realize the integration of functionalism through the degradation of guaranteed ownership. In mainland law countries, the connection between formalism and functionalism represented by traditional property right is a difficult point in system design. In the case of ownership retention, finance lease, transfer and guarantee, there are all publicity and change of ownership, but in such transactions, ownership itself is only a means of guarantee. Guarantee system judicial interpretation will be such ownership clear "dimension" for the real right of security, such as article 56 clearly retain the ownership of the seller, the financing lease contract sponsor for security, article 68 clear and guarantee even have completed the property rights of the public, the creditors have no right to request to confirm the ownership of the property.

Third, the guarantee responsibility, the contract responsibility and the compensation responsibility are connected to expand the effectiveness of functionalism. Guarantee is a method for creditors to prevent risks and strengthen the possibility of realizing creditor's rights. The judicial interpretation of the guarantee system starts from this fun-

damental purpose, bringing the guarantee liability and the contract responsibility and the compensation liability with the same function into the vision together. As stipulated in Article 36, if a third party provides promises other than the guarantee, it shall perform the agreed obligations or assume the corresponding civil liability. For example, Article 55 stipulates the liability for breach of contract and the liability of the pledgor and the supervisor under the supervision of the chattel pledge.^[6]

4 Path Construction of the Guarantee Function of Ship Finance Lease

4.1 Acquisition of the Ownership of the Ship Financial Lease Property

During the mortgage period of Article 406 of the Civil Code, the mortgagor may transfer the mortgaged property. If the parties agree otherwise, such agreement shall prevail. Where the mortgaged property is transferred, the mortgage right shall not be affected. Where the mortgagor transfers the mortgaged property, it shall promptly notify the mortgagee. If the mortgagee is able to prove that the transfer of the mortgaged property may damage the mortgage right, he may request the mortgagor to pay off the debts or put in escrow the proceeds from the transfer to the mortgagee in advance. The part of the transferred price exceeding the amount of the claim shall be owned by the mortgagor, and the insufficient part shall be paid off by the debtor.

4.2 When the Right of Ownership Cannot Be Exercised, the Guarantee Function Doctrine May Claim the First Right of Compensation

Although Article 65 of the Interpretation of Security in the Civil Code is not clear that the lessor has the priority of compensation for the lease property, combined with the relevant provisions of the Civil Code, the ownership of the lease property enjoyed by the lessor is equal to the real right of security in the final effect. First of all, although the concept of guarantee functionalism has been implanted into the Civil Code, due to the traditional legislative style of China, the financial lease contract is a famous contract in the contract section, and the guarantee functionalism has not been thoroughly implemented, which is reasonable. Secondly, according to the provisions of the Civil Code and relevant judicial interpretations, the lessor's ownership of the leased item is one of the elements of the legal relationship of the financial lease, and the Civil Code only stipulates that the lessor has the ownership of the leased item, so the civil Code guarantee interpretation should not overreach. Thirdly, the Civil Code has established a unified rules for the registration of the real right of security, the order rules of the real right of security and the realization rules of the real right of security. The ownership of the financial lease lessor has also been included in these rules, and the ownership is equivalent to the real right of security in effect. Finally, when the lessor of the finance lease needs to realize the ownership of the lease item, whether it claims to accelerate the expiration or terminate the contract to return the value of the value of the lease item,

and implement "more refund and less compensation", which is obviously the same as the real right of security.

Therefore, the author thinks that, although the financing lease lessor enjoy ownership of the lease property, but is essentially the real right of security, even if the civil code guarantee interpretation does not stipulate the lessor have priority to the lease item, the lessor also need in accordance with the provisions of the civil code of security right registration against, order and other related rules claim its rights.^[7]

4.3 The Invalidation of the Ship Finance Lease Contract Shall Not Affect the Play of the Guarantee Function of the Ship Finance Lease

Since the financing contract is an integrated contract, there is no master and slave contract problem, so it cannot be determined according to the provisions that the guarantee contract is invalid in the 1, Article 388 and the article 38 of the Civil Code if the principal creditor's right and debt contract is invalid. In the case that the financial lease contract is invalid due to the parties fabricating the lease item, the guarantee function does not need to be discussed due to the absence of the lease item. However, according to the academic explanation of the cause of the change of real right, the contract for the establishment of real right is invalid, and the corresponding change of real right is also invalid. Therefore, the effect of security right with guarantee function should not be exceptional.

although the financial lease contract is invalid, the transaction between the parties constitutes lending or other legal relations. For example, as for the "fictitious leasehold" stipulated in Article 737 of the Civil Code, there are some views in theory and practice that in addition to the absence of the lease item, there are also cases of Low value overestimation or qualification of the leasehold. under these circumstances, the author believes that although contracts for financial lease is invalid at this time, according to paragraph 2 of Article 146 of the Civil Code, "indicating the effect of hidden civil legal acts, it shall be dealt with in accordance with relevant laws and regulations.", the two parties may still constitute private lending or other legal relationship. At the same time, Article 1, Paragraph 2 of the New Financial Leasing Interpretation stipulates: "If the financial lease contract is named but does not constitute a legal relationship of financial lease, the people's court shall deal with the legal relationship according to its actual composition." At this point, even if the financial lease contract is invalid, the two parties constitute other legal relationship. As long as the lease item exists, if the lessor registers the "ownership" of the lease item according to law, the creditor's right of the lease item still has the guarantee function, but the actual value is far lower than the purchase price agreed between the lessor and the lessee, and the guarantee function is weakened. In fact, in the judicial practice before the implementation of the Civil Code, in some cases, the court determined that the lessor and the lessee was "called a financial lease is actually a loan", but at the same time, it supported the lessor to claim the mortgage right against the leasehold on the grounds that the leasehold had been registered. Therefore, if the parties constitute other valid loan or legal relations, the author tends to think that the leasehold still has the guarantee function despite meeting the conditions.^[8]

5 Conclusion

Ship financial leasing is an innovative financial product, but it brings smooth financing at the same time, accompanied by the complex financial and legal relationship. On the one hand, the three legal subjects and the two independent contracts break through the traditional concept of specific obligations. On the other hand, the particularity of ship finance lease rent also causes the particularity of the real right rules of ship finance lease. Therefore, it is necessary to explore the guarantee function of ship financial lease. The guarantee function of ship finance lease constructs a new concept of property rights. The guarantee function of ship finance lease is to revise the traditional security right of ship and strengthen the protection of the rights of ship lessor. Therefore, its path construction is mainly designed around the protection of the lessor's rights. The guarantee function of ship finance lease is reflected in the pursuit of the ownership of the ship finance lease property; when the ownership cannot be exercised, the guarantee function is claim; the protection of the rights of the ship lessor in the execution stage or bankruptcy procedure; the invalidation of the ship finance lease contract does not affect the guarantee function of ship finance lease.

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