



Study on the Small and Middle-Sized Enterprises Credit Guarantee Legal System

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Abstract

In this article, we put forward the small and middle-sized enterprises (SMEs) credit guarantee is the effective measure to solve the financing difficulty for SMEs. Through the analysis of the actuality of Chinese SMEs credit guarantee legal system, we try to find the shortages such as the deficiency of the SMEs special guarantee legislation, the unreasonable capital financing structure, the risk prevention and control system without legal references, and the imperfect credit legal system. According to present shortages, we put forward corresponding advices, i.e. constituting basic law of the SMEs credit guarantee and perfecting the credit laws system.

Keywords: Small and middle-sized enterprise (SMEs), SMEs credit guarantee, Legal system

1. Actuality of Chinese SMEs credit guarantee legal system

Both the Guarantee Law of the People's Republic of China enacted in 1995 and the judicial interpretation of the guarantee law enacted in 2000 are adapted to credit guarantee, but the inherent deficiencies of the guarantee law can not offer good legal criterions for the SEMs credit guarantee. The Promotion Law of China's Small and Medium Sized Enterprises enacted at Jan 1 2003 is the first special law about SMEs, and it is the law with the highest power layer which can be followed to establish the credit guarantee system for SMEs at present. Comparing with guarantee law, it has large advancement, but it still lacks in the maneuverability, and the policies and regulations matching with it still don't come into being. Because the credit guarantee institutions of SMEs exist by the form of the legal person, so the modified "the Company Law" is applied, but the guarantee institutes also possess characteristics which are different to general companies, so the company law can not be completely applied. Though the new "Property Law" perfects the shortages in the guarantee law, but it still can not completely regulate the behaviors of credit guarantee. Since 1999, relative departments successively enacted some administrative rules, local rules and policy documents aiming at credit guarantee and promoting the development of the guarantee industry. The existing credit guarantee legal rules of China lacking in professionl, systematic, perfect and healthy SMEs credit guarantee legal system are too dispersive and disorder, and it doesn't still form the system, and the legislation layer is low, which make Chinese credit guarantee system lack in powerful legal guarantees.

2. Problems existing in Chinese SMEs credit guarantee legal system

2.1 Problems of capital financing

In the "Instructional Advices", the guarantee capitals and operation charges of SMEs credit guarantee mainly depend on governmental capitals, and the guarantee charge incomes are only supplements. At present, the capital financing system in China adopts the multiple-mode which takes the governmental capitals as the main body and adopts the common financing mode including financial institutions and other castes and civilian multiple financing modes. The governmental guarantee is in the absolutely main status in the whole guarantee system. For the guarantee institution quantity and the guarantee loan sum, the governmental guarantee share is too much higher, and the civilian capital guarantee proportion is seriously deficient. Thus capital financing structure will produce two sorts of conflict. First, as the macro control and market manager, the government needs to utilize its main financial power to supervise and control the market, and it has no enough financial power to support the credit guarantee system of SMEs, and on the contrary, many civilian capitals lack in proper investment direction. Second, the quantity of SMEs is increasing continually and the scale is continually expanding, but the guarantee capitals of the government are limited, and the

SMEs credit guarantee which gives priority to the governmental investment has not fulfill the actual demand of the SMEs financing guarantee.

Therefore, the existing SMEs credit guarantee system can not make the government investments exert their efficiencies and the civilian investment can not become into the effective supply, which induces the serious unbalance of the demand and the supply in the SMEs financing and guarantee market and the low total efficiency. The financing difficulty in the SMEs development is mainly induced by the insufficient civilian capital guarantees.

2.2 Problems of risk prevention

At present, China mainly adopts following measures to prevent the risks of SMEs credit guarantee, i.e. the credit guarantee limitation management mechanism, the proportional guarantee implementing in guarantee institutions, the counter-guarantee and there-guarantee system. But some problems exist in these systems.

First, one of tenets of the credit guarantee institution is to disperse the risk of SMEs loans, and it doesn't assume all loan risks. The credit guarantee institution, bank and SMEs should assume the risks together, and the single institution should not assume all risks. Or else, the "moral risk" of the bank will occur. Therefore, the credit guarantee institutions should guarantee the risk according to certain proportion of the loan. But in the practice, the bank occupies the predominant status in the credit guarantee, and according to the guarantee contract offered by the bank, all guarantee institutions will implement sum guarantees. In this way, under the situation without risk and responsibility, the bank will obtain the loan interests, but the credit institutions will assume large guarantee risks only depending on slender guarantee charges. The risk asymmetry will increase the risk of the guarantee institutions, and seriously restrict the developments of the guarantee institutions and the guarantee industry.

Second, the article four in the guarantee law definitely regulates that "when the third person offers guarantee to the creditor for the debtor, he can require the counter-guarantee", and the "Instructional Advices" also regulates that the enterprise accepting the guarantee service should offer securities with same amount to the guarantee institutions, which are legal proofs for the guarantee institutions to require counter-guarantee for the guaranteed enterprises. But it is not feasible to offer counter-guarantees for all SMEs accepting guarantee services, because the properties of SMEs which can be bonded are not too much, and the matching counter-guarantee condition may refuse some enterprises with good foregrounds and breach the original idea of the SMEs credit guarantee system, and the third person can not be found to offer guarantees, so the essential problem of the difficult financing will occur again, and the SMEs guarantee institutions become into the "scapegoat" of the loaner, and the function of developing the financing can not be really exerted.

Third, at present, China only regulated the re-guarantee system principally in relative policies, and the re-guarantee system is not definitely regulated on the legislation layer. In the practice, one national re-guarantee institution is absent, which not only seriously limit the guarantee ability of single guarantee institution, but induce the unequal cooperation relationship between the guarantee institution and the bank, so in the guarantee practices, many guarantee institutions can not only assume sum guarantee, but also assume 100% suretyship of joint and several liability. That is relative with the deficiency of the credit ability of the guarantee institutions. Therefore, it is very important to establish the national guarantee institutions and comprehensive and effective re-guarantee system.

2.3 Problems of guarantee institution

2.3.1 The guarantee market system is not complete and the quantity of the guarantee institution with single variety is short

Some places only have policy SMEs credit guarantee institutions and have not mutual guarantee institutions and commercial SMEs guarantee institutions generated in the market. Some places have not SMEs credit guarantee institutions, and the re-guarantee institutions have not been founded up to the present. The mechanisms of operation cooperation and risk dispersion among various guarantee institutions still have not formed.

2.3.2 The market orientation of the guarantee institution is not specific

Considering the benefit and development, most guarantee institutions of China put the profits on the important position, and they always incline to the enterprise with many assets mortgages when selecting the guarantee enterprises, and some enterprises which most need the guarantees can not obtain the guarantee because they can not fulfill the effective mortgages of the bank.

2.3.3 The capital scale of the guarantee institution is small, and the guarantee ability is deficient congenitally

At present, almost all capital sources of Chinese guarantee institutions come from the financial appropriate funds of the government, and most local finances in China can not fulfill the demands of SMEs to the guarantee funds, which will induce a series of problems such as small capital scale of the guarantee institution, insufficient guarantee ability, the bad anti-risk ability, high financing cost and single operation sort.

2.3.4 The guarantee institutions lack in standard interior management system and risk management mechanism

Chinese SMEs guarantee institutions universally lack in many interior management systems such as the guarantee security system, the counter-guarantee system, the re-guarantee system and the collective auditing system, and the risk management systems such as standard operation mechanism, interior risk control mechanism, risk alarming mechanism and compensation transfer mechanism. The administrative order guarantee and human feeling guarantee happens often, and they will reduce the credit of the guarantee institutions and increase the risk. In addition, there are not organizational structures and supervision institutions restricting each other in the interiors of the credit guarantee institutions, which can not supervise the guarantee institutions and their behaviors.

2.4 Problems of credit system

2.4.1 The important status of the integrity principle has not be established in the market economy construction

Chinese “General Provisions of the Civil Law” and “Contract Law” all regulate the integrity as one basic principle, but in the judicial practice, because it is not a concrete legal rule, it mainly depends on judges’ free appreciation, and the legal compulsory function can not be fully exerted. So the restriction power that only depends on parties’ self-discipline to standardize his behavior is limited.

2.4.2 The legal systems about the credit management are deficient

The guarantee institution is the professional credit guarantee institution, and whether the information are exact, complete and timely is very important for the guarantee institutions. At present, the acquirement, evaluation, development and issuance of the credit information resources lack in legal references, and the legal regulations about the credit industry are still deficient. Because the credit information of enterprises and individuals are not opening, that seriously influences the quality of the credit report, and the guarantee institutions can not obtain enough guaranteed enterprise information. The problem of the information asymmetry makes the credit guarantee industry become into one of industries with the largest risk.

3. Perfecting the SMEs credit guarantee legal system of China

The establishment of Chinese SMEs credit guarantee faces the deficiency of the system environment, which are mainly embodied in lacking in healthy legal systems and regulations according with the requirement of the market economy, so many credit guarantee activities can not depend on laws under many situations. Therefore, we need quicken the legislation process, adjust corresponding legislation contents and form a set of complete and uniform guarantee laws to standardize SMEs credit guarantee activities.

3.1 Unveiling the “SMEs credit guarantee administrative measures” as soon as possible

The countries which emphasize the development of SMEs all have established the SMEs credit guarantee laws, such as the “credit guarantee funds law” of Korea and the “SMEs credit guarantee association law” of Japan, and China should enact a special law about the SMEs credit guarantee as soon as possible. Though Chinese “SMEs credit guarantee administrative measures” (“measures”) is brewed for a long time, but it still has not enacted. To solve above problems, the “measures” should include following contents.

3.1.1 Credit guarantee institution

In the SMEs credit guarantee system, the SMEs credit guarantee institutions are in the core statues, and they are the policy support institutions that the governments indirectly support the developments of SMEs, and they belong to the non-financial institutions, and they can not engage in the financial operation and finance credit, and they should be supervised by the governmental department. The “measures” should regulate the market admittance condition, legal status, exit system, operation range, operation flow and the legal form of the credit guarantee institutions. And the legal form should take the business entity as the principle, and take the enterprise entity and juridical association as the supplements. The credit guarantee institutions should be operated according to the complete marketization.

3.1.2 Service objects

The service objects of the SMEs credit guarantee system are not all SMEs, and it should aim at the SMEs which can not offer the mortgages required by the bank and possess development potentials. Japanese SMEs credit guarantee plans mainly take the governmental industrial policies in every term as the references, and offer guarantees for the items which accord with the industrial policies. China can refer to this way, constitute corresponding SMEs guarantee plan according to the economic development demands in different terms, and support the SMEs according with the present industrial policies to embody the legislation attention and exert the economic lever function of the credit guarantee.

3.1.3 Capital financing system

The capital sources of the SMEs credit guarantee system should form the financing mechanism with multiple channels and quantities. For the SMEs credit guarantee institutions, except for the governmental investment, we should actively encourage the civilian capitals to participate in order to improve the capital financing structure, expend the guarantee

ability of the credit guarantee institution, balance the supply and demand of the SMEs financing guarantee market, and exert its highest efficiency.

3.1.4 Re-guarantee system

The State Council of China can authorize the civilian capitals to establish the Chinese credit re-guarantee sharing Ltd which will be the only national re-guarantee institution in China. The national re-guarantee institution will not compete with various guarantee institutions to control and partake in the management risk of other guarantee institutions, and enhance the guarantee ability of other guarantee institutions. The national re-guarantee institution gives priority to the marketization re-guarantee operations and carry on various political re-guarantee capital trusteeship, and the re-guarantee institution will partake in certain proportional loss. In this way, after confirming the legal status of the re-guarantee institutions, the legislation could fully exert the important functions utilizing the market mechanism and economic measures to standardize various management behaviors of the guarantee institutions, control the risks of the guarantee industry and perfect the national guarantee system.

3.1.5 Governmental harmony and supervision mechanism

At present, there is still not a national supervision management department of SMEs credit guarantee institution, and the provincial supervision department is still not complete. In the world, almost all credit guarantee institutions have perfect supervision mechanisms such as the Minor Enterprise Management Bureau of US which was founded according to the "Minor Enterprise Law". China can refer to this way and confirm the SMEs credit guarantee supervision mechanism in the "measures", establish the administrative institution which mainly manage the national credit guarantees, make concrete regulations for the responsibility, limitation and supervision procedures of the administrative institution by the legal form, establish and perfect the supervision mechanism of Chinese SMEs credit guarantee institution.

3.2 Perfecting Chinese credit system and legal system

The development of the SMEs credit guarantee system is related with the establishment of the social credit system, but the lagged credit legislation has been the bottleneck to construct Chinese social credit system, so we should quicken relative legislations works for Chinese social credit management. The social credit system includes the government credit, enterprise credit and individual credit. Under present situation, the social credit system legislation about credit guarantee should include three aspects. First, constitute the laws or regulations limiting the opening range of information, and these laws regulations should include opening data source and the responsibility of the supervision institution. Second, starting from developing the credit management behaviors, China should enact laws or regulations to limit the range of the data secrecy as soon as possible. Third, constitute relative legal regulations to strictly standardize the behaviors of the institutions and organizations relating to credit record, usage and activity.

Referring to international experience and combining with Chinese concrete situation, we should institute the legal regulations including following contents such as standardizing the content and procedure that the government and the public department open the credit data, standardizing the supervision management measures about the enterprise credit information and enterprise credit institution, standardizing the supervision management measures about the individual credit information and individual credit institution, and standardizing the management measures about the credit institution and the credit service. In addition, we should also study and perfect the credit fault punishment mechanism as soon as possible and confirm the start and emphasis of the credit fault punishment mechanism design, the difference and legal boundary between credit fault and guilty, and the punishment form of the credit fault and the punishment degree, and the operation and implementation effects of the credit fault punishment mechanism. And the legal collection and diffusion approaches should be established for the "blacklist" public display system aiming at the credit fault enterprises.

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