

# Liability of the mortgagor who cannot register the real estate mortgage from the outset

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*Received: 26 March 2025 /Accepted: 4 April 2025 /Published online: 7 April 2025*

## Abstract

This article takes the Supreme People's Court Guiding Case No. 168 as the research object to explore the legal liability of real estate mortgagors when they are unable to register mortgages initially. The study points out that according to Articles 402 and 577 of the Civil Code, when the mortgage contract is valid but the mortgage right is not established, the mortgagor only bears the liability for breach of contract rather than the guarantee liability. Through normative interpretation and empirical analysis, it is found that in judicial practice, it is necessary to combine the fault offset rule (Article 592) and quantify the proportion of liability reduction according to the intensity of the bank's review obligation and the degree of fault. The innovation of the research lies in demonstrating the nature of the mortgagor's obligation to assist in registration from the perspective of the "bilateral contract obligation group", and proposing the judgment standard of "the scope of liability does not exceed the guarantee liability when the mortgage right is established", providing theoretical support for judicial practice.

**Keywords:** Real Estate Mortgage Guarantee; Mortgage Registration; Liability For Breach of Contract

## 1. Introduction

As an essential form of financing guarantee, the legal application of real estate mortgage plays a pivotal role in ensuring financial security and maintaining market order. In recent years, with the accelerated pace of urbanization and rapid changes in property rights, disputes arising from defects in mortgage registration have become increasingly common. This growing complexity not only threatens the stability of the financial market but also challenges the effective implementation of existing legal provisions. Against this backdrop, the present study examines the Supreme People's Court Guiding Case No. 168, a landmark decision that illuminates the legal consequences when mortgagors fail to register mortgages at the outset.

The significance of this case is multifaceted. Article 402 of the Civil Code establishes the validity of real estate mortgage registration, ensuring that once a mortgage contract is formed, its legal effect is recognized. However, practical challenges often arise due to historical issues such as the separation of land use rights from house ownership. In the case under review, the mortgagor was unable to register the mortgage due to such a separation, while the bank proceeded with issuing a loan despite being aware of these underlying defects. This oversight eventually led to a dispute over the allocation of responsibilities between the bank and the mortgagor, highlighting the intricate balance between contract validity and the effective establishment of mortgage rights. Guiding Case No. 168 marked a turning point in judicial interpretation by clarifying that, after the formation of a mortgage contract, the failure to complete registration does not invalidate the contract. Instead, it confines the mortgagor's responsibility to the breach of contract, rather than imposing the broader guarantee liability. Furthermore, the ruling acknowledges that any fault attributable to the bank may mitigate the mortgagor's liability. This nuanced approach not only sets a benchmark for balancing the review obligations of financial institutions but also serves to protect the rights and interests of mortgagors. By analyzing this case, the article provides crucial theoretical support for linking Article 577, which addresses liability for breach of contract, with Article 402 on the establishment of mortgage rights in the Civil Code.

The academic debate surrounding the liability for unregistered real estate mortgages further enriches the discourse. Scholars are divided between the "guarantee liability theory," which posits that the mortgagor should bear the property's guarantee liability, and the "breach of contract liability theory," which contends that the appropriate remedy is compensation for breach of contract. Additionally, varying judicial interpretations have resulted in inconsistent standards for identifying bank faults across different courts. In response to these challenges, this article employs a dual methodological approach that integrates normative interpretation with empirical analysis. By systematically sorting out the logical framework of the Civil Code and its judicial interpretations and by statistically analyzing similar cases from courts nationwide over the past five years, the study offers a comprehensive overview of judgment discrepancies and their underlying causes.

Furthermore, the paper adopts a comparative law perspective to investigate the mortgage guarantee legal theories in other countries (Wang, 2022). This cross-jurisdictional analysis provides valuable insights and inspiration for potential reforms within our own mortgage system. Distinct from previous studies that have predominantly focused on unilateral analyses of contract effectiveness, this research underscores the importance of the "bilateral contract obligation group." In doing so, it demonstrates that the mortgagor's duty to assist in the registration process is a critical element in the overall contractual relationship. By incorporating the fault offset rule outlined in Article 592 of the Civil Code, the study proposes a quantitative standard for evaluating "the intensity of bank review obligations and the corresponding extent of liability reduction." This innovative framework not only refines the theoretical underpinnings of mortgage law but also provides practical reference points for judicial decision-making in future cases.

In summary, this paper endeavors to offer a richer and more coherent understanding of the legal intricacies associated with real estate mortgage registration. Through detailed empirical

analysis and rigorous normative interpretation, it contributes to the ongoing debate on liability allocation in unregistered mortgage cases and lays the groundwork for future legal reform aimed at enhancing financial security and market stability.

## 2. Case introduction

In 2013, CITIC Bank Dongguan Branch signed a “Comprehensive Credit Contract” with Huafengsheng Plastic Co., Ltd., stipulating that the Dongguan Branch would provide Huafengsheng Plastic Co., Ltd. with a comprehensive credit line of RMB 150 million. The parties in this case: Chen Renxing, Chen Zhihua, Chen Zhibo and others, respectively signed a maximum mortgage contract with the Dongguan Branch. At the same time, in order to ensure the realization of creditor's rights and debts, they agreed to provide mortgage guarantees to CITIC Bank Dongguan Branch with their real estate and corresponding land use rights.

In 2011, the Dongguan Real Estate Administration Bureau sent a letter to all financial institutions in Dongguan City, informing them that houses with inconsistent ownership and land use rights could no longer be registered for mortgage, and suggested that all financial institutions carefully examine whether the ownership of the mortgaged real estate and land is consistent when applying for real estate mortgage loans.

After signing the mortgage contract, before the bank issued the loan, Chen Renxing and other parties went to the Dongguan Housing and Real Estate Management Department with the staff of CITIC Bank Dongguan Branch to handle the real estate mortgage registration. Since the parties did not obtain the right to use the land occupied by the mortgaged house, they could not handle the real estate mortgage registration according to law. That is, because the land user and the house owner are not the same, the mortgagor did not obtain the real estate registration certificate, and thus failed to handle the mortgage registration. Then the bank should know that the real estate of Chen Renxing and others could not handle the real estate mortgage registration from the beginning.

Subsequently, the Dongguan branch signed a series of RMB working capital loan contracts with Huafengsheng Plastic Co., Ltd. based on the previously signed "Comprehensive Credit Contract". Since then, the total amount of loans issued to Huafengsheng Plastic Co., Ltd. is about RMB 70 million.

It was not until 2014 that the Dongguan branch found that Huafengsheng Plastic Co., Ltd. failed to fulfill the contract and pay interest on time and as agreed, and then filed a civil lawsuit after the reminder failed. Request Huafengsheng Plastic Co., Ltd. to pay the principal, interest and other payable expenses (lawyer fees, etc.), and require Chen Renxing and others to bear joint and several liability for the above debts within the value of the collateral.

### **3. Disputes in the case**

#### **3.1. Whether the fact that the real estate mortgage has not been registered for mortgage affects the validity of the mortgage contract**

In this case, due to the inconsistent ownership of the real estate of the mortgagor Chen Zhihua, it was impossible to register the real estate mortgage, so that the mortgage right could not be established according to law. As for the dispute over whether the “mortgage contract” is valid, according to the current law “Property Law”, if the property right registration is not handled, it will no longer affect the validity of the contract (Gao & Luo, 2020). Therefore, the author believes that the mortgage contract involved in this case is established and is no longer controversial (Liu, 2017).

#### **3.2. Whether Chen Zhihua and others should bear the liability for breach of contract**

According to Article 577 of the Civil Code, if a party fails to perform its contractual obligations or performs its contractual obligations inconsistent with the agreement, it shall bear the liability for breach of contract such as continuing to perform, taking remedial measures or compensating for losses. In this case, although the mortgagor expressed his intention to provide real estate mortgage when the contract was signed, he failed to complete the registration procedures afterwards, resulting in the failure to establish the mortgage right. His behavior has constituted a violation of the obligations stipulated in the mortgage contract. However, there are different views on the legal consequences of this breach of contract in judicial practice.

The defense lawyers of Chen Zhihua and others argued that according to Article 584 of the Civil Code on breach of contract damages, the mortgagor only needs to bear the liability for compensation for the losses suffered by the bank due to the failure to establish the mortgage right, and the scope of compensation should be limited to the losses foreseen or should have been foreseen at the time of the contract. The bank cited Article 402 of the Civil Code on the effectiveness of real estate mortgage registration, and believed that the mortgagor should bear the guarantee liability, that is, when the principal debtor fails to repay the debt, the bank has the right to request auction and sale of the mortgaged property and receive priority compensation. At the same time, if the mortgage contract is not registered after it is established, the creditor has the right to request the mortgagor to bear the liability for breach of contract, but the liability for breach of contract shall not exceed the scope of the guarantee liability that the mortgagor should bear when the mortgage right is established. This ruling rule actually creates a special form of "breach of contract guarantee liability", which not only affirms the contractual obligations of the mortgagor, but also limits the scope of liability within the framework of guarantee liability (Zhao, 2024).

From the perspective of legal interpretation, although Article 402 of the Civil Code clearly states that immovable property mortgages will not take effect without registration, it does not deny the legal validity of mortgage contracts. According to the principle of distinction, the validity of mortgage contracts is independent of changes in property rights. Therefore, the mortgagor's failure to perform the registration obligation constitutes a breach of contract and should bear the liability for breach of contract to continue to perform or compensate for losses.

However, when the mortgaged property cannot be registered due to objective reasons, continued performance is no longer possible. How should the scope of damages be determined at this time? Under the current legal framework, how to balance the interests of the parties has become a difficult point in judicial adjudication. On the one hand, the reasonable expectations of the creditor should be protected so that they do not lose the guarantee due to the mortgagor's breach of contract; on the other hand, it should also avoid excessively increasing the mortgagor's responsibilities and making them bear risks beyond the expectations of the contract. Article 46, paragraph 3 of the Interpretation of the Guarantee System of the Civil Code stipulates that if the mortgaged property cannot be registered due to the loss or expropriation of the mortgaged property due to reasons that are not attributable to the mortgagor himself, the people's court will not support the creditor's request for the mortgagor to bear the liability for compensation (Zhao, 2018). The provision clarifies that the premise for the mortgagor to bear the liability for compensation is the existence of fault, but if the mortgagor fails to register due to its own reasons, it shall bear the corresponding liability for compensation.

Based on the above analysis, Chen Zhihua and others in this case, as persons with full civil capacity, should have foreseen the possible legal consequences of not registering when signing the mortgage contract, and their failure to complete the registration procedures constituted a breach of contract. Given that the mortgaged property still has the possibility of registration, the bank has the right to request the mortgagor to continue to perform the registration obligation in accordance with Article 577 of the Civil Code; if the mortgaged property cannot be registered due to objective reasons, the bank may claim that the mortgagor bears the liability for breach of contract within the value of the mortgaged property. This form of liability not only conforms to the general principle of contractual breach of contract liability, but also takes into account the special value of the guarantee system, and can achieve the unity of legal effect and social effect.

### **3.3. Whether Chen Zhihua and others should bear joint and several liability**

In this case, the mortgage contract signed by Chen Zhihua and others did not specify whether to bear joint and several liability or supplementary liability (Gebizlioglu & Ozturkkal, 2018). The two different ways of bearing responsibility are different, and the amount of compensation that the mortgagor should bear is very different (Gete & Zecchetto, 2018). In the process of realizing supplementary liability, after the right holder has exhausted all remedies and enforcement measures against the principal responsible person, and still cannot fully realize the debt, he can ask the supplementary responsible person to bear the payment, so the supplementary responsible person has the right to demand and the right to sue first. This is completely different from the assumption of joint and several liability. The "joint and several liability theory" believes that the Dongguan Branch of CITIC Bank can directly request the mortgagor to assume joint and several liability for compensation limited to the mortgaged property .

### **3.4. Regarding the allocation and assumption of responsibilities of the mortgagor and the bank when the real estate mortgage is not registered**

The defense lawyer of the mortgagor Chen Zhihua and others said that "the parties are not clear about the changes in laws, regulations and policies, which led to the failure to handle the real

estate mortgage registration. As the general public, the parties are not very sensitive to the policy and their responsibilities should be reduced." There is a certain rationality in this statement. According to the case brief, the mortgagor handled the real estate registration about two years after the policy was introduced, and the parties may not be aware that the policy has changed. The bank failed to conduct a thorough review and was at fault, so its liability for compensation should also be reduced. The bank believed that since the real estate was in a situation where it was impossible to register a mortgage on it from the outset, it was entirely because the mortgagor failed to fulfill its obligation to ensure the integrity of the mortgaged property. The mortgagor was at fault, and the liability of Chen Zhihua and others should not be reduced.

#### **4. Legal analysis**

Through the case brief introduction and dispute analysis in the previous article, it can be confirmed that the mortgagor is at fault and must bear legal responsibility. However, the specific responsibilities and reasons for assuming responsibilities require further legal analysis to be concluded. This section will specifically analyze whether the mortgage contract in Guiding Case No. 168 is valid, and then the responsibilities of each mortgagor and finally comprehensively answer the question of the responsibility and distribution of the bank and the mortgagor .

##### **4.1. Validity of real estate mortgage contract**

In the legal relationship of this case, the validity of the mortgage contract constitutes the logical starting point of the entire case. According to Article 402 of the Civil Code on the effectiveness of real estate mortgage registration and the principle of distinguishing between property rights changes and contract effectiveness established in Article 215, the "Maximum Mortgage Contract" signed by the two parties in this case has been established and effective at the level of civil legal acts. It is worth noting that my country's legislation adopts the negative position of the theory of causelessness of property rights acts, that is, the completion of mortgage registration only produces the property right effect of the establishment of mortgage rights, and does not affect the creditor's rights effect of the contract itself (lin, 2021). Specifically, the validity of the mortgage contract in this case can be demonstrated from three dimensions: first, the contracting parties have the corresponding civil capacity, the intention is true and does not violate the mandatory provisions of laws and administrative regulations; second, the subject matter of the contract meets the requirements of Article 143 of the Civil Code on the effectiveness of civil legal acts, that is, the mortgaged property is real estate that can be disposed of according to law; finally, the form of the contract meets the provisions of Article 490 of the Civil Code on written form. The completeness of the above requirements is sufficient to determine that the mortgage contract has complete binding force at the level of debt law. It should be emphasized that the legal consequence of the failure to establish the mortgage right is not equivalent to the invalidity of the contract. According to Article 46, paragraph 1 of the Interpretation of the Guarantee System of the Civil Code, the effective establishment of the mortgage contract makes the mortgagor obliged to handle the mortgage registration. If the mortgage right cannot be established due to its fault, the mortgagee has the right to claim damages for breach of contract in accordance with the contract.

The nature of this kind of compensation liability belongs to contractual liability, and its scope should be equivalent to the benefits that the creditor can obtain after the establishment of the mortgage right, so as to achieve full relief for the party that abides by the contract. Further analysis shows that the maximum mortgage contract involved in this case has special legal attributes. As a type of contract that provides security for claims that occur continuously within a certain period of time, its scope of effectiveness extends to unspecified claims that occur within the agreed period. Although the failure to establish the mortgage right leads to the lack of security rights, the elements such as the scope and period of security stipulated in the contract are still legally binding on both parties and constitute an important basis for pursuing liability for breach of contract.

In summary, the validity of the mortgage contract in this case has been clearly confirmed by law, and the failure to establish the mortgage right only produces legal consequences at the level of property rights change, and does not affect the continuation of the validity of the contractual creditor's rights. This principle of distinction not only meets the basic requirements of the theory of property rights behavior, but also reflects the balance between transaction security and efficiency in my country's current legislation.

#### **4.2. The mortgagor shall bear the liability for breach of contract**

The real estate mortgage contract is established, and we continue to analyze whether Chen Zhihua and others bear the liability for breach of contract. Regarding the liability of the mortgagor, the current mainstream is the "guarantee liability theory" and the "breach of contract liability theory", and many scholars support both theories. First of all, regarding the "guarantee liability theory", it does not mean that the mortgagor does not bear the liability for breach of contract, but emphasizes that the mortgagor uses the mortgaged real estate to guarantee the realization of the creditor's rights. There is a guarantee intention. This theory focuses more on the guarantee intention between the parties, so it emphasizes that the mortgagor should bear the guarantee responsibility. This means that in this case, when the principal debt is not repaid, the Dongguan Branch of CITIC Bank has the right to request the mortgagor to auction the mortgaged real estate for repayment and other actions. This article believes that the right to request for repayment by conversion in this case is a relative security right, not the security right of "guaranteeing the realization of creditor's rights with specific property" as we usually understand it. It is still a claim for creditor's rights in essence. At the same time, considering that there is no written document in this case to prove that the mortgagor promised to bear the guarantee responsibility, the author believes that it is not appropriate to apply the "guarantee responsibility theory", and the mortgagor does not bear the guarantee responsibility. Secondly, the "liability for breach of contract theory" believes that if the mortgagor fails to register the mortgage of the real estate, resulting in the inability to realize the mortgage contract, the mortgagor should bear the liability for breach of contract such as damages (Li, 2021).

In this case, Article 6 "Party A's Statement and Guarantee" and Article 12 "Liability for breach of contract" of the "Maximum Mortgage Contract" signed by both parties believe that: "Chen Zhihua and the other four should ensure that the real estate involved in the case can be registered for mortgage in accordance with the law, otherwise they should bear the corresponding liability

for breach of contract ." This shows that the mortgagor had the obligation to register the mortgage of the real estate, but failed to perform the obligation, so according to the mortgage contract signed by both parties, the mortgagor should bear the liability for breach of contract .

#### **4.3. Mortgagors should bear joint and several liability**

Regarding whether the mortgagors should bear “supplementary liability” or "joint and several liability" in this case, the author analyzes as follows:

Regarding the nature of the guarantor's liability when the real estate mortgage is not registered, there are two theories in the theoretical community: “supplementary repayment liability” and “joint and several repayment liability”. The "supplementary repayment liability" theorists argue that: According to Article 500, paragraph 1 of the Civil Code, the application of joint and several repayment liability is subject to the explicit provisions of the law or the special agreement of the parties. In the case where the mortgage contract does not clearly stipulate joint and several liability, the current law only stipulates that the mortgagor shall bear supplementary repayment liability when the debtor cannot perform the debt (Article 17 of the Supreme People's Court's Interpretation on the Application of the Guarantee System of the Civil Code). The establishment of this form of liability requires the existence of actual losses by the creditor, and the losses can only be determined after the compulsory execution of the debtor's property procedures, so the mortgagor enjoys the right of prior defense.

The proponents of the “joint and several liability” theory hold a different view. According to Article 394, Paragraph 1 of the Civil Code, when the debtor fails to perform the debt on time or the agreed circumstances occur, the creditor has the right to claim priority for repayment on the mortgaged property. The exercise of this right has the same level of effect as the principal debt claim, and the mortgagor does not enjoy the right of prior defense. In particular, when the creditor knowingly grants a loan despite the defects in the mortgage registration, the mortgagor's liability can be appropriately reduced according to the rule of offsetting negligence, but the nature of its liability will not be changed.

Combined with the specific facts of this case, the mortgagor has breached the contract by failing to perform the obligation of real estate registration, and the scope of its liability for compensation should be limited to the value of the mortgaged property(Wang, 2022). In view of the fact that the creditor, Dongguan Branch of CITIC Bank, chose to lend money despite knowing the registration obstacles, it had certain faults. According to Article 592, paragraph 2 of the Civil Code, the mortgagor's liability can be reduced accordingly. In this case, the court required the mortgagor to bear joint and several liability within the scope of one-half of the value of the mortgaged property, which not only reflects the protection of the creditor's trust interests, but also takes into account the principle of fault offset, which has important judicial demonstration significance(Han, 2023).

This article tends to the second view, believing that in the case of unregistered real estate mortgage, the mortgagor should bear non-real joint and several liability . The creditor has the right to choose to claim rights from the debtor or the mortgagor, and a statutory joint and several relationship is formed between the guarantors. However, it should be noted that the scope of the

joint and several liability should be limited to the value of the mortgaged property, and the corresponding proportion of the creditor's own fault should be deducted (Article 46, paragraph 3, of the Supreme People's Court's Interpretation on the Application of the Guarantee System of the Civil Code) (Yang, 2019). This form of liability is in line with the spirit of Article 392 of the Civil Code on mixed guarantees, and can effectively balance the interests of all parties and comply with the principle of substantive fairness.

#### **4.4. Reducing the liability of the mortgagor when the bank is at fault**

First, the bank is a legal financial institution and should have higher response requirements. In this case, the bank staff went to the Housing Authority with the mortgagor to handle the mortgage registration, but failed to handle the real estate mortgage registration (Huang, 2019). Then the bank staff should report this situation in time so that the bank can make adjustments, but the documents do not show any response from the bank. On the contrary, this behavior shows that the branch knew that the mortgagor Chen Zhihua and others failed to handle the real estate mortgage registration. In this case, it still issued a loan of 70 million yuan based on the "Comprehensive Credit Contract". It is obvious that the bank is extremely negligent.

Secondly, after the bank determined that it could not go through the mortgage registration, and if it still chose to lend money knowing that, it should have anticipated the risks that would arise and should have taken some risk management measures. However, according to the judgment documents, the Dongguan Branch of CITIC Bank did not take any measures to prevent the loss from expanding, such as suspending the issuance of loans, requiring new guarantees, etc., and was at greater fault, so it cannot claim compensation for the expanded losses (Yao, 2023). It can be said that the responsibility for this part of the expanded losses is entirely the bank's responsibility and cannot be shirked.

Finally, to sum up, the bank's losses were huge, but its fault was also huge. Therefore, taking all factors into consideration, the compensation liability of Chen Zhihua and others should be reduced.

### **5. Conclusion**

According to the controversial points of the case, corresponding suggestions and measures are proposed. For banks: First, banks should fulfill their full review obligations; second, banks should take measures to prevent the expansion of losses. For government departments: First, strengthen the responsibilities of government departments and require them to increase the popularization or education activities of laws and regulations on real estate mortgage guarantees (Sun, 2023); second, establish and improve measures to disclose information on real estate mortgage registration.

Real estate is an important part of the people's property, and there are connections and differences between practice and legal provisions. All these have led to the implementation of the law not being able to achieve the role of regulating the market when legislating. Therefore, we must be more cautious in dealing with real estate mortgages and actively respond to the real estate

mortgage registration system. I hope that more legal scholars will offer suggestions for the real estate mortgage registration system in the future.

### **Author Contributions:**

Conceptualization, M.M.; methodology, M.M.; software, M.M.; validation, M.M.; formal analysis, M.M.; investigation, M.M.; resources, M.M.; data curation, M.M.; writing—original draft preparation, M.M.; writing—review and editing, M.M.; visualization, M.M.; supervision, M.M.; project administration, M.M.; funding acquisition, M.M. All authors have read and agreed to the published version of the manuscript.

### **Funding:**

This research received no external funding.

### **Institutional Review Board Statement:**

Not applicable.

### **Informed Consent Statement:**

Not applicable.

### **Data Availability Statement:**

Not applicable.

### **Conflict of Interest:**

The authors declare no conflict of interest.

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