



农村承包土地经营权 抵押制度研究

沈思言 © 著

STUDY ON THE MORTGAGE SYSTEM OF MANAGEMENT
RIGHT TO CONTRACTED RURAL LAND



对外经济贸易大学出版社
University of International Business and Economics Press

对外经济贸易大学中央高校基本科研业务费专项资金资助 (SSZX01)

Supported by “the Fundamental Research Funds for the Central Universities”

in UIBE (SSZX01)

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中国·北京

图书在版编目（CIP）数据

农村承包土地经营权抵押制度研究 / 沈思言著. —
北京：对外经济贸易大学出版社，2022.11

ISBN 978-7-5663-2444-3

I. ①农… II. ①沈… III. ①农业用地-土地产权-
抵押贷款-研究-中国 IV. ①F832.43

中国版本图书馆 CIP 数据核字（2022）第 198071 号

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责任编辑：刘传志

出版发行：对外经济贸易大学出版社
社 址：北京市朝阳区惠新东街 10 号
网 址：www.uibep.com
资源网址：www.uibepresources.com

邮政编码：100029
邮购电话：010-64492338
发行部电话：010-64492342
E-mail：uibep@126.com

成品尺寸：170mm×240mm
印 张：12
字 数：184 千字
ISBN 978-7-5663-2444-3

印 刷：北京九州迅驰传媒文化有限公司
版 次：2022 年 11 月北京第 1 版
印 次：2022 年 11 月第 1 次印刷
定 价：62.00 元

前言

“以史为鉴，可以知兴替。”以法史为鉴，可以明法理。党的十八大以来，中国特色社会主义法治体系不断健全，法治中国建设迈出坚实步伐，法治固根本、稳预期、利长远的保障作用进一步发挥，党运用法治方式领导和治理国家的能力显著增强。习近平总书记强调指出，“推进全面依法治国，根本目的是依法保障人民权益”“要把体现人民利益、反映人民愿望、维护人民权益、增进人民福祉落实到全面依法治国各领域全过程”“要积极回应人民群众新要求新期待，坚持问题导向、目标导向，树立辩证思维和全局观念，系统研究谋划和解决法治领域人民群众反映强烈的突出问题，不断增强人民群众获得感、幸福感、安全感，用法治保障人民安居乐业。”^①坚持以人民为中心，以权利保障为基点，加快构建以权利为本位的法治社会治理新格局，是当代中国共产党人义不容辞的政治责任，也是每一位法律人义不容辞的历史责任。

我们党领导的社会主义发展史也是一部中国农村土地制度的改革史。党的十九大以来，党把“土地制度改革”摆在突出位置，“乡村振兴”列为国家重大战略。早在党的十八届三中全会《中共中央关于全面深化改革若干重大问题的决定》及后续出台的一系列中央文件均明确指出“中国要富，农民必须富”“赋予农民更多财产权利”“建立‘土地所有权、承包权、经营权’三权分置的农地权利体系”，强调“稳定承包权，放活经营权”“构建农村承包土地的经营权抵押制度”，同时农村承包土地抵押贷款试点成为党的十八届三中全会确定的重点改革任务之一。实践中，在坚持集体所有制前提下的农地抵押制度已出现 20 余年，经历了从农户自发探索、试点推行再到国家大力支持的过程。纵观 20 多年来实践中试点农地抵押制度的推行成效，确实在一定程度上促进了土地经营的规模化和专业化，

^① 习近平在中央全面依法治国工作会议上强调 坚定不移走中国特色社会主义法治道路 为全面建设社会主义现代化国家 提供有力法治保障 [N]. 人民日报, 2020-11-18 (1).

促进了农民增收，积累了有益经验，但同时也有一些问题逐渐显现，使得农民土地财产权益的实现程度相对不足，制度功能的实现存在一些障碍。

“法与时转则治，治与世宜则有功。”为研究分析出农地抵押制度还存在哪些障碍，并以农民为中心、以农民的土地财产权利为基点提出对策建议，在推进“乡村振兴”的国家战略背景下，给国内乡村治理、土地流转等领域提供理论和实践参考，在对外经济贸易大学党史、新中国史、改革开放史、社会主义发展史研究专项项目“农村承包土地经营权抵押制度研究”的支持下，撰写学术专著《农村承包土地经营权抵押制度研究》。在撰写过程中，力求把握理解最新法律法规和最新中央政策规定，搜集总结研究最新学术研究成果，进行实地调研，收集第一手资料和数据，发布高水平咨询性专家建议。报告的突出特点是：以服务于国家“乡村振兴”重大战略需要和重大现实问题为导向；做到文献研究和实地调研结合，历史分析和比较分析结合；强化应用性、研究性。

本书在主体结构设计上共分八章。第一至七章每章三节，第一章阐述研究背景、意义、文献综述、思路、方法、重点难点和主要创新；第二章阐述农村承包土地经营权抵押的界定、制度功能与法律关系；第三章阐述农村承包土地经营权抵押的法律现状、改革试点实践及问题；第四章阐述确立农村承包土地经营权抵押制度面临的主要障碍；第五章阐述构建农村承包土地经营权抵押制度的基本原则；第六章阐述农村承包土地经营权抵押的设立；第七章阐述农村承包土地经营权抵押的实现。第八章是结语。

“农村承包土地经营权抵押制度研究”课题由对外经济贸易大学国际发展合作学院副院长沈思言主持负责。本课题是在前期博士论文基础上展开研究的，在此，衷心感谢博导徐海燕教授（对外经济贸易大学）、硕导刘士国教授（复旦大学）给予的悉心指导和无私帮助。在撰写过程中，本书还得到了对外经济贸易大学科研处、法学院、国际发展合作学院等有关部门、学院领导和专家的指导和大力支持，在此一并表示感谢。本课题本着认真负责的态度，力争精益求精，然能力所限，难免有谬误之处，还请各位读者批评指正。

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2022年3月2日

Abstract

Farmers' land property rights in China are not perfect to some extent, represented by the prohibition by current laws on creating mortgage right on rural land contracting and management rights (hereafter referred to as "land contracting and management rights") acquired in the way of household contracting. However, as a scarce resource, land possessed both use value and exchange value, the latter of which tended to be far higher than the former. In developed countries, land was generally allowed to be traded in the market to acquire its exchange value.

At the beginning of the 21st century, in some rural areas in China, peasants spontaneously mortgaged land contractual management rights. As more and more rural laborers are transferred to cities and towns, more and more attempts have been made to mortgage land contractual management rights. This phenomenon has aroused the attention and research of the academic community, and the state has also given attention and support from the policy level. At present, under the positive affirmation and vigorous advocacy of national policies, many localities have established pilot projects for land contract management mortgages. However, in the face of the prohibitive provisions of relevant laws, the pilot land contract management rights mortgage rules must either "upstream" or "detour", resulting in high cost, high risk, and low efficiency in the mortgage of rural land contract management rights. Failure to maximize farmers' land interests. Under the premise of insisting on the collective ownership of rural land, what are the restrictions on the mortgage of rural land contractual management rights? What are the countermeasures? This article will carry out research and analysis accordingly, and put forward corresponding legal suggestions. The main contents are as follows:

The first chapter of this article is an introduction. This chapter first introduces

the research background and significance of the article, and then summarizes the main viewpoints and research status of the current academic world, and sorts out the effective agricultural land for overseas developed countries and regions. The experience of the mortgage system is expected to be beneficial to the subsequent analysis and suggestions for improving the system. Based on the collected latest research results at home and abroad, a review is made, and future research is prospected. The third section describes the research ideas and methods of this article, and finally explains the main innovations of this article.

The second chapter is the definition, system function and legal relationship of the mortgage of rural contracted land management right. In this chapter, the author firstly defines what constitutes a rural land contracted management right mortgage through the concept, characteristics, and particularity of the rural contracted land management right mortgage. Then the author analyzes the function of mortgage of the contracted land management right. Specifically, the mortgage of the contracted land management right has economic and social functions and legal functions. Finally, the legal relationship of the subject and object, rights and obligations of the rural contracted land management right mortgage were analyzed.

The third chapter is the legal status of China's land contracted management right mortgage, the reform practice and problems. This chapter explains the legal status of the mortgage of the contracted land management right in rural areas, and summarizes the reform of the pilot practice of the mortgage of the contracted land management right. The pilot mortgage implementation method is administratively compulsory, the effectiveness of the mortgage right lacks stability and sustainability, and the risk dispersion mechanism is difficult to meet practical needs.

The fourth chapter is the main obstacle to establish the mortgage system of rural contracted land management rights in China. This chapter deeply analyzes the existing restrictions and reasons for the mortgage of land contractual management rights in current practice. Farmers' land property rights are not the first value of institutional changes. Legal restrictions on the value and capabilities of land

contracted management rights and the lack of legal basis for the mortgage of land contracted management rights are the main reasons leading to the lack of the subject status of farmers' land property rights. The rules for setting up mortgage rights formed in the practice of the reform pilot are still not perfect. Pilot mortgages for land contractual management rights generally emphasize safety and light efficiency, which are specifically manifested in the different scopes of mortgage subject qualifications, different forms of mortgage object, low mortgage object value, and mortgage types are complex. In addition, the lack of external control mechanisms for the realization of mortgage rights, insufficient implementation methods of mortgage rights and collateral disposal methods, and the inability of landless farmers to resettle properly after the realization of mortgage rights are also reasons for restricting the mortgage of land contractual management rights.

The fifth chapter is the basic principles of constructing the mortgage system of land contracted management rights in China. In the process of promoting the “rule by law” in our country, farmers' rights are truly “empowered” only when they become legal rights. Therefore, we should firstly clarify the legal status of farmers as the subject of land property rights in order to realize that farmers' land property rights are the primary value of institutional change. Then, by improving the value and capabilities of the land contractual management right, the land management right should be separated, and the mortgage of the land management right should be allowed to give farmers more land property rights and establish the subject status of their land property rights. On the basis of establishing a mortgage system for the management rights of rural contracted land in China, the power of contracting land management rights should be reasonably expanded. This is an effective way to fill the defect of the “separation of two rights” type land property right structure, and also adapts to the legal structure of the “three rights separation” type land property right structure. The chapter concludes with the necessity and feasibility of legalizing the mortgage of contracted land management rights. On the premise of insisting on collective ownership of rural land, a mortgage system for

the management rights of rural contracted land should be established. Based on the distinction between the “farmers” and “new agricultural subjects” mortgaged land management rights system, the scope of the mortgage subject, the nature of the mortgage object, the relative uniformity of the mortgage types, and the term validity of the mortgage rights are analyzed.

The sixth chapter is the establishment of the mortgage of the rural contracted land management right in China. This chapter analyzes the subject and object of the mortgage right and the establishment and registration of the mortgage. The organic combination of the “registration effectiveism” and “registration antagonistism” of the mortgage right as the principle of the entry into force of the mortgage right; the land contract management right and the land management right are registered separately according to the “land” acquisition and compilation method; As the mortgage registration agency, when the mortgaging rights are realized by the farmer as the mortgagor, only the land management right will be dealt with. The implementation of the mortgage right will increase the “mandatory management”. It is not appropriate to use forced sale and forced auction.

The seventh chapter is the realization of the mortgage of the right to operate the rural contracted land in China. In this chapter, based on the previous analysis, the path of the realization of the rural contracted land management right is explained from three main aspects, namely the validity period and scope of the realization of the mortgage right, the specific realization of the mortgage right, and the construction and improvement of the mortgage. Risk realization mechanism for realizing rights. In terms of the specific realization of the mortgage right, the author firstly types the different mortgagors and takes negotiation as the first-internal disposition of the collective economic organization-the mortgagee subcontract, lease, and other creditor's rights transfer methods to dispose the land contractual management, and the preferential treatment of the proceeds from the circulation of the proceeds-swaps, transfers, and other methods of disposition of mortgage disposal, and proposed that members of this collective organization do not enjoy

priority when the mortgage is realized. In constructing and improving the risk diversification mechanism for the realization of mortgage rights, we should define the main types of risks in the realization of mortgage rights, and then set up a diversified risk dispersion mechanism to give full play to the role of the government in diversifying risks, while actively using insurance, funds and other means, so as to effectively guarantee the security and smooth progress of the mortgage of the right to farmland contractual management in China.

The eighth chapter concludes by suggesting that under the premise of adhering to the collective ownership system of rural land in China, a “three rights separation” type rural land rights structure is established, with the land contract management right and the land operation right as mortgage objects, and the rural contract land management right mortgage system. The chapter also proposes corresponding legislation and amendments accordingly.

Keywords: Separation of three rights, Land contracted management right, Mortgage land contracted management right

内 容 提 要

我国农民土地财产权利存在一定程度的缺失，其具体表现之一就是，现行法律禁止在以家庭承包方式取得的农村土地承包经营权（以下简称“土地承包经营权”）上设定抵押权。然而，土地作为一种稀缺资源，既有使用价值也有交换价值，且后者往往远高于前者，发达国家普遍允许土地在市场上交易并获取其交换价值。

21 世纪初，我国部分农村出现农民自发抵押土地承包经营权的情形。随着农村劳动力越来越多地移转到城镇，各种抵押土地承包经营权的尝试也越来越多。这种现象不仅引发了学界的关注和研究，国家也从政策层面开始给予关注和支持。目前，在国家政策的正面肯定和大力倡导下，很多地方已经开始土地承包经营权抵押试点。但是，面对相关法律法规的禁止性规定，各试点土地承包经营权抵押规则要么“逆流而上”，要么“绕道而行”，致使农村土地承包经营权抵押成本高、风险高、效益低，并没有实现农民土地利益的最大化。在坚持农村土地集体所有权制度的前提下，农村土地承包经营权抵押究竟存在哪些限制？解决对策为何？本书将据此展开研究和分析，并提出相应的法律建议。

主要内容如下：

第一章为绪论，本章首先介绍了本书的研究背景与研究意义，然后归纳整理了当前学界的主要观点和研究现状，并通过梳理可供借鉴的境外发达国家和地区行之有效的农地抵押制度经验，以期对后文的分析与提出制度完善的建议有所裨益。对所收集的国内外最新研究成果进行了评述，同时对今后的进一步研究作了展望。第三小节阐述了本书的研究思路与研究方法，最后说明了本文的主要创新点。

第二章为农村承包土地经营权抵押的界定、制度功能与法律关系。笔者首先通过农村承包土地经营权抵押的概念、特征和特殊性界定了何谓农村土地承包经营权抵押，然后分析了农村承包土地经营权抵押的功能，具体而言，农村

承包土地经营权抵押具有经济与社会功能以及法律功能。最后通过对农村承包土地经营权抵押主体与客体、权利与义务等方面分析了其法律关系。

第三章为我国土地承包经营权抵押的法律现状、改革试点实践及问题。本章通过对农村承包土地经营权抵押的法律现状的阐述,以及对农村承包土地经营权抵押的改革试点实践的总结,分析出试点实践中依然存在诸多不足之处,例如抵押权的设立受到附加条件限制,试点抵押推行方式存在行政强制性,抵押权的效力缺乏稳定性与可持续性,风险分散机制难以满足实践需求等。

第四章为确立我国农村承包土地经营权抵押制度面临的主要障碍。这一章深入分析了当前实践中,土地承包经营权抵押存在的限制及其原因。农民土地财产权利不是制度变迁的首位价值,土地承包经营权价值和权能存在法律限制,以及土地承包经营权抵押权的无法可依,是导致农民土地财产权利主体地位缺失的主要原因。改革试点实践中形成的抵押权设立规则尚不完善,土地承包经营权试点抵押普遍重安全、轻效益,具体表现为抵押主体资质范围不一、抵押客体形式各异、抵押客体价值低,以及抵押类型纷繁复杂。另外,抵押权实现的外部性控制机制缺失,抵押权实现方式及抵押物处置方式不足,抵押权实现后失地农民不能妥善安置,也是限制土地承包经营权抵押的原因。

第五章为构建我国土地承包经营权抵押制度的基本原则。我国在推进全面“依法治国”的进程中,农民的各项权利只有成为法定权利才是真正得到了“赋权”,因此应当首先明确农民作为土地财产权利主体的法律地位,以实现农民的土地财产权利作为制度变迁的首要价值。然后应当通过完善土地承包经营权的价值和权能,分离出土地经营权,并允许就土地经营权设定抵押,赋予农民更多的土地财产权利,建立其土地财产权利的主体地位,以此来构建我国农村承包土地的经营权抵押制度。在此基础上,应当合理扩大承包土地经营权的权能,这是对“两权分置”式土地财产权利结构缺陷的有效填补,同时也适应了“三权分置”式土地财产权利结构的法律构造。本章最后提出将承包土地经营权抵押的法定化具备必要性与可行性。在坚持农村土地集体所有权的前提下,建立农村承包土地的经营权抵押制度。在区分“农户”和“新型农业主体”抵押承包土地经营权制度的基础上,就抵押主体的范围扩大、抵押客体的性质界定、抵押类型的相对统一,以及抵押权的期限效力做了分析。

第六章为我国农村承包土地经营权抵押的设立，这一章分析了抵押权的主体、客体以及抵押的设定与登记，建议“三权分置”视野下，以“登记”作为抵押权公示方法；以抵押权“登记生效主义”和“登记对抗主义”的有机结合作为抵押权生效的原则；以按“地”采编法对土地承包经营权和土地经营权分别登记；以土地经营权的确权颁证机关作为抵押权登记机构；以农户为抵押人的抵押权实现时，只处分土地经营权，抵押权实现方式增加“强制管理”，不宜采用强制变卖和强制拍卖；以“协议为先”原则安排抵押物处置顺序，并就构建抵押风险分散机制提出建议。

第七章为我国农村承包土地经营权抵押的实现。本章基于前文的分析，从三个主要方面阐述了农村承包土地经营权实现的路径，即抵押权实现的效力期限与效力范围、抵押权的具体实现方式、构建并完善抵押权实现的风险分散机制。在抵押权的具体实现方式方面，本书首先将不同的抵押人类型化，采取协商为先——集体经济组织内部处置——抵押权人转包、出租等债权性流转方式处分该土地承包经营权，且以流转所得价款优先受偿——互换、转让等物权性流转方式进行处分的抵押处置方式，并提出本集体组织成员在抵押权实现时不享有优先权。在构建并完善抵押权实现的风险分散机制方面，应当界定抵押权实现的主要风险类型，然后设置多元化的风险分散机制，充分发挥政府对于分散风险的作用，同时积极运用保险、基金等手段，切实保障我国农地承包经营权抵押的安全与顺利进行。

第八章结语则建议在坚持我国农村土地集体所有权制度前提下，构建“三权分置”式农村土地权利结构，分别以土地承包经营权和土地经营权为抵押客体，建立农村承包土地经营权抵押制度，并据此提出相应的立法和修法建议。

关键词：三权分置 承包土地经营权 承包土地经营权抵押

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