



中国政策性担保公司 法律制度研究

On the Law Systems
of Policy-based Guarantee Companies

陈秋明 / 著



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中文摘要

本书综合运用比较分析法、历史分析法等研究方法,以金融监管为视角,以市场准入、内部控制及市场退出为线索,对政策性担保公司法律制度的构建进行了比较系统的研究。本书共分四章:

第一章 政策性担保公司法律制度的基本理论

本章主要探讨了政策性担保公司及其法律制度的几个基本理论问题,共分五节。

第一节 政策性担保公司的法律界定

主要探讨了政策性担保机构的内涵界定、法律形态选择以及法律特性分析三个问题。

担保机构界定:比较了担保与保险在功能定位、运营机理、法律关系等方面的不同特点,政策性担保与商业性担保在目的宗旨、担保对象、资金来源等方面的不同,政策性担保与政府担保在责任承担主体和承担方式的不同,从比较分析中界定了政策性担保的含义:是指由政府出资、不以营利为目的、具有特定的服务对象、为实现政府政策性目标而设立的担保。政策性担保机构是指主要承担政策性担保业务的担保机构。

法律形态选择:考察了世界主要国家政策性担保机构的法律形态(主要包括以英国和美国为代表的政府机关法人型,以日本和韩国为代表的社团法人型,发展中国家的公司法人型),分析了各国政策性担保公司法律形态选择的依据,对我国目前政策性担保机构的主要法律形态(事业法人、社团法人、公司法人)的优缺点进行了比较,认为公司法人是我国目前政策性担保机构应该采用的法律形态,而且从是否能够帮助

政府实现协调经济发展的政策性目标以及是否能够高效地完成政策性任务等方面,论证了国有独资公司是我国政策性担保机构的最佳选择。

法律特性分析:从机构担保与一般民事担保的区别以及担保与金融本质属性(货币流通、信用、风险管理)的内在联系,分析了政策性担保公司的金融属性;从政策性担保公司的目的宗旨、资金来源、服务对象的特殊性,分析了政策性担保公司的政策性;从独立的市场经营主体、公司的组织形式、保本微利的实际经营目标分析了政策性担保公司一定的商事主体性。认为金融属性、政策性和一定的商事主体性是政策性担保公司的本质属性。

第二节 政策性担保公司存在的理论解释

系统考察了市场失灵与政府干预理论、资源配置理论和公共物品供给理论,通过分析信用的有用性、稀缺性和可选择性,认为信用是一种资源,信用资源的配置也会发生市场失灵,政策性担保公司是在市场失灵与政府干预理论、资源配置理论和公共物品供给理论的支撑下,政府干预信用资源配置市场失灵的工具。

第三节 政策性担保公司兴起的背景梳理和现状考察

梳理了日本、韩国、美国、英国、德国等世界主要国家或地区政策性担保机构的发展轨迹和历史背景,总结了国际先进经验对我们的启示:政策性担保机构是市场经济繁荣的产物;政策性担保机构的繁荣得益于政府干预理论的产生;政策性担保机构是政府解决特定历史问题的工具;政府主导是政策性担保机构发展的前提;健全的法律法规是政策性担保机构健康发展的基础;风险控制与分散是政策性担保机构发展的关键。同时,考察了我国政策性担保公司的历史轨迹和发展现状,分析了政策性担保公司发展面临的困境:政策性担保公司作为政府实现政策性目标的工具,未得到政府应有的支持;政策性担保公司作为独立的市场经营主体,因追逐利润往往偏离了政策性方向;政策性担保公司作为金融机构,缺乏政府应有的监管。

第四节 金融监管的基本理论

金融自身的脆弱性和高风险性、金融对于一国经济的重要影响以及

金融危机的现实教训,都决定了各个国家都要加强金融监管。金融监管有各种模式,各国根据自身的国情选择了不同的监管模式。全球金融危机后,各国都对自己的金融监管进行了反思和调整。反思的第一步是找出存在的问题,然后才能根据问题提出对策。我国金融监管存在的问题包括:如何防范系统性金融风险,如何完善监管机构之间的协调机制,如何实施全面监管,如何进一步强化监管的内容,如何保护金融消费者的权益等。

第五节 政策性担保公司法律制度概述

探讨了政策性担保公司法律制度的概念、特征、立法理念及价值取向,认为政策性担保公司作为政府实现政策性目标的工具,其法律制度应追求公平;作为独立的市场经营主体,其法律制度应追求效率;作为金融机构,其法律制度应追求安全。根据法律制度的定位、法律制度所规制的领域、社会的不同发展阶段的要求,分析了当公平与效率发生冲突时,应坚持公平优先、兼顾效率的原则;通过梳理金融理论的发展脉络以及总结本次金融危机的深刻教训,认为应坚持安全优先、兼顾效率的原则。检讨了目前我国政策性担保法律制度存在的诸多问题:立法严重滞后;部门规章和地方法规法律位阶较低;未能从金融监管的角度制订法规规章;现行部门规章和地方法规缺乏规范性和系统性;并未体现对公平、效率及安全价值的追求,等等。政策性担保公司及其法律制度的实践呼唤统一、规范、科学的政策性担保公司法律制度。

第二章 完善政策性担保公司市场准入制度

本章从政策性担保公司的法律特性入手,以公平、安全、效率的法律价值为视角,从资本要求、审批机构、功能定位三个方面,分四节对政策性担保公司准入制度的构建进行论述。

第一节 政策性担保公司市场准入制度概述

本节探讨了政策性担保公司准入制度的内涵,认为政策性担保公司市场准入制度是指规范进入政策性担保市场的条件和程序的法律法规。检讨了目前我国政策性担保公司市场准入制度的缺陷:现有的部门规章对政策性担保公司是否要实行准入制度,规定不尽一致;准入资本要求

方面存在问题;审批(监管)机构不明确;未对政策性担保公司进行明确的功能定位。

第二节 政策性担保公司市场准入的资本要求

政策性担保公司资本的特殊性在于其债权担保功能强于价值创造功能,以此为基础探讨政策性担保公司资本制度的构建。法定资本制有利于资本担保功能的实现,因此政策性担保公司应实行严格的法定资本制;应限定最低资本额,各类政策性担保公司资本不得低于5000万元人民币;由于政策性担保公司的非营利性,政府应成为政策性担保公司的唯一出资主体,且不得像日本、韩国那样要求银行类金融机构捐资。由于政策性担保公司资本承担着很强的对公司相对人财产及交易安全的保障责任,所以应选择价值的确定性、稳定性、可转换性和可变现性相对较高的资本形态,即货币形态,而且出资必须在公司成立时一次性缴清。

第三节 政策性担保公司审批(监管)机构的立法选择

政策性担保公司作为金融机构,应实行严格的准入审批制度。通过比较机构监管和功能性监管的优劣势,并分析我国担保公司均实行混业经营、利用功能性监管完全可以克服目前机构监管存在的问题、功能性监管已成为世界金融监管的潮流等因素,认为我国政策性担保公司的监管模式应采用功能性监管。分析了政策性担保公司监管机构应具备的条件:必须具备较强的防范和化解金融风险的能力;必须具备全面监管和统一监管的能力;必须具备一定的监管基础和监管经验。比较了目前政策性担保公司几个监管机构以及我国目前的金融监管机构的特点,认为只有保监会完全符合三个条件,应成为政策性担保公司的监管(审批)机构。

第四节 政策性担保公司的功能定位

本节探讨了三个问题:(1)能否经营商业性担保业务?(2)能否经营担保业务以外的其他业务?(3)担保公司的名称如何限制?

对于第一个问题,各国都采取了禁止性立法规定,即政策性担保机构不得从事商业性担保业务,我国也采取了禁止性立法规定。但是,由于我国各级政府财力有限,很难做到为政策性担保公司持续地补充资

金,因此,为提高政策性担保公司的“造血”功能,本书认为应允许政策性担保公司按一定的比例经营政策性担保业务和商业性担保业务,并且规定商业性担保业务应控制在20%~30%。

对于第二个问题,本书分析了允许和禁止两种立法例,认为为促进政策性担保公司担保业务的发展、减小担保风险,可允许政策性担保公司经营部分与政策性担保业务相关的其他业务。

对于第三个问题,本书认为要严格规范政策性担保公司名称的使用,只有主要经营政策性担保公司的机构,才能冠以担保公司的名称。

第三章 强化政策性担保公司内部控制制度

本章从公司治理结构、风险控制与分散、担保程序等方面探讨了政策性担保公司的内部控制制度,共分四节。

第一节 政策性担保公司内部控制制度概述

政策性担保公司风险具有风险系数特别高、传递性、突发性等特点,这要求政策性担保公司必须建立严格的内部控制制度,才能控制和分散风险。我国政策性担保公司目前的内部控制制度还存在诸多缺陷:政策性担保公司治理结构不完善;风险控制与分散的规定过于原则,且相互矛盾;担保程序缺乏规范化。

第二节 公司治理结构完善

应根据政策性担保公司国有独资公司的法律形态、金融属性、政策性等特性,构建政策性担保公司科学合理的治理结构。本书分析了我国政策性担保公司国有股权行使主体体制的弊端,认为国资委应成为政策性担保公司国有股权的行使主体,并明确国资委的权能及其限制;要通过强化董事会的中心地位、设立外部董事、设立专业委员会、设立职工董事等措施完善董事会;要通过强化监事会职能、优化监事会结构、强化监事责任,强化监事会;要妥善处理董事会与经理的关系,充分发挥经理的经营管理作用。

第三节 风险控制与分散制度安排

提高偿付能力:分析了政策性担保公司偿付能力计算方法的争议,确定政策性担保公司偿付能力表现为担保余额与广义的资本之比,即通

常所说的担保放大倍数,我国政策性担保公司的放大倍数应确定为10倍。应通过政府持续的资本补充、计提风险准备金、有条件发行次级定期债券、合理运用担保资金、收取担保费等,提高政策性担保公司的偿付能力。

反担保:分析了反担保制度及国外立法例,认为我国目前的反担保制度并未解决“政策性担保公司反担保的两难问题”,应将上海市《小企业贷款信用担保管理的若干规定》对反担保的相关规定作为政策性担保公司立法的选择。

再担保:分析了国外再担保立法例及我国再担保的立法缺陷。认为再担保的本质是再保险;再担保的资金应全部来源于政府拨款;我国应建立两层再担保体系;再担保业务既包括对担保公司日常担保业务的再担保,也包括对担保公司破产的担保;应确定合适的再担保比例和担保费率。

比例担保:应实行强制比例担保,担保公司承保的比例不得高于90%。

联保:联保的性质为一般共同保证。单个担保对象担保额度的限制:为分散风险,对单个担保对象的担保额度应限制在公司净资产的10%以内。

第四节 担保程序制度安排

应将担保项目受理、担保项目审查和评估、担保项目决策与实施、担保项目后期监督与管理等政策性担保公司的担保程序上升为法定程序,以规范政策性担保公司的担保行为,保证政策性担保公司的安全。

第四章 重构政策性担保公司市场退出制度

本章从退出的必要性、退出的可行性、退出的预警及应急处理制度、退出的方式、退出的善后处理等方面探讨了政策性担保公司退出制度的构建,共分四节。

第一节 政策性担保公司市场退出制度概述

本书分析了政策性担保公司市场退出的必要性、可行性和特殊性,认为政策性担保公司退出制度是政策性担保市场健康发展、完善政策性

担保体系、政策性担保公司自身健康发展的内在要求,其金融属性和商事主体性又决定了市场退出的可行性。市场退出影响的广泛性、市场退出的标准高于一般企业、行政权力的介入、债务问题更加复杂、引发市场退出原因的偶然性等方面决定了政策性担保公司市场退出的特殊性。政策性担保公司市场退出的特殊性要求其不能完全适用一般企业的市场退出法,而应单独立法,而且政策性担保公司法应独辟一章专门规制市场退出。我国目前政策性担保公司市场退出制度还存在诸多缺陷:缺乏损失分担制度,缺乏对或有债务处理的制度安排,政策性担保公司的退出方式不明确,缺乏对政策性担保公司风险程度的警戒系统和危机处理机制,缺乏责任追究制度,缺乏退出保障制度。

第二节 政策性担保公司市场退出预警系统及应急处理制度安排

本节分析了建立预警系统和危机处理机制的必要性,认为应通过建立反映政策性担保公司风险警情、警兆、警源和变动趋势的组织形式、指标体系和预测方法等所构成的有机整体,来确定政策性担保公司的风险状况及应采取的应对措施。应通过建立制订危机应急预案、危机报告制度、明确相关部门的职责,来建立应急处理机制。

第三节 政策性担保公司退出的方式安排

接管:保监会应成为政策性担保公司接管主体;当政策性担保公司担保放大倍数超过 20 倍时,可以实行接管;接管应成为政策性担保公司被动退出的必经程序。

并购重组:并购重组是政策性担保公司退出的首选方式;并购重组须经主办政府批准;并购重组者应为一定区域内的具有重组能力的政策性担保公司或再担保公司。

解散:解散之于政策性担保公司,只有自愿解散,政策性担保公司解散除了须经股东会决议(国资委决定)之外,还必须经监管机构批准。

撤销:撤销的标准应该援引《金融机构撤销条例》《融资性担保公司管理暂行办法》的有关规定,并可由监管机构根据实际情况,灵活掌握撤销标准;政策性担保公司的撤销托管机构应明确为再担保公司。

破产:破产是最严厉的退出方式,应明确政策性担保公司的破产标

准即放大倍数超过二十倍方可被宣告破产;破产申请人包括债权人、债务人和监管机关;应明确破产财产的范围、破产财产的变价及破产财产的分配顺序。

第四节 政策性担保公司市场退出的善后处理

妥善处理担保合同的转让,被撤销或被依法宣告破产政策性担保公司的担保合同只能转让,不能终止;再担保公司应成为担保合同的法定受让人;转让担保合同的内容不得变更。通过建立担保保险制度以保护债权人利益,要明确政策性担保保险是强制保险。要按照政府机制与市场机制相结合的原则,明确政府、银行、担保保险公司应承担的责任和损失。只有建立责任追究制度,法律所规定的权利和义务才能实现,应明确规定市场退出政策性担保公司经营管理者们的民事责任、行政责任、刑事责任。

结语 总结了我国政策性担保公司法律制度的构建方案,并归纳了20条主要立法建议。

Abstract

A systemic research on law systems of policy – based guarantee companies has been made in the paper in the ways of comparative and historical analysis. The paper consists of four chapters discussing admittance, interior control and withdrawal of policy – based guarantee companies.

Chapter one is about basic theories of law systems of policy – based guarantee companies. Main topics in this chapter include some basic theory problems of policy – based guarantee companies and law systems in five sections.

Section one is about the legal definition of policy – based guarantee companies. It mainly discusses three topics of policy – based guarantee institutions: definition of connotation, choice of the legal form and analysis of the legal characteristics. Topic one is definition of policy – based guarantee institutions; The paper compares different characteristics of guarantee and insurance in aspects of function registration, management principle, legal relationship, difference between policy – based guarantee and business guarantee in aspects of purpose and tenet, guarantee object and capital source, difference between policy guarantee and government guarantee in aspects of responsibility subject and ways. By comparative analysis, the chapter defines policy – based guarantee; It is the government – funded guarantee with not – for – profit purposes, with specific clients, and for realization of the objectives of government policy. Policy – based guarantee institutions are guarantee institutions which mainly take on policy guarantee. Topic two is choice of the legal form. The

paper inspects legal forms of policy – based guarantee institutions of many important countries all over the world (including mainly government department corporations represented by those in the United Kingdom and the United States , juridical associations represented by those in Japan and South Korea , company corporations in developing countries) , analyzes the cause of choice of the legal form of policy – based guarantee companies in different countries , compares advantages and disadvantages of main legal forms (institution legal person , juridical association , and corporation) of policy – based guarantee institutions in China , and believes corporation is the best choice of the legal form of the current policy – based guarantee institutions. From the aspect of whether or not to help the government realize policy object of developing economy in harmony and fulfill policy tasks efficiently , the chapter shows that the legal figure of the state – owned exclusive company is the best choice for policy – based guarantee institutions in China. Topic three is analysis of the legal characteristics. From the general distinction between institution guarantee and general civil guarantee and the internal relations of guarantee and financial nature (currency in circulation , credit , risk management) , the paper analyzes the character of finance of policy – based guarantee companies ; from aspects of purpose and tenet , funding sources , and unique clients , the paper analyzes the character of policy of policy – based guarantee companies ; from aspects of independent market operators , the company forms of organization , and the operating goal of break – even and petty profit , the paper analyzes the character of commercial subject of policy – based guarantee companies. Characters of finance , policy and commercial subject are inner essential properties of policy – based guarantee companies.

Section two is about theoretic explanation of existence of policy – based guarantee companies. The paper has systemic reviewed on theories of market failure , resource allocation and public goods supply. By analysis of usefulness , exiguity , and selectivity , the paper believes credit resources collocation

will sometimes suffer from market failure. According to theories of market failure, government intervention, resources collocation, public goods supply, policy – based guarantee companies are essentially policy tools of the government to intervene market failure of credit resources collocation.

Section three is about background and actuality of development of policy – based guarantee companies. Based on reviewing of development and history background of policy – based guarantee institutions of many important countries or regions all over the world including Japan, South Korea, the United States, Britain, and Germany and so on, this article has summed up our inspiration from the international advanced experience: the policy – based guarantee institution is the product of prosperity of market economy; prosperity of the policy – based guarantee institution benefits from formation of government intervention theory; the policy – based guarantee institution is the tool for the government to settle down specific historical problems; government – lead policy is prerequisite for the development of policy – based guarantee institutions; sound policy – related laws and regulations is the basis of the healthy development of policy – based guarantee institutions; risk control and decentralized policy is the key to the development of policy – based guarantee institutions. At the same time, the paper inspects the history and development actuality of the policy – based guarantee companies, analyzes dilemma of the development of policy – based guarantee companies; as tools of the government to realize policy aims, they have not achieved support from the government; as independent market management subjects, they often deviate from policy directions for profits; as financial institutions, they lack supervision from the government and sound internal control systems and so on.

Section four is about outline of financial regulation. Finance's fragility and high risk, finance's significant impact on a country's economy and real lessons from financial crisis, all determine that it is very necessary for each country to strengthen the supervision to its finance. There are different models

of financial regulation, and each country can choose different model based on its own situation. After the global financial crisis, many countries carried out reflection and adjustment to its model of financial regulation. The first step of reflection is to find out the problems, and then design countermeasures to the problems. The problems existing in the financial regulation in our country include how to keep away from systematic financial risk, how to perfect coordination mechanism between supervision organizations, how to implement all-round supervision, how to further intensify the items of supervision, how to protect the rights and interests of financial consumers, and so on.

Section five is about sum of law systems of policy-based guarantee companies. It discusses conception, characters, legislation ideas and value tropism of law systems of policy-based guarantee companies. As the tool for the government to achieve policy objectives, law systems should be fair; as independent market management subjects, law systems should be efficient; as financial institutions, law systems should be safe. In accordance with orientation of law systems, the field of law systems, and social requirements of different stages of development, the paper insists on the principle of a fair priority taking into account efficiency when fairness is in conflict with efficiency. By combing through the development of the financial theory and summing up the profound lessons of the financial crisis, the paper believes that we should adhere to safety priority, taking into account the principle of efficiency. This chapter reviews many problems of law systems of policy-based guarantee companies: serious lag of legislation, legal low ranks of department regulations and local rules of laws, lack of criterion and system of present department regulations and local rules of laws, lack of display of pursue of fairness, efficiency and safety value and so on. Practice of policy-based guarantee companies and law systems calls for unified and orderly law systems.

Chapter two is about improvement of market admittance systems of policy-based guarantee companies. Starting with legal characters of policy-based

guarantee companies from perspectives of legal value of fairness, safety and efficiency, this chapter elaborates construction of the admittance system of policy – based guarantee companies from three aspects of capital requirement, examination organizations and function orientation.

Section one sums up the market admittance systems of policy – based guarantee companies. This chapter discusses the connotation of market admittance systems and points out that market admittance systems are laws and regulations to rule conditions and procedures to enter the policy – based guarantee market. It reviews limitation of present market admittance systems of policy – based guarantee companies: Existing department regulations are not consistent as to whether policy – based guarantee companies should carry out admittance systems; there is no capital requirement of admittance, the regulation institute is not definitude; functional localization of policy – based guarantee companies is not clear.

Section two is about capital requirements of market admittance of policy – based guarantee companies. Capital particularity of policy – based guarantee companies lies in the fact that the guarantee function of creditors' rights is stronger than creation function of value, which is a basis for exploring the policy – based guarantee policy of building a company's capital system. Statutory capital system is conducive to the realization of capital policy – based guarantee function, therefore the policy – based guarantee companies should have strict statutory capital systems; there should be limited on the amount of minimum capital, and various types of policy – based guarantee capital shall not be less than 50 million yuan; owing to non – profit character of policy – based guarantee companies, the government should be the only policy – based guarantee company's main investor, and should not request financial institutions such as banks to donate like Japan and South Korea. Because of the company's capital commitment to the company's relatively high property and the responsibility to protect the safety of transactions, the company should

choose the capital form with value of certainty, stability, transferability and relatively high, which are monetary and real estate. In the constitution of investment, the currency may not be less than 80 percent of capital, real property shall not exceed 20 percent, and investors in the company must pay all the capital when the company is set up.

Section three is about legislative choice of the regulation institute of policy - based guarantee companies. As financial institutions, policy - based guarantee companies must carry out strict admittance systems. By comparing the advantages and disadvantages of the institutional and functional supervision, analysing that policy - based guarantee companies in China all carry out mixed operation, the use of functional supervision can overcome the current problems in the institutional and functional supervision has become the trend of the world's financial supervision, the paper believes that policy - based guarantee companies in China should adopt functional supervision. Supervision institutions of policy - based guarantee companies should meet the following requirements: strong ability to guard against and defuse financial risks, a comprehensive regulatory and supervisory capacity of unity; a certain degree of basis and experience of supervision. By comparison of a number of current regulatory agencies, as well as the current characteristics of the financial regulatory agencies of policy - based guarantee companies in China, the paper believes that only the China Insurance Regulatory Commission can meet three requirements to act as monitoring (for approval) institutions of policy - based guarantee companies.

Section four is about function orientation of policy - based guarantee companies. This section discusses three issues: (1) Can policy - based guarantee companies operate commercial policy - based guarantee business? (2) Can policy - based guarantee companies operate other business besides guarantee? (3) How to limit the name of the company? On the first question, the countries have adopted legislation to prohibit the policy - based guarantee