

Realization of Pledge Right in Pledge Financing of New Plant Variety Right

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Abstract

The pledge financing of new plant variety right is a special content of intellectual property pledge financing. It can give full play to its exchange value and economic value. By expanding the financing channels of modern small and medium-sized enterprises, it is conducive to maximize the role of enterprise resources. However, the change process of the pledge is more complex. When the debt is due, the debtor is unable to repay the loan or the parties agree on the pledge right in advance, the exchange of the price change of the new plant variety right must be used to protect the interests of the creditor. The transfer of new plant variety right is affected by variety quality, production conditions, enterprise reputation and other factors. When the new plant variety right is pledged, it is difficult to deal with it, that is, when the pledge right is realized according to the agreement or legal provisions, the subject matter cannot be traded and difficult to realize due to various reasons, resulting in the failure to effectively realize the pledge right. The poor financing channels of new plant variety rights will reduce the number of transactions, affect the quality of transactions, and worsen bank credit.

Keywords

New Plant Variety Rights; Finance; Pledge.

1. Conditions for the Realization of the Pledge of New Plant Variety Right

The pledge financing of new plant variety right is a new financing method in the era of knowledge economy. Since the frequent exchanges of international economy and trade, China's seed enterprises are facing opportunities and challenges. Seed enterprises sometimes need pledge financing of new plant variety rights in order to expand their business scale. [2] However, the realization of the pledge right of new plant variety right requires certain conditions.

1.1. Conditions for the Realization of Pledge Right of New Plant Variety Right

1.1.1. The Pledge Right of New Plant Variety Right Must be Effective

If the establishment of the pledge of plant new variety right is invalid or has been revoked, it can not be realized because the pledge of plant new variety right no longer exists. For example, there is uncertainty in the legal effect of the new plant variety right. During the pledge period, if the new plant variety right is declared invalid or revoked, the subject matter of the pledge right does not exist, and the pledge right does not exist. Of course, its realization is impossible. According to the regulations of the people's Republic of China on the protection of new plant varieties, Article 13 stipulates that the new plant varieties applying for variety rights shall belong to the genera or species of plants listed in the national plant variety protection list. The protection catalogue of new plant varieties shall be determined and published by the examination and approval authority. Otherwise, if the granted variety does not belong to the plant genus or plant species within the scope of the national list of new plant varieties

protection, the variety right shall be declared invalid. To sum up, the invalidation of the new plant variety right means that the pledge right does not exist and cannot be realized. [3].

1.1.2. The Parties Agree to Realize the Pledge

Article 436 of the Civil Code stipulates that when the parties agree to realize the pledge, the pledgee may negotiate with the pledgor to convert the pledged property into money, or have priority to be paid for the money obtained from the auction and sale of the pledged property. Article 436 of the Civil Code stipulates the circumstances under which the pledgee can exercise the pledge. The situation in which the parties agree to realize the pledge is the legal situation in which the pledge is realized. Seed enterprises pledge their new plant variety rights to the bank as their own guarantee. When the parties agree to realize the pledge right, the bank (Pledgee) and the seed enterprise (Pledgor) agree to discount the pledge right of new plant varieties, and the proceeds from auction and sale of the pledged property shall be paid in priority.

1.2. Factors Affecting the Realization Conditions of Pledge in the Pledge Financing of New Plant Varieties

1.2.1. Judicial Factors

Put forward the requirements of implementing the construction project of high-level trial organization of new plant variety rights, and strengthening the construction of trial foundation, system and mechanism and smart court. New plant variety right is a new type of intellectual property. Therefore, higher requirements are put forward for the construction project of trial organization of new plant variety right. In the era of knowledge economy, the "new" of new plant variety right makes the national judicial organ face a severe test. In view of the novelty of the right of new plant varieties, the judge has no appropriate reference for judgment. The judge is required to have rich knowledge of new plant variety rights. Only if the judge has rich knowledge of new plant variety right, can the disposal of pledge right of new plant variety right be more reasonable and fair. Judges are a part of the judicial organization. The progress of judges has developed the judicial organization and promoted the construction of a high-level judicial organization of new plant variety rights.

1.2.2. Enterprise Factors

The financial situation of the seed enterprise determines whether the debtor can pay off the debt at the expiration of the performance period, which affects the creditor's consent to the seed enterprise to use its own right of new plant varieties as collateral. The financial situation of the seed enterprise is good, and the bank has reason to believe that the seed enterprise has the ability to pay off all the debts when the debts expire. [4] When the seed enterprise pays off all its debts, the bank will return the pledged new plant variety right. On the contrary, the financial situation of seed enterprises is poor. Because the bank is worried that the enterprise will not be able to repay the debt at the expiration of the debt performance period, it refuses the seed enterprises to pledge their new plant variety rights as their own guarantee, which hinders the realization of the pledge of new plant variety rights.

2. Realization of Pledge Right in Pledge Financing of New Plant

2.1. Limitations of Pledge Disposal in Pledge Financing of New Plant Variety Right

2.1.1. Reasons for the Limitations of Pledge Disposal Methods

The basic premise of intellectual property pledge is that the subject matter of pledge is tradable, so that funds can be circulated, and its essence is that the pledge can be realized. The particularity of new plant variety right determines that it can not be widely applied to private lending. Due to the limited transferee group, it is difficult to give full play to the transaction

value, and can not find a qualified buyer in time. The transaction subject is limited, which makes it difficult to realize the new plant variety right or realize it according to the reasonable value, so that the pledge right of commercial banks can not be realized. Secondly, due to the influence of its own reasons, it is difficult to realize the pledge right of new plant varieties, mainly because the process of R & D, breeding and cultivation of new plant varieties requires a certain amount of time and risk, which makes it difficult to realize the right of new plant varieties during disposal. [5] At the same time, as a kind of intellectual property object that can be pledged, the circulation and Realization Channels of new plant variety right are limited. As a special intangible substance, new plant varieties have limited space in auction and sale, and the subject of realizing the pledge is limited. Only the enterprises and other entities involved in the variety of products will pay attention to the realization of the right of new plant varieties, and the restriction of the subject will aggravate the difficulty of the realization of the right of new plant varieties to a certain extent. Therefore, due to the particularity of new plant variety right and the influence of the realization subject, the realization channel of pledge financing of new plant variety right is not smooth. [6].

2.1.2. Innovate the Disposal Method of Pledge

In order to solve the problem of difficult financial disposal of intellectual property pledge, the State Intellectual Property Office, China Banking and Insurance Regulatory Commission and the national development and Reform Commission issued a notice on the action plan for benefiting enterprises through intellectual property pledge financing in the park (2021-2023) on June 16, 2021, pointing out that in order to solve the problem of difficult disposal of intellectual property pledge, we should innovate the disposal mode and require banking financial institutions to explore intellectual property disposal The effective way and feasible mode of circulation, through centralized auction, third-party collection and storage, convert short-term disposal into long-term intellectual property operation, and realize the value of intellectual property to a greater extent.

Centralized auction is an innovative way to dispose of pledged goods. The intangibility of new plant variety rights makes its own value difficult to estimate. Therefore, as a disposal method of new plant variety rights, the general auction method is not conducive to solving the problem of financing the pledge of new plant variety rights. The limitation of the disposal of new plant variety rights restricts the smooth pledge of new plant variety rights, which affects the realization of pledge rights. Change the traditional auction method, innovate the centralized auction method, make the disposal methods of plant variety rights diverse, promote the easy realization of new plant variety rights, and promote the smooth realization of the pledge of new plant variety rights. [7].

2.2. Adding the Realization Mode of Debt to Equity Swap of New Plant Variety Rights

2.2.1. Reasons for Debt to Equity Swap of New Plant Varieties Rights

New plant variety rights face many difficulties in pledge financing, such as difficult disposal, limited financing channels and high risks, which need to be solved by specific measures. The emergence of pledge financing is a special financing way for enterprises to expand their scale and development. The right of new plant varieties is a special intellectual property right. Auction, sale and other methods make the transferee limited, resulting in poor implementation. In addition, this way of discount is not conducive to the bank to achieve capital recovery. The main reason is that according to the provisions of China's commercial bank law, banks are not allowed to conduct commercial acts. For the realization way of discount, according to the law, banks are required to recover the right of new plant varieties at the market price, which seriously violates the provisions of the commercial bank law. Therefore, in the face of this dilemma, we should change the traditional way of realization of pledge and appropriately

introduce new disposal channels. Such as debt to equity swap, securitization and other market methods, which embody a concept of private rights and free disposal of modern private rights, and accelerate the development of pledge financing of new plant variety rights. [8].

2.2.2. Realization of Debt to Equity Swap of New Plant Variety Rights

When the pledgee (creditor) is a bank, according to the provisions of paragraph 2 of Article 42 and Article 43 of China's commercial bank law, the equity obtained by a commercial bank due to the exercise of the pledge shall be disposed of within two years from the date of acquisition, and the commercial bank shall not engage in relevant profit-making activities. On October 10, 2016, the general office of the State Council issued the guidance on the conversion of creditor's rights into equity of market-oriented banks (hereinafter referred to as the guidance), which made it clear for the first time that "banks shall not directly convert creditor's rights into equity, and asset management companies can participate in the debt to equity conversion of banks". Therefore, when the creditor is a bank, the way of debt to equity swap is that the bank and the financing enterprise of new plant variety rights determine the proportion of creditor's rights in exchange for the proportion of equity according to the market value of new plant varieties. After the bank obtains the equity, according to relevant laws and regulations, the bank shall not engage in profit-making behavior. At this time, the bank shall pass bidding according to the guidance Through the market-oriented methods such as bidding, AMC legally transfers the equity of the new plant variety right company to the four asset management companies (Asset Management Company), and AMC competes for the equity held by the bank. This debt to equity conversion helps the bank recover part of the capital in a market-oriented way, and reduces the capital loss caused by the difficulty of realizing the new plant variety right, AMC company acquired the equity of the new plant variety company, and the equity of the new plant variety company obtained by the bank was converted into ordinary equity under the market bidding of AMC company. [9] The bank withdrew from the equity management of the new plant variety right company and transferred AMC company to participate in the asset management of the seed industry financing company. Under the management of AMC company participating in the new plant variety right company, the equity can also be transferred to a professional equity management company for long-term professional management, so as to finally realize a favorable solution to the difficulty of financing the new plant variety right. Promote the economic development of new plant variety rights companies through debt to equity swap, improve the financing and development efficiency of new plant variety rights, and help open a new chapter of modern seed industry.

3. Realization Procedure of Pledge of New Plant Variety Right

3.1. Private Relief and Public Relief of the Realization of Pledge in the Pledge Financing of New Plant Varieties

3.1.1. Private Relief of the Realization of Pledge in the Pledge Financing of New Plant Varieties

Private relief refers to a right relief method in which the parties rely on their own strength to protect their rights without litigation and other procedures when their rights are infringed. Private relief can better safeguard the interests of the pledgee because of the convenient transaction in the realization of the pledge in the pledge financing of new plant varieties. [10] From the perspective of comparative law, the countries and regions where private relief can be used to realize the pledge of new plant variety rights are mainly North America represented by the United States. For example, based on litigation efficiency, American law allows the pledgee to realize the pledge by means of his own relief. When the conditions for realizing the pledge are ripe, the creditor can occupy the pledged property, so that his creditor's rights can be paid

off. American banks can take private relief to protect their property from infringement. The Bank of Italy requested the court to sell the rights of new plant varieties by public auction.

3.1.2. Public Relief of the Realization of Pledge in the Pledge Financing of New Plant Varieties

By investigating the legislative situation and judicial practice in foreign countries and China, the realization mode of public relief in the pledge realization procedure in the pledge financing of new plant variety right is mainly the non litigation realization mode. The realization of the pledge of new plant variety rights adopts the way of procedural law. Before realizing the pledge, the pledgee usually needs to obtain the judgment document issued by the court after trial, and can not realize the pledge without permission. [11] Non litigation procedure is relative to litigation procedure. The most important area where non litigation procedure is adopted to realize the pledge of new plant variety right is Taiwan in China. Taiwan region adopts non litigation procedure to decide the auction of new plant variety rights through the court, and then enters the enforcement procedure, so as to realize the creditor's rights of the pledgee.

3.2. The Realization Procedure of Pledge in the Pledge Financing of New Plant Variety Right is Not Smooth

3.2.1. It is Difficult to Implement the Right of New Plant Varieties

As an intangible intellectual property right, the right of new plant varieties reflects the difficulty of enforcement incisively and vividly in the non litigation procedure of realizing the security right. The evaluation of intangible property rights needs to be carried out with higher professional cost and professional cost. A series of evaluation procedures increase the litigation cost and make it more difficult to realize the pledge right of new plant varieties. Secondly, the important reason why the enforcement of the right of new plant varieties is difficult to realize is that as a special intellectual property right, there are few ways to realize it. The enforcement court has limited space to sell the right by auction. Ordinary social workers will not directly participate in the bidding of new plant variety rights, and it is difficult to realize the loan for the financial industry. In addition, the court's property preservation of the debtor is limited to form. When preserving, the court only adopts form preservation and does not pay attention to the substantive preservation of the debtor's property, which further aggravates the difficulty for the bank to realize the creditor's rights, makes it difficult to pledge the intangible intellectual property rights of new plant varieties, and makes it difficult to apply for loans in the financial industry. In addition, the realization procedure of pledge financing of new plant variety right is a non litigation procedure. According to the provisions on the realization procedure of security interest in article 197 of China's civil procedure law, it is more abstract, and there is no corresponding realization procedure of pledge right. This will lead to the insufficient guarantee of the realization procedure of such security interests as the right of new plant varieties in practice, which aggravates the difficulty of the realization procedure of the right of new plant varieties.

3.2.2. The Respondent of Non Litigation Procedure is Not Clear

How to choose the respondent in the case of pledge realization is a problem worthy of discussion, which is not clearly stipulated in Article 196 of our civil procedure law. Generally speaking, when the pledgee files an application, the pledgor is the respondent, and when the pledgor files an application to the court, the pledgee is the respondent. However, there are some special circumstances that need to be further clarified: such as the debtor when the pledgor is inconsistent with the debtor, the original pledgee and the original debtor in the transfer of pledge, and other obligees when the pledge competes with other security interests, etc. The law has no clear provisions on how to choose the respondent under the above circumstances. In order to avoid causing confusion in practice, it is necessary for us to make clear provisions. Are

the respondents listed selectively or are they all listed as respondents? It is a key problem that needs us to solve.

3.3. Optimize the Realization Procedure of Pledge Financing of New Plant Variety Rights

3.3.1. Implement Regulation System

In order to further solve the problem of difficult realization of new plant variety rights, it is difficult to achieve the purpose of implementation in implementation, which is not conducive to the realization effect of pledge of new plant variety rights as security interests. The difficult realization of new plant variety rights can be further alleviated by mediating the realization of new plant variety rights. According to Article 2 of the provisions of the Supreme Court on Several Issues concerning the civil mediation work of the people's court, the people's court will not mediate cases subject to special procedures. The realization of the right of new plant varieties is subject to special procedures. Therefore, the realization of the right of new plant varieties cannot be mediated according to the law. [12] Because mediation is mainly to mediate the conflict of civil rights and interests between the parties without identifying certain facts, and the realization of new plant variety right is a non litigation procedure, there is no dispute over rights and obligations between the parties, so mediation is not applicable according to the law. However, for the realization of the right of new plant varieties, although it does not involve the rights and interests disputes between the parties, it does not involve the confirmation of a certain factual state, but only the negotiation on the realization of the property right of new plant varieties. As the "flower of the East", the mediation system has the unique advantages of the East. The mediation of plant new variety rights does not violate the legal provisions in essence. On the contrary, it can more effectively solve the difficulty of realizing plant new variety rights through procedures, reflect the efficiency and quickness of mediation, accelerate the fund recovery of bank loans, and promote the development of pledge of plant new variety rights.

3.3.2. Accurately Grasp the Special Procedure in Line with the Trial Law of New Plant Variety Right

In accordance with the requirements of the outline of the national intellectual property strategy, take the strategic height of building a powerful country with intellectual property rights as the starting point, carefully summarize the basic laws and experience of the trial of new plant variety rights, strengthen the analysis of the current situation and the study and judgment of international trends, study and establish the appeal trial mechanism of new plant variety rights cases at the national level, and realize the specialization, centralization of jurisdiction, intensification of procedures and specialization of personnel in the trial of new plant variety rights cases, Fundamentally solve the institutional problems restricting scientific and technological innovation, such as the non-uniform judgment scale of plant new variety right and the complex litigation procedure. Further improve the specialized trial system in line with the law of judicial protection of new plant variety rights, and effectively meet the judicial needs of scientific and technological innovation for the specialization of new plant variety rights.

4. Platform for the Realization of New Plant Variety Right Pledge and Financing Qualification Right

4.1. The Transaction Platform in the Pledge Financing of New Plant Variety Right is Not Perfect

4.1.1. Current Situation of Realizing Transaction Platform by Pledge Financing of New Plant Variety Right

In recent years, China's intellectual property rights have sprung up in a blowout, and the demand for intellectual property rights of small and medium-sized science and technology enterprises is increasing day by day. However, in terms of the realization of pledge rights, China lacks a special typed intellectual property transaction platform, resulting in the failure to realize the relevant pledge rights of intellectual property rights in China. [13] The problem faced by the trading platform for the realization of intellectual property pledge is that there is no unified information sharing platform and standardized requirements for transaction evaluation. For physical assets, the information trading platform helps to enhance the flexibility of trading. [14] However, for the particularity of the intangibility of new plant variety right, its value is not easy to be predicted, and it also has certain confidentiality, monopoly and value uncertainty, so it is difficult to realize the pledge right on the trading platform. On the one hand, even if there is a trading platform, it can not ensure the success of the transaction. The trading platform is only a physical trading place. Due to the intangibility of intellectual property, its value is difficult to determine, and the purpose of realizing the transaction will fail. In this way, it is difficult for the trading platform to realize the purpose of trading. Then, for the right of new plant varieties that are pledged, it is the same situation, and it is difficult to realize the right during bidding.

4.1.2. Problems in the Realization of Transaction Platform for Pledge Financing of New Plant Variety Rights

In practice, driven by interests, the trading platform in the pledge financing of new plant variety rights disrupts the market order, and there are malicious monopoly, unfair competition and other behaviors. Driven by interests, trading platforms that cooperate more with the government and banks are likely to obtain more or more cases of pledge trading of new plant variety rights. In the absence of national unified business operation rules, trading platforms may be monopolized by a few or even one or two, and the relevant markets will lack due fair and free competition. The charging of trading platform services is determined by the trading platform that can occupy an advantageous or monopoly position, which is bound to affect the realization of the pledge of new plant variety rights, and ultimately affect the continuous spread and steady promotion of the financing practice of intellectual property pledge. This is contrary to the goal of strengthening the application of intellectual property and building a strong intellectual property country in the outline of the national intellectual property strategic plan. We must pay attention to it and carry out legal regulation to guide its sound development.

4.2. Improve the Financing and Trading Platform for Pledge of New Plant Variety Rights

4.2.1. Build a Public Service System with Government Guidance, Diversified Participation, Interconnection and Sharing

At present, the core competitiveness of seed enterprises is the right to develop new plant varieties, which is an important intangible asset for the development of seed enterprises. If seed companies want to revitalize intangible assets, they need to pledge and finance the right of new plant varieties, realize the exchange value and economic value of the pledge, improve the use of funds and promote the circulation of funds. In order to enhance the pledge of new plant variety rights and realize the new plant variety rights trading platform, the lack of information

on the trading platform will seriously affect the realization of new plant variety rights on the trading platform, so that the subject of the transaction can not understand the relevant information of new plant variety rights in time, resulting in the difficulty of effective transaction. In order to speed up the pledge of new plant variety rights, in view of the dilemma of lack of information on the trading platform, we can establish the national traceability information of new plant varieties to verify, so that the new plant variety rights company can input real information on the trading platform and carry out credit detection, so as to realize the whole process monitoring and real-time update of new plant variety rights information by the trading subject, so as to realize transaction security. [15].

4.2.2. Give Full Play to the Role of Intermediary

The perfect financing and trading platform for pledge of new plant variety rights provides an intermediary and bridge for the pledgor and the pledgee, reducing the transaction costs of both parties. It provides more trading opportunities for market participants. The main supplier of new plant variety right pledge financing is financial institutions, and the main capital demand is scientific and technological small and medium-sized enterprises. In the financing process of scientific and technological small and medium-sized enterprises, it will face prominent problems of difficult evaluation, pledge and disposal. As an intermediary agency serving scientific and technological small and medium-sized enterprises and financial institutions, the new plant variety right pledge financing platform has effectively solved the problems of information asymmetry through professional services. [16] The new plant variety right pledge financing trading platform provides guarantee services for credit transactions between both parties. To give full play to the intermediary role, we should adhere to the principle of marketization.

The principle of marketization requires that the pledgor and Pledgee of new plant variety right be given sufficient autonomy, make flexible adjustment and decision-making according to the market law, bear risks and obtain profits accordingly. Based on this principle, measures should be taken to reduce the degree of government intervention, give enterprises, banks and other subjects more autonomy, and promote them to make independent choices and decisions according to their own operation, management and development needs. Local governments should establish a model and operation mechanism more in line with the development of market economy, so as to promote the scientific and sustainable development of the pledge financing business of new plant variety rights in China.

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