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On the Rules for Determining Pure Future Claims in Factoring Contracts

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Abstract

The market economy's strong demand for the rapid flow of assets has led to the determination of the transferability of pure future claims, but the uncertainty of pure future claims also poses a threat to the stability of the market order, and therefore a set of rules is needed to judge its eligibility. While the current civil normative system does not address this issue, the "expectability" rule, which has been spontaneously developed in judicial practice, also runs the risk of being impractical and of interfering too much with commercial autonomy. By introducing the rule of "identifiability", combining both "horizontal" and "vertical" considerations, we can establish more objective and operable rules while recognising the transferability of purely future claims in a wider context. The transferability of pure future claims is recognised on a broader scale; this is complemented by a registration system to further safeguard the stability of the trading order.

keywords

factoring contracts; future claims; assignment; registration

Introduction

The development of the commodity economy has made claims gradually depart from the attribute of pure claim right, and participate in the complicated commercial activities as the property belonging to the creditor, among which asset securitisation and factoring are the main forms of financing transactions. China has also separately stipulated factoring contract as the only newly added contract type in the Contract Part of the Civil Code, so as to provide institutional-level regulation for the extremely fast-growing factoring business in China. Factoring contracts are based on accounts receivable, which are essentially monetary claims and include existing and future monetary claims according to Article 3 of the Uniform Registration of Security over Movable Assets and Rights. China's practical and doctrinal research on future claims is relatively late, and now China has preliminarily solved the problem of assignability of future claims, but future monetary claims, especially the pure future claims among them, are not all able to be used as the subject matter of factoring contracts due to their intrinsic uncertainty. There is still a gap in China's legislation on this issue, and a set of unified and practical standards has not yet been formed in practice.

Practical dilemmas in the determination of purely future claims

Future claims is the concept corresponding to the existing claims, which refers to the type of claims that do

not exist at present but may exist in the future. According to the general theory, future claims can be further distinguished into future claims with underlying legal relationships and future claims without underlying legal relationships, which are also commonly referred to as "pure future claims". Compared with future claims with underlying legal relationship, pure future claims have stronger uncertainty. In the face of pure future claims as the subject of the factoring contract, the factor to determine whether to finance and the amount of financing can only be based on the future creditor's business conditions, individual credit, industry development expectations and other factors for specific judgement. As far as judicial practice is concerned, on the one hand, the lack of effective regulation of pure future claims may lead to fictitious claims, financing fraud and other crises that undermine the market economic order, and at the same time, the lack of uniform guidance on the validity, performance and liability of the factoring contract for ineligible pure future claims may also lead to irregularities in the judicial decisions; on the other hand, the contract is in essence a manifestation of the autonomy of meaning, and the factoring contract is the only way for the factor to judge the amount of financing and the amount of financing. Factoring in the process of concluding factoring contract is bound to maintain due commercial rationality, under the premise of the necessity of regulation, how to achieve the maintenance of economic order at the same time respect for the business subject autonomy, is also the legislation and practice must face the problem.

China's current effective law on the future claims of the explicit provisions of the Civil Code, Article 761, which clearly affirmed the future claims in the factoring contract transferability. However, in addition to the application of Article 761, the conditions for the eligibility of future claims, or also future receivables, can only be applied in accordance with Article 769, which can only be referred to the relevant provisions on assignment of claims in Chapter VI of the Book of Contracts, which lacks any special provisions on future claims, except for the general provisions.

Rethinking the "expectability" rule for purely future claims

The blankness of the legislative level does not hide the problems in practice. Judicial organs in the process of dealing with the relevant cases gradually formed the "future claims whether the expectability" as the main standard, to measure the pure future claims in the case of suitability.

Formation of the "expectability" rule for purely future claims

The more common form of pure future claims in practice is the amount of the creditor's business in a future period of time as the subject of the transfer, of which a representative case is "Wande Kali v. Jiaxing Agricultural Company". In this case, Jiaxing Agricultural Company entered into a factoring contract with Vantec Poly Factoring Company to obtain financing money by taking the accounts receivable formed in the POS machine as the subject of the assignment. The court of first instance and the court of second instance disagreed on the validity of the factoring contract entered into by the parties. The Court of First Instance recognised the validity of the future receivables and considered that the factoring company's wrong estimation of the value of the future receivables should not be used to deny its authenticity, and thus recognised the validity of the factoring contract; however, the Court of Second Instance considered that, in terms of the nature of the contract, it recognised that the contract in question was a factoring contract and that the validity of the factoring contract depended on the assignability of the claims in question, and in respect of the future claims in the case in ques-

tion, if the civil subject has a reasonable expectation that a future With regard to the future claims, if the civil subject has a reasonable expectation for the occurrence of future claims, the expectation benefit shall be protected by law, and whether it has the expectation or not has become the criterion of whether the receivables can be particularised or not. As to whether there is "expectability", the court held that it should judge whether there is "relative certainty", based on the creditor's business status, the nature of the receivables, the subject matter of the transaction and other elements to integrate the final judgement of whether the future claims have "relative certainty". "Relative certainty", the court finally denied the "expectability" of the business amount on the POS machine by fictionalising the business status of Jiaxing Agriculture at the time of the conclusion of the contract, and ultimately denied the validity of the factoring contract in question.

Limitations of the "expectability" rule

The "expectability" rule seems to solve the problem of the eligibility of pure future claims, but if further analysed, there are still many problems. On the one hand, in its form, there is confusion in the interpretation standard of "expectability"; on the other hand, in the value level, the "expectability" rule also has the risk of replacing commercial thinking with adjudicative logic, which to a certain extent will inhibit the flexible development of commerce.

Confusion over the criteria for determination

In the judge to whether the expectability as a judgement standard at the same time, it needs to explain another issue that is "expectability". In the interpretation of this issue, judicial practice is not uniform. Such as the same as through the POS machine generated by the operation of the money, and future accounts receivable has actually partially realised the case, in the aforementioned "Wande Kali" case will be "does not have the relative certainty" for the denial, and in the "In the case of Cadwalee Co. v. Lianzhi Business Store, the judge affirmed its expectability for the same reason. In practice, it has also been argued that whether the assigned claim is immovable property or not, and whether it is of a public nature is also one of the criteria for judgement. The reason for the above problem is that the concept of "expectability" itself is too abstract, and even if other concepts are used to further refine it, it still needs to be analysed on a case-by-case basis according to the specific circumstances of the case. In individual cases, the subject matter, amount and nature of the transaction, the creditor's business prospects, and whether the factoring company's research is comprehensive or not are all factors that may be reflected in different cases. The relationship between "expectability" and "relative certainty" is also not clear, and in practice, there are cases in which the latter explains the former, and there are also cases in which the two are juxtaposed as the qualifying elements for purely future claims. If the latter explains the former, is "relative certainty" a sufficient condition for "expectability"? And if the two are side by side, what is the difference between the conditions of "expectability" and "relative certainty"? These deeper questions require further study.

Lack of "Expectability" Effectiveness Challenge

The deeper question of "expectability" is whether the lack of "expectability" necessarily leads to the invalidity of the factoring contract. Combined with the provisions of the Civil Code on the validity of factoring contracts, there are three main levels of factors affecting the validity of factoring contracts:

First, Article 763 of the Civil Code provides for the extinction of the debtor's right of defence in the case of a

fictitious receivable by the creditor or debtor, and although the lack of "expectability" is not a fictitious claim, the commonality of the two forms is that both of them are deemed to be "non-existent" claims, whereas Article 763 of the Civil Code provides for the extinction of the debtor's right of defence in the case of a fictitious receivable by the creditor or debtor. "The reason why article 763 does not deny the validity of a factoring contract based on a fictitious claim is that, according to article 146, paragraph 1, false conspiracy only affects the validity of the contract between the creditor and the debtor, and the validity of the factoring contract is not affected as a result. The lack of "expectability" is only the judgement of the possibility of the claim, which is not as serious as the fictitious situation, and it is not appropriate to deny the validity of the factoring contract; Secondly, according to Article 769, the issue of validity is referred to Chapter VI of the Contracts, which is mainly based on the provisions of Article 545(1) and (3), and at the level of "not transferable by nature", it mainly includes: (1) claims where the change of claims will lead to a complete change of the content of the payment; (2) claims codified in the cross-calculation; (3) certain subordinate rights; and (4) claims that are not (iii) certain subordinate rights; and (iv) claims that do not qualify as claims. Pure future claims, which are mainly monetary claims, cannot be interpreted as any of the above types even though they lack "expectability";

Finally, factoring contracts are placed at the level of general contracts to evaluate their validity. Since the Civil Code places most of the validity evaluation clauses of contracts in the section on the validity of legal acts in the General Part, this level is also the final evaluation of them. In the General Provisions, the directly relevant articles are Article 143(3) and Article 145, which determine whether there are mandatory provisions of laws and administrative regulations on the validity of future claims, and whether the "lack of expectation of benefits" is contrary to "public order and morality". Currently in China in the field of future claims in the absence of norms affecting the validity of the contract, so the discussion focuses on the "lack of expectancy" and "public order and morality" relationship. This article argues that the lack of "expectability" does not yet reach the level of "against public order and morality". On the contrary, the current linkage between "expectability" and the validity of the contract is rather destructive to the economic order. On the one hand, the factoring contract belongs to the typical commercial contract, the factor as a commercial subject, its profitability and professionalism makes it in the commercial activities compared to the ordinary civil subject has a stronger rationality. Therefore, in the process of regulating the market by law, the independent judgement of commercial subjects should be respected to the greatest extent possible, and there is no need to intervene too much when it is not necessary. In most cases, the substance of "expectability" affects the amount of financing available to the creditor by the factor and the cost of factoring, rather than the assignability of the claim. The success or failure of the judgement is therefore also a legitimate business risk that should be borne by the factor. The "expectability" rule, to a certain extent, makes the judge's judgement of the contract override the contractual parties, and ultimately makes the judge's own judgement standard replace the normal commercial judgement standard, and the judicial logic replace the commercial logic. On the other hand, from the point of view of "public order and good morals", as the final barrier to the evaluation of the effectiveness of the value of universal and in the scope of application of the third party and the public interest of society; at the same time, the value of the local and the times also requires that it is based on the practice of socialism with Chinese characteristics. The "foreseeability" as a commercial risk, the direct target of the damage to the interests of the factor, and this damage is also a normal commercial risk, and will not adversely affect the third party or even the overall economic order, on the contrary, it is also the embodiment of free competition in the market.

In Mr Liang Huixing's typology study on "public order and morals", "restriction of economic freedom" is also one of the types of violation of "public order and morals". Therefore, at the level of evaluation of validity, whether in form or in value, "lack of expectability" cannot be used as a justification for "affecting the validity of the contract".

Suggestions for improving the rules for the determination of purely future claims

The introduction of the "identifiability" rule

In order to correct the disadvantages of the "expectability" rule, the author believes that the "identifiability" rule should be introduced as a substitute. "Identifiability", also known as "identifiability", requires that a purely future claim can be assigned as a proper claim as long as it can be reasonably identified by the contents of the contract. There are three main reasons for this:

First, at the value level, "identifiability" has a more lenient judgement standard, which, while respecting the self-judgment of the commercial subject to the greatest extent possible, is more in line with the attributes of pure future claims, so that their uncertainty is always limited to a reasonable range. This article argues that the ultimate goal of "identifiability" is to determine whether the description of future claims in the factoring contract will delineate a relatively certain range in the general public's perception. The determination of the scope can be made through both vertical and balanced dimensions. The vertical dimension is the temporal dimension, where the description of future claims should have a reasonable duration, while the horizontal dimension requires the judge to analyse whether elements other than time in the description of future claims can be combined with time to form a closed cognitive range. For example, there is a case in which "all receivables arising from all downstream sales customers during the next 2 years of operation from 26 December 2017" is the subject of the assignment of the claim. At the vertical level, "the next 2 years from 26 December 2017" is a definite point in time; while at the horizontal level, the creditor has defined "downstream" and "sales customers" as the key descriptors for this claim. At the horizontal level, the creditor constructed a clearer scope for the claim through the two key descriptions of "downstream" and "sales customers", and the judge agreed with this view, finding that the expressions were reasonably identifiable.

Secondly, "identifiability" takes time as the basic reference, and restricts the judge's discretion to the interpretation of other contents, which on the one hand helps to avoid the excessive expansion of the judge's discretion, and on the other hand, it also makes the judge not need to think about the possibility of the occurrence of the claim from the perspective of the subject of commerce, and makes his judgement on the relevant issues more stable and practical. On the one hand, it helps to avoid excessive expansion of the judge's discretion, and on the other hand, it also makes it unnecessary for the judge to think about the possibility of claims from the perspective of commercial subjects, which makes his judgement on relevant issues more stable and practical.

Finally, "identifiability" has universality in the world, whether it is Germany and Japan of civil law system, or the United States of America of common law system, as well as the International Factoring Convention and the Convention on the Assignment of Receivables, which are used to resolve international trade, have similar provisions, so it can be seen that the universality of this rule, which is worth to be borrowed by our country.

Improving the registration system

After clarifying the rules for determining purely future claims, it is necessary to complement them with other systems in order to protect the interests of the factor more comprehensively. Article 768 of the Civil Code stipulates the rules for determining the priority of the factor's rights in the case of multiple factoring, i.e., registration has priority - notification has second priority and proportionality is paid. Since there is no underlying legal relationship for a purely future claim, it is naturally impossible to determine who the future debtor of the claim will be, and therefore the factor cannot exercise its right of notification and can only achieve the purpose of publicity by means of registration. However, due to the uncertainty of purely future claims, registration of such claims should also satisfy the requirement of "identifiability" so as to avoid improper registration that would not satisfy article 9 of the Uniform Registry of Movable Assets and Security Rights and thus affect their effectiveness. In this regard, on the one hand, for purely future claims, the factor and the creditor should be required to act as joint registrants, with both supervising each other to ensure the authenticity of the content of the registration; on the other hand, the horizontal and vertical elements of "identifiability" should also be used as a reference for the content, with the period of time as a mandatory option, in order to satisfy the completeness and ascertainability of the content to the greatest extent possible. On the other hand, the content should also refer to the horizontal and vertical elements of "identifiability" and make the period of time a mandatory option, so as to maximise the completeness and certainty of the content.

Conclusion

Pure future claims eligibility rules is the market economy to solve the problem of in-depth development. The establishment of the "identifiability" rule on the one hand, help to optimise the existing rules of the current judicial trial, on the other hand, also for the future construction of the system to provide useful reference. But the establishment of the rule is only a beginning, and then also need to solve such as "lack of identifiability" factoring contract effectiveness, and the resulting distribution of rights and responsibilities between the parties to the contract. At the same time, pure future claims are not only the subject matter of factoring contracts, but may also exist in the construction of many systems, such as pledge of claims and cession of claims, whether the scope of application of "identifiability" can be expanded to the above areas, these issues need to be further resolved by subsequent research.

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