

# On the Establishment of Pledge Right of Plant New Variety Right Pledge Financing

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## Abstract

**The pledge of new plant variety rights has been an important way to solve the financing problems of seed industry enterprises, and there is little research on the establishment of pledge rights as the key link of the pledge financing of new plant variety rights. In order to better promote the financing of new plant variety rights and alleviate the financial pressure of enterprises, we analyze the elements required for the establishment of pledge rights in the pledge financing of new plant variety rights based on the legal provisions, one is to conclude the pledge contract, the other is to register the pledge, and explore the idea of establishing pledge rights in line with the characteristics of the pledge financing of new plant variety rights.**

## Keywords

**New Plant Variety Rights; Pledge Financing; Pledge Establishment.**

## 1. Introduction

In recent years, with the continuous development of knowledge-based economy, IPR pledge financing has become an important issue of concern for science and technology-based SMEs, as well as a focus of discussion for many scholars. According to the annual report released by the State Intellectual Property Office in 2021, there were 12,093,000 pledged projects in the year, an increase of 43% year-on-year, among which patent and trademark rights occupied most of them, while the application space of new plant variety rights, a new type of intellectual property, still needs to be improved. As the core competitiveness of seed industry enterprises, the pledge financing of new plant variety rights has become an important way for seed industry enterprises to broaden financing channels. In order to speed up the development of new plant variety rights pledge financing to alleviate the financing problems of seed industry enterprises, it is urgent to promote the development of new plant variety rights pledge financing, and the research on the establishment of pledge rights is an important premise to achieve this goal. There are numerous studies on new plant variety rights in academia, and most of them in the early stage were biased to the protection of new plant variety rights. Bao Mingming put forward suggestions and measures for the protection of new plant variety rights in China from the perspectives of legislative direction, law enforcement construction and citizens' cognition; [1]. Wang Huan et al. researched from the perspective of administrative protection of new plant variety rights; [2]. With the gradual depth of research, more and more scholars began to conduct research around the pledge of new plant variety rights. Chen Huiying et al. put forward a series of risk prevention measures by analyzing the risks related to the pledge financing of new plant variety rights; [3]. Chen Huiying et al. launched a study on the valuation of new plant variety rights [4]. From the existing research literature, the research on new plant variety rights mainly focuses on the protection of new plant variety rights, the risk of pledge financing of new plant variety rights, and the value assessment, etc. Few scholars have explored the establishment of

pledge rights for pledge financing of new plant variety rights. Based on the important position of the establishment of pledge right in pledge financing, this paper focuses on the establishment of pledge right in the pledge financing of new plant variety rights, and analyzes the elements of the establishment of pledge right with a view to playing a positive role in the smooth promotion of the pledge financing of new plant variety rights.

## **2. Overview of the Establishment of Pledges for Plant Variety rights Pledge Financing**

### **2.1. The Concept of Establishment of Pledge Right for Financing Pledge of New Plant Variety Rights**

As a kind of intellectual property rights, the pledge financing of new plant variety rights is a kind of intellectual property pledge financing, which belongs to the category of right pledge rights. The new plant variety right represents certain property interests and has its own economic value, while its assignable features makes it possible to realize its exchange value when pledging financing. This guarantee function established by the pledge of new plant variety rights in the pledge financing has an important role in guaranteeing the safety of transactions and maintaining the economic order. At the same time, the financing function based on the pledge of rights on the basis of its guarantee function. For the pledgee, when the pledgee is unable to pay off the debt, the pledgee is compensated with the exchange value of the new plant variety right, which guarantees the pledgee to recover the capital and alleviates the pressure of lending. For the pledgor, the existence of the new plant variety right in the hands of the pledgee or the pledgor does not affect the utilization of the new plant variety right[5]. Thus, the establishment of the pledge of new plant variety rights refers to the act that the pledgor, due to the need of financing, takes the new plant variety rights owned by him as the subject matter to the pledgee to obtain financing, and the parties sign a written contract according to the law and register it through a specific pledge registration agency.

### **2.2. Features of the Establishment of Pledge Financing Pledge of New Plant Variety Rights**

The subject matter has a "life span". New plant variety rights have a "life span", which refers to the economic cycle of new plant variety rights. When new plant variety rights appear or the corresponding geography, climate and other natural environment change, any new plant variety may face renewal and replacement at any time. At the same time, as a kind of intangible property, new plant variety rights are knowledge information that can flow and spread freely, and once they start to spread, they are no longer exclusively controlled by the owner of such knowledge information, and usually will accelerate to consume their "life span" outside the stipulated protection period or after new technological breakthroughs. Therefore, it makes sense to talk about pledge financing within the economic cycle of new plant variety rights. In this case, the pledge financing of new plant variety rights refers to the creation of pledge rights within the economic cycle of the new plant variety rights.

The value of the subject matter is uncertain. As an intangible property, the value of new plant variety right is unstable and vulnerable to the influence from the market, policies, variety implementation and promotion. Meanwhile, the operation ability, market risk prediction ability, brand influence and positioning of enterprises are also important reasons affecting the value of new plant variety rights. In addition, as an intangible property right, the new plant variety right is easy to be possessed or counterfeited without compensation out of the control of the right holder. According to the analysis of market supply and demand, the emergence of misappropriated and counterfeit varieties in the market will certainly reduce the demand for legal variety rights, which will in turn cause the value of new plant variety rights to decrease.

Thus, it seems that the uncertainty of value is a major characteristic of the establishment of pledge financing pledge of new plant variety rights.

### **2.3. Conditions for the Establishment of Pledge Right for Financing Pledge of New Plant Variety Rights**

It is clearly stated in the provisions of Article 427 of the Civil Code that the agreement to create a pledge of rights shall be in writing, i.e., it is necessary for the parties to conclude the pledge contract in writing by mutual consent. Accordingly, when the pledge of new plant variety rights is established, the two parties to the pledge of new plant variety rights shall conclude a written agreement on the pledge of new plant variety rights by mutual consent, and the pledge contract shall take effect when the parties sign the written contract, but the establishment of the pledge contract shall not be confused with the establishment of the pledge right. According to Article 444 of the Civil Code of China, if the property right in intellectual property is pledged, the pledge right shall be established upon registration. As for the establishment of the pledge of new plant variety rights, the pledgee and the pledgor shall, in addition to concluding a written contract, register the pledge with its management department, and the pledge is not necessarily established because the establishment of the pledge contract takes effect. The current law of China stipulates that the administrative departments of agriculture and forestry under the State Council shall be the registration authority for the pledge of new plant variety rights.

As can be seen from the above, the elements for the establishment of the pledge of new plant variety rights include two: firstly, the pledge contract in written form based on the agreement reached by the parties on the pledge of new plant variety rights; secondly, the registration of the pledge by the administrative department of agriculture and forestry under the State Council.

## **3. Pledge Contract for Pledge Financing of New Plant Variety Rights**

### **3.1. Value Orientation of the Contract of Pledge of New Plant Variety Rights**

#### **3.1.1. Fairness**

The so-called "fair", public means just, reasonable, flat means equal, average. Article 6 of China's Civil Code states: "Civil subjects engaged in civil activities shall follow the principle of fairness and reasonably determine the rights and obligations of the parties." This provision is in line with the most basic value orientation of the law.

The fair value orientation of the pledge contract of new plant variety rights is reflected in the following aspects: First, the parties to the pledge contract of new plant variety rights shall follow the principle of fairness and reasonably determine the rights and obligations of the parties. Secondly, each party in the contract of pledge of new plant variety rights shall clearly recognize the limits of their rights, shall not infringe upon the legitimate rights and interests of the other party and others, and shall safeguard their own interests but shall not abuse their rights [6]. The principle of equality is followed in the contract of pledge of new plant variety rights, and the parties shall protect the interests of the pledgee equally while safeguarding the interests of the pledgor [7]. To establish a stable transaction order based on fairness.

#### **3.1.2. Freedom**

As a basic form of promoting economic development, freedom of contract reflects the basic concept of free economy. In terms of the value of freedom embodied in the contract of pledge of new plant variety rights: Firstly, externally, the parties voluntarily conclude the contract without the interference of the state, other social subjects or organizations. Secondly, from the internal point of view, the parties voluntarily conclude the contract out of their true intention, rather than the existence of fraud, coercion or obvious unfairness.

From the legal point of view, the parties to the contract of pledge of new plant variety rights have the right to enjoy the freedom to voluntarily conclude the contract according to law. According to the law, civil subjects shall follow the voluntary principle to engage in civil activities and establish civil legal relations according to their own intention. From the perspective of economic development, the economic system implemented in China has the characteristics of a market economy, and market subjects freely adjust their economic behaviors according to the needs of supply and demand and the pursuit of profit. The freedom of contract embodied in the contract of pledge of new plant variety rights is consistent with the characteristics of the market economy of autonomy and openness.

### **3.2. Form of Contract for Pledge of New Plant Variety Rights**

The form of contract formation has undergone a long process of development and refers to the way in which a contract is concluded between the parties. There are various types of contract forms in the theory, such as legal form and contractual form according to the different consequences of the contract form; written form and oral form according to the external expression of the contract; and contract in the form of a contract or not according to the need to conclude a specific form. In order to fully respect the free will of the parties in reaching the contract and to pursue more convenient and efficient transactions, specific form requirements are usually made only for contracts with large transaction amounts or complex transaction contents (such as the establishment of mortgage contracts, financial lease contracts, technology transfer contracts, etc.). According to the provisions of Article 427 of the Civil Code of China, when establishing a pledge right, the parties shall conclude a pledge contract in written form. It is thus clear that the conclusion of a pledge contract for a new plant variety right requires that the pledge contract be concluded in writing. The written contract form is clear and the content of the contract is clear, and the clear content of the contract is of positive significance to clarify the rights and responsibilities and stop disputes when disputes occur.

### **3.3. Contents of the Contract of Pledge of New Plant Variety Rights**

The content of the contract of pledge of new plant variety rights refers to the terms of the contract in form and the rights and obligations of the parties to the pledge contract in substance. According to the provisions of the law on the terms of the pledge contract, the content of the contract of pledge of new plant variety rights mainly includes the following aspects: First, the type and amount of the secured claim, to clarify the basis of the pledge right and determine the basis for the pledgee to realize the pledge right with respect to the priority of the new plant variety rights to be paid. Secondly, the period for the debtor to perform the debt, the period for the debtor to perform the debt as stipulated in the contract for the financing of the pledge of new plant variety rights is in essence the starting point of the creditor (i.e., the pledgee) to exercise the right of pledge. Thirdly, the name and quantity of the pledged property, the more detailed the description of the subject situation in the contract of pledge financing of new plant variety rights, the more it is conducive to avoiding disputes. Fourthly, the scope of guarantee, the essence of the clear scope of guarantee is to clarify the scope of responsibility, which can better guide the parties to perform their contractual obligations. Fifth, the time and manner of delivery is clearly defined in the contract of pledge of new plant variety rights, which is convenient for the parties to enjoy their rights and fulfill their obligations and reduce the disputes in the transaction.

However, no provision is made in the clause for the outstanding matters stipulated in the contract clause, and the law usually adopts a combination of enumeration and general provisions to make up for the incomplete enumeration or the disconnection between the law and reality. Moreover, the core of private law is to respect the autonomous meaning of the parties [8]. Therefore, in addition to the general clauses listed above, the contract of pledge of new plant variety rights should also contain, for example, other matters that can be agreed by

the parties and other similar clauses, to show sufficient respect for the results of the parties' free negotiation and to ensure the integrity of the content of the provisions.

## **4. Registration of Pledge of New Plant Variety Rights for Financing**

### **4.1. Effectiveness of Registration**

The registration of pledge of new plant variety right is also called the registration of pledge of new plant variety right. Generally speaking, according to the effect produced by the registration, the registration can be divided into two cases: one is the registration of adversarialism, and the other is the registration of effectiveism. According to Article 444 of the Civil Code of China, if property rights in intellectual property rights such as registered trademarks, patents and copyrights are pledged, the pledge right is established from the time of registration of the pledge. In terms of the pledge of new plant variety rights, the law has clearly stipulated that the registration effective doctrine shall be adopted, and the reasonableness of this provision is analyzed in this article, that is, the reasons why it is appropriate to adopt the registration effective doctrine for the establishment of the pledge of new plant variety rights for financing in China are as follows.

First, due to its intangible nature, the change of the right of new plant variety right cannot be delivered as the external manifestation, so it must rely on the registration of the agricultural and forestry departments of the State Council for public notice, which is conducive to the traders being informed of the true right status of the new plant variety right and facilitates the bona fide third party to avoid the transaction conflicts in advance [9]. Secondly, the pledge of new plant variety rights is still in its early stage and does not have a relatively perfect pledge transaction market and registration system. Finally, security and efficiency are important factors in economic transactions, and security is the basic element to maintain the transaction order, without transaction security, there is no efficiency to speak of. Although registration may be a bit cumbersome in the form of establishment, the increase in transaction cost is minimal compared to the risk taken by eliminating the link. Therefore, the adoption of registration effectiveness is more appropriate to its own characteristics.

### **4.2. Pledge Registration Related Laws**

The pledge registration institution in the pledge financing of new plant variety rights in China is the administrative department of agriculture and forestry under the State Council. According to the Regulations for the Implementation of the Regulations on the Protection of New Varieties of Plants, the transfer of the right to new varieties of plants shall be subject to a written contract concluded by the parties concerned and registered and published by the administrative departments of agriculture and forestry under the State Council before it takes effect. The registration of pledge is conducive to creditors' full understanding of the existence of setting prior rights on the subject of pledge, and facilitates creditors' registration procedures for pledge. The People's Bank of China issued the Uniform Registration Measures for Security over Movable Assets and Rights, which was officially implemented on February 1, 2022, provides that the Credit Center of the People's Bank of China is the registrar of security over movable assets and rights, and establishes an Internet-based unified registration and public notice system for movable financing (hereinafter referred to as the unified registration system) to provide the public with registration and inquiry services for security over movable assets and rights. The proviso in the approach to exclude the pledge of property rights in intellectual property, taking into account the current status of intellectual property pledges, the reasons may include the following: First, intellectual property pledges are more professional usually by different authorities, at this time generalized to the credit center is inappropriate. Secondly, the interests of intellectual property pledges are significant and involve many issues, which are not

in line with the characteristics of the unified registration system that does not carry out prior approval registration and substantive review of registration contents. Thirdly, at present, there are corresponding registration management organs for intellectual property rights such as new plant variety rights, and the application for registration adopts the way of substantive examination, so the registration of pledges will be subsumed under the corresponding organs to continue to manage the current realistic needs of intellectual property pledges.

### 4.3. Registration Review

In practice, the review of registration information by the registry is usually incomplete, resulting in the registry not actually fulfilling its review obligations and the corresponding institutional functions gradually weakening. Thus, there is a practical need to strengthen the obligation of registration review. There are formal and substantive review models of the registry. Formal review focuses on the efficiency of the review, in which the registration authority only examines whether the application materials are complete and whether the form meets the legal requirements, but not the authenticity and validity of the materials, which can effectively reduce the cost of registration and search. The substantive review requires that the content recorded by the registrar and the actual state of rights should be consistent with each other, and the adoption of this review mode is conducive to enhancing the publicity and credibility of registration.

In essence, the needs of social and economic development and the characteristics of registration matters are the important reference factors for choosing formal or substantive review. In the case of the registration of the pledge of new plant variety rights, it not only involves the latest technological achievements of the relevant seed enterprises and thus has a significant relationship with the enterprises, but also involves the economic interests of multiple parties in the pledge financing and thus has important economic significance. At the same time, the registration of the pledge of new plant variety rights is related to the registration quality, credibility and transaction security. Therefore, it is necessary to conduct a detailed substantive examination rather than a superficial formal examination when registering the pledge of new plant variety rights.

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