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硕 士 学 位 论 文

保证保险法律问题研究

Study on The Legal Problems of Bonding Insurance

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内 容 摘 要

保证保险是一种具有保证担保功能的特殊财产保险，其法律关系相对复杂，风险较难控制，在保险法理论中争议颇多。其中，保证保险的法律性质是保证还是保险，一直以来是争议的热点。保证保险法律性质决定着保证保险的法律地位和法律适用，因此，本文以比较的研究方法，深入分析保证保险的性质，全面探讨保证保险理论和审判实务中存在的问题，最后就如何完善保证保险制度提出立法建议和对策。全文除引言和结束语外，共分四章。

第一章保证保险的基本理论问题。第一节介绍保证保险的历史发展和定义；第二节论述保证保险法律关系的构成要素，指出保证保险的主体有三方当事人，客体为信用利益；第三节介绍保证保险与其相近的信用保险、责任保险的关系；第四节介绍保证保险的分类以及我国保证保险的主要险种：诚实保证保险和汽车消费贷款保证保险。

第二章比较视野下的保证保险性质。第一节比较保证与保险的异同点，从而找到保证保险产生的原因；第二节通过保证保险与保证的异同分析，发现二者“形似”，但有本质区别；第三节将保证保险与一般财产保险进行比较，认为二者虽有区别，但保证保险具有一般财产保险的机理；第四节在前三节比较分析的基础上，针对理论界和实务界争议的观点，提出保证保险的法律性质是一种具有保证担保功能的特殊财产保险的观点。

第三章司法实践中的法律问题研究。当前保证保险纠纷案件审理中争议较大的问题主要有：保证保险纠纷的法律适用；保证保险合作协议与保证保险合同的关系；保证保险纠纷能否与借款纠纷合并审理；保证保险与担保并存时当事人的抗辩权问题；保险人的代位求偿权问题。针对当前保证保险纠纷案件审理中争议较大的上述热点问题，结合案例谈处理的观点。

第四章我国保证保险制度的完善。首先，归纳制约我国已开办的保证保险业务发展的因素；其次，提出保证保险理论完善方面的立法建议；第三，提出保证保险完善的具体制度构建。

关键词：保证保险；法律性质；制度完善

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ABSTRACT

Bonding insurance is special property insurance with guarantee function. For the complicated legal relationship and difficulties in controlling risks, there are a lot of controversies in this area. The nature of bonding insurance, namely, whether it is guarantee or insurance, is one of such hot topic. It decides the legal status and applicable law of bonding insurance. This dissertation deeply analyzes the legal nature of bonding insurance in a comparative way, fully discusses the questions existing in the theory and practice, and then puts forwards some suggestions on how to perfect the system of bonding insurance.

Besides the introduction and conclusion, this dissertation is divided into 4 chapters as follows:

Chapter 1 gives an overview of the basic theory of bonding insurance. Its subchapter 1 firstly introduces the history and definition of bonding insurance. Subchapter 2 focuses on the elements of legal relationship of bonding insurance, pointing out that the subject of bonding insurance includes three parties, and its object is credit interest. Subchapter 3 deals with the relationship between bonding insurance, credit insurance and liability insurance. Subchapter 4 introduces the categories of bonding insurance and those that have developed in our country, such as bonding insurance for honesty, bonding insurance for car consumption loans.

Chapter 2 tries to illustrate the legal nature of bonding insurance by comparison. Subchapter 1 explains under what circumstances bonding insurance occurs by comparing guarantee and insurance. Subchapter 2 analyzes the similarities and essential differences between bonding insurance and guarantee. The author compares the bonding insurance with general property insurances in subchapter 3, concluding that bonding insurance, though differs from general property insurances, has its basic characteristics. Based on three subchapters, subchapter 4 elucidates the author's viewpoint, that is bonding insurance is one of special property insurance with guarantee function.

Chapter 3 focuses on the problems in practice. At present, the most controversial issues in insurance cases are as follows: the law applicable to the bonding insurance; the relationship between the bonding insurance cooperation agreement and the

insurance contract; whether the bonding insurance disputes could be joinder of actions with loan disputes; what are the parties' defence rights when the bonding insurance coexist with the guarantee; the insurer's subrogation right. By studying typical cases, the author states her point on these issues.

Chapter 4 discusses how to perfect the system of bonding insurance. Firstly, it sums up the elements which restrict the development of the established bonding insurances. And then, the author gives some legislature suggestions generally, as well as detailed advices on system reconstruction specifically.

Key Word: Bonding insurance; Legal nature; System perfection.

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引言

保证保险是以信用利益为保险客体的一种特殊保险。因其具有显著的信用担保功能，故已成为世界各国保险业的重要险种之一。1998年3月3日，中国人民银行发布《关于开展个人消费贷款的指导意见》后，消费信贷业务迅猛发展，“用明天的钱圆今天的梦”正成为我国人民新的消费方式。同时，如何有效地防范和降低导致金融秩序波动且日渐增多的信贷风险现象，也成为人们密切关注的问题。保险公司基于与生俱来的有效化解风险功能的公信力，自觉或不自觉地介入到了信贷风险防范领域。^①因此，保证保险在我国应运而生，并为各利益主体所接受，显示出强大的生命力。但快速发展的保证保险业存在的问题日渐暴露，纠纷不断，居高不下的赔付率使得保险公司遭受巨大的经济损失，许多保险公司纷纷暂停了该项业务。其中，我国《保险法》未对保证保险作出规定，理论界和实务界对保证保险的法律性质、法律适用等争议颇大，司法实践中此类纠纷的处理标准不一，是导致上述问题的主要原因之一，因此，冷静地分析当前保证保险业的现状，思考和解析保证保险的相关基础理论和实务问题，其意义尤为迫切和深远。本文以保证保险的法律性质这一争议的焦点为切入点，在与保证担保、一般财产保险进行比较分析的基础上，针对当前我国保证保险存在的问题，提出立法建议和制度建设两方面的对策，以期对我国保证保险制度的发展和完善有所裨益。

^① 王颖琼,魏子杰,徐彬.保证保险二元性思辨及其法律适用[J].河北法学,2004,(4):91.

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