

Protection of Investor Interests in Asset Securitization Based on Big Data——Research on Legal Issues of Real Sale and Bankruptcy Isolation

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Abstract: As a financial innovation product, asset securitization has greatly activated the activity of the financial market and provided sponsors with a more flexible way to improve the balance sheet structure. However, due to the complexity of securitization products and the leverage effect, investors can easily become the ultimate bearers of financial risks due to information asymmetry. For this reason, it is necessary to improve the legal mechanism for investor protection based on the big data environment. choose. Whether for investors or other participants in the asset securitization market, bankruptcy isolation is a core system; real sales are an important means to achieve bankruptcy isolation. Starting from the nature of real sales, this article makes a distinction between secured financing and interprets its effect on bankruptcy isolation, and strives to explore the legal mechanism of investor protection in China.

Keywords: Asset securitization, Investor protection, Real sale, Bankruptcy isolation, Financing guarantee, Big Data

Introduction

Asset securitization refers to the fact that the promoters make certain arrangements and structured designs for their flawless basic assets, and sell them to special purpose carriers, which use the assets as support to issue securities to obtain structured financing with cash discounts. Process. In legal form, the asset is transferred to a special purpose carrier; in accounting form, the asset is no longer reflected in the sponsor's liability sheet.

Due to the complexity of asset securitization products, market participants have increased the cost of risk assessment and lack of reasonable expectations. The harm is due to the existence of leverage, which lacks controllability in breadth and depth. In addition, due to incomplete information disclosure by the promoters and insufficient supervision and other reasons, the risks of securitized assets are usually passed on to investors to bear the consequences of investment losses without an effective risk prevention mechanism. The subprime mortgage crisis broke out in the United States in 2007, and its scale and scope far exceeded the expectations of market participants and regulators. The chain-related industries and the real industry continued to ferment, causing the continued economic downturn in the United States and the world. . A large number of US investment institutions have been reorganized and even went bankrupt. The US government has invested a huge amount of money to rescue the market. Countries around the world have also actively raised funds to hedge against the impact of this financial turmoil on their own economies. This makes the world and our country have to re-examine the undetected risks of asset securitization, and it is precisely because of this financial turmoil that China's securitization process has slowed down. Examining the warnings of the financial turmoil and other countries' asset securitization legal systems to our country, it is necessary to improve the legal system for investor protection in terms of asset securitization related systems. In this regard, this article intends to conduct legal research on the core mechanism of investor protection of asset securitization from the perspective of real sales and bankruptcy isolation, in order to provide a useful reference for the improvement of the investor protection system of asset securitization.

1. The Concept and Nature of Real Sales

A true sale means that the initiator sells the basic assets it owns to obtain discounted cash flow. The object of sale is a special purpose vehicle (SPV), and the initiator's own assets and credit are completely risk-isolated from the underlying assets. The initiator The balance sheet no longer reflects the underlying assets, and the legal consequences of the initiator's bankruptcy and reorganization have nothing to do with the underlying assets. As a carrier of basic assets, SPV's only business is to undertake these basic assets that are securitized, issue securitized products, and isolate the rights and risks of basic assets. SPV only serves as an isolation institution for basic

assets. On the one hand, it cuts off the promoters and their creditors' right of recourse against the underlying assets [1]. On the other hand, the protection of basic assets becomes an independent subject, so that the process of asset securitization can be operated independently and publicly, so that investors can verify the securitization, authenticity and safety of basic assets to the maximum extent based on the information disclosed. The disclosed information can verify the securitization, authenticity and safety of the underlying assets to the greatest extent.

For the asset securitization of bonds, the real sale means the effective transfer of bonds. There is a strict distinction between the transfer behavior and the financing guarantee:

(1) Different accounting treatments. The real sale realizes the substantial transfer of the basic assets, which makes the basic assets completely separated from the seller and no longer reflected on the balance sheet, so it has the characteristics of off-balance sheet financing; although the assets of financing guarantee are in Formally separated from the seller, but in essence, it is only used as a guarantee measure for the main creditor's rights. The asset is still the seller's asset and is reflected in the seller's balance sheet. Therefore, it only appears as a statement from the accounting system. Internal financing. In the case of "Tongyuan Phase II Personal Auto Mortgage-backed Securities" initiated by SAIC-GM Finance Co., Ltd. ("SAIC-GM"), although SAIC-GM transferred the financial lease bonds to SPV in the form of an agreement, the formally It meets the standards of asset securitization, but as a service organization, it still has the obligation to recover bonds and undertake the management of daily affairs. The most important thing is that its accounting statements do not list them, according to the accounting principle that substance is more important than form , The securitized asset did not achieve bankruptcy isolation, and did not really meet the standard for real sale [2].

(2) The legal consequences are different. After the real sale is made, the ownership of the underlying assets is transferred, and the underlying assets will no longer be affected by the seller's bankruptcy, reorganization or liquidation; the financing guarantee does not change the legal relationship of the asset as the seller's property, and the ownership remains unchanged In the event of bankruptcy, reorganization, or liquidation of the sale, the financing secured assets will still be disposed of as assets for sale, and the guarantee period shall be deemed to have expired.

(3) Different legal status. Since the real sale is made, the underlying asset has achieved an independent legal status, without any ancillary nature, and cannot be recoured by the seller's other creditors; while the financing guarantee has a subordinate legal attribute due to its own guarantee nature. The legal effect of its assets is subordinate to the main creditor's rights and is not independent.

From the above comparison, it can be seen that whether the real sale occurred effectively has a completely different legal effect on the protection of investors' interests. At the same time, there are risks due to the seller's own credit status, legal risks are difficult to assess, and there is a possibility of fraud, which violates the fiduciary obligations of financial institutions and their staff to investors. The famous "Enron Incident" in the United States stemmed from a series of overly complex financial products that made the true content undiscoverable. However, in reality, a clear distinction cannot be made between real sales and financing guarantees, and even if there is a right of recourse, it cannot be used as a basis for judging the difference between the two. For the sale of furniture, Castel Credit provides financing arrangements for its accounts receivable. The two parties agree on all the debt receivables for furniture sold in the "sale contract", and Castel has the right of recourse against Major Company. The two parties executed a large number of similar contracts, but from 1973 to 1975, major Company believed that there was a problem with Custer's accounts and sued to make it public [3]. When determining whether the transaction was a financing guarantee or a real sale, the court held that on the one hand, the right of recourse is not an inevitable condition for secured financing. However, the court examined the case from the perspective of substance over form and held that all accounts receivable. The risk of uncollectibility is borne by Major Company, and Major Company guarantees to Caster Company that every account will be fulfilled without causing losses to it. The court accordingly determined that the transaction was secured financing. In the past cases of the United States on true sales, the process has gone from true sales in the formal sense to true sales in the substantive sense. In the past judicial precedents in the United States, although the promoters and all parties believe that the "true sales" has been adopted However, the bankruptcy court may still "redefine" the transaction as a financing secured transaction, thereby affecting the interests of investors. Based on this, the U.S. Congress attempted to pass legislation in 2001 to clearly determine that asset securitization may not be included in bankruptcy assets according to the transfer agreement, so as to ensure the safety of transactions and the stability of legal relations, so as to prevent the occurrence of unrecognized or inconsistent judicial precedents. The judicial practice. Attempting to specify clear rules for real sales in a substantial sense. The bill

objectively limits the discretion of judges to design securitized assets in trial cases, but in view of the complexity of objective facts and the structure of asset securitization in product design The judges still have greater flexibility in determining whether they are actually sold. In any case, as a pioneer in the securitization market and a representative of the common law system, the United States has taken a substantial step towards the certainty of real sales. This so-called safe harbor principle solves the following problem: that is, at the beginning of the design, the purpose of real sales, but because the transfer of part of the equity may lead to the problem that the purpose of the design cannot be confirmed. This provides a model meaning for the legislation and judicial practice of the civil law system [4].

2. The Purpose of the Real Sale

The significance of the real sale is that the procedure guarantees the complete isolation of the underlying assets, makes the assets completely independent, cuts off the creditors' right of recourse, and guarantees the interests of investors. Under the arrangement of this guarantee mechanism, investors' judgments on basic assets are more targeted, and they can fully invest in the risk analysis of basic assets without worrying about the seller's own qualifications and credibility. This cuts out from the procedure. Many interfering factors caused by subject issues have made due diligence more clear and convenient, and also made asset securitization more efficient.

The real sale is the establishment of a legal procedure mechanism to ensure the protection of the interests of investors. In turn, investors have seen a more transparent process of asset securitization through the mechanism of real sales, which not only contributes to the fair realization of the process of asset securitization, but also promotes the development of asset securitization. Therefore, the procedural protection of the interests of investors and the development of asset securitization promote each other and jointly promote the real sale [5-6]. Real sales are a necessary mechanism for establishing bankruptcy isolation. Only when real sales in a substantial sense can be established can effective bankruptcy isolation be established. The full realization of bankruptcy isolation requires not only true sales to achieve the purpose of isolation from the seller's assets, but also SPV itself, and SPV's parent company, still need to take necessary measures or make necessary arrangements to ensure the independence of the underlying assets, and not to affect the safety of the underlying assets due to the operating risks of the SPV or the SPV parent company, so as to protect investors The rights and interests enjoyed in basic assets help investors isolate risks [7].

There is a view that the true meaning of real sales may be misleading. Usually people think that if real sales cannot be realized, real asset securitization cannot be realized. But the key is not whether there is a real sale, but whether the disposer has real rights when disposing of the assets. However, the judicial practice of civil law countries requires that the definition of rights must be clear. Otherwise, judicial practice cannot reveal from the perspective of equity that basic assets should be isolated due to different interest mechanisms. For common law systems, judicial precedents can solve problems. The civil law system can only be realized through legislation.

3. China's Regulations and Issues on Real Sales

3.1 Legal obstacles to the transfer of creditor's rights

1. The notification cost of the transfer of creditor's rights is too high, which is not conducive to the development of asset securitization. Article 80 of the "Contract Law" stipulates the conditions for the transfer of creditor's rights to be effective for the debtor, that is, the creditor's notice reaches the debtor. Generally speaking, the notice is expressed as a written notice, which greatly limits the efficiency of the transfer of creditor's rights and restricts the development of asset securitization. In the actual operation of asset securitization, in the process of the transfer of the underlying assets by the initiator, if the debtor is notified one by one as the creditor, it will not only be time-consuming and laborious, but also cannot be guaranteed. More importantly, for investors, such a legal framework implies significant legal risks. If the transfer of creditor's rights is invalid or uncertain due to the legal form of the notification, a generally applicable procedure cannot be passed. To solve the problem of debt transfer, investors must check whether each credit asset contract has a clause prohibiting the transfer, and each credit asset transfer needs to go through a strict notification procedure [8]. For the handling of massive credit contracts and massive information asset securitization In terms of the process, this is basically an impossible task, and the waiver of the review by investors means that legal risks are implicit in these specific terms. Although financial institutions can notify the debtor through public announcements due to the judicial interpretation of the Supreme Court, they are deemed to have claimed claims against the debtor and fulfilled the obligation of notification, which objectively alleviates the strict procedures involved in

the transfer of credit assets by financial institutions [9]. But on the one hand, the level of effectiveness of this regulation is low, and it needs to be recognized by the law. On the other hand, this regulation is only for financial institutions and is not universal in the scope of application.

2. Lack of regulations on the transfer of future claims. Although the transfer of existing creditor's rights in China is still the mainstream form, according to the relevant definition of basic assets, the transfer of creditor's rights in the future is bound to show a more rapid development trend. Whether it is the toll rights of expressways, the rental income of the real estate industry, the fees of park tickets, or the income of intellectual property rights, franchising rights and other licensing fees, they are all generated from the expected cash flow in the future, its scope and development space far exceed existing claims. However, in the current Chinese legal system, there are no relevant regulations on the transferability of future claims, which will undoubtedly become a state where a large number of basic assets cannot be relied upon on the path of securitization. At the same time, according to the relevant provisions of the Contract Law, the parties can restrict the transfer of creditor's rights through the agreement of the contract, and the future creditor's rights, as the basic asset of asset securitization, must prohibit the restrictions on the transfer of creditor's rights. Otherwise, it is not conducive to the protection of investors' interests.

3.2 The ownership of the underlying assets must be confirmed by law

Regarding the ownership of basic assets, China has not yet given a clear regulation on the legal level. In fact, in view of independent property rights such as funds and beneficiary rights, in practice, it has been acquiesced in practice that consortium legal persons are qualified as an independent subject to participate in legal acts including subscription of shares. For example, in the new third board trading market, the special asset management plan subscribed for the equity of Shanghai Yincheng Culture Media Co., Ltd. in its own name as an independent subject. In the business management regulations issued by the China Securities Regulatory Commission, the assets of the special plan need to be independent of the assets in which all parties participate. If all participants or intermediaries in the capital market are liquidated, the scope of liquidated assets does not include special asset plans. However, the nature of the assets of the special plan has not yet been given clear legal certainty. Based on this, the qualitative nature of trust assets in the Trust Law seems to have certain common features, but whether it is trust assets or special plan assets, how to liquidate, Regarding judicial relief, there is still a lack of specific rules and guiding norms [10].

At the same time, the "Corporate Bankruptcy Law" as the basic legal document defining "bankruptcy isolation" does not stipulate in the chapter "Debtor's Property" whether the basic assets to be securitized shall be subject to bankruptcy isolation. At present, the applicable normative documents that can isolate basic assets are only the departmental regulations, guiding opinions, and industry rules of the China Banking Regulatory Commission and the China Securities Regulatory Commission, and their legal effects have inherent deficiencies. In the case of the securitization of leased assets by Far East International Leasing Co., Ltd. (referred to as "Far East Leasing Company"), the transaction structure was designed so that the sale did not transfer the risks and benefits of the underlying assets, so the real sale was not realized. The Far East Leasing Company is a central enterprise with financial leasing as its main business. It has issued two securitizations of leased assets in 2006 and 2011. The Far East Leasing Company uses the business income of financial leasing properties operated by its main business as its basic assets. All the basic assets are packaged and transferred to the securities company. The securities company uses the basic assets as the support to establish an asset plan. After a series of splits, combinations, packaging, ratings, and classifications, the securities company securitizes the underlying assets into financial products and sold to investors and paid to the financial leasing company with the proceeds from the sale as consideration. Investors obtain benefits from the future income of the underlying asset [11].

In terms of accounting treatment, the Far East Leasing Company "debits bank deposits to increase assets, while crediting long-term accounts payable to increase liabilities", and at the same time, the ownership of the financial lease property has not been transferred to a special plan. In this case, if the Far East Leasing Company enters the bankruptcy proceedings, whether the financial lease item will be included in the bankruptcy property is subject to judicial uncertainty [12]. Far East Leasing Company has not formed a real real sale and bankruptcy isolation, neither the financial statements nor the legal nature meets the requirements of asset securitization, and there is a greater legal risk. The reason why the asset securitization has a good sales performance is entirely due to the background of the central enterprise of the Far East Leasing Company and good financial status. However, as the degree of marketization of asset securitization becomes higher and higher, The background and past asset-liability structure as an endorsement of credibility will gradually not be accepted by the market. The bankruptcy of "Enron" is a lesson for the past. If the underlying asset of the securitization is deemed to be secured financing during the transfer, during the judicial process,

the distribution of the SPV may be placed after the sponsor's other creditors due to the lack of guarantee in the process of the distribution of the underlying asset. If a person is unable to reproduce the share of the income or receive compensation in an equal proportion as a result, he shall be deemed to have undertaken unnecessary losses, which has caused a great legal risk to the investor.

4. Legal Advice on Improving the Real Sale System

The establishment of these legal mechanisms is the core and fundamental way to effectively prevent risks and protect the interests of investors by realizing the independence of basic assets and achieving the effect of bankruptcy isolation through the true sale of the promoters. For this reason, it is necessary to address the current legal issues related to real sales in our country, realize the establishment of relevant systems in legislation, and protect the interests of investors through legislation, which is an inevitable requirement for the development of practice. China's current legal system basically centers on traditional institutional norms, and does not involve the particularity of the innovative business field of asset securitization. In addition, for systems outside the applicable traditional rule system, special rules need to be applied independently to facilitate the rational operation of asset securitization business. If the traditional system rules cannot be formulated in accordance with the characteristics of securitized financial products, the securitization process will result in non-compliance with the law, which will put the interests of investors into a dangerous situation that is not recognized by the law [13]. In order to protect the interests of investors, existing legislation must be cleaned up or revised.

4.1 Amendments to the Legislative Rules on the Assignment of Creditor's Rights

1. Modify the notification method of the assignment of creditor's rights. The "Contract Law" stipulates that the notice of the transfer of creditor's rights can only take effect when it reaches the debtor. In this regard, it is necessary to set up as simple as possible and operable notification methods in order to simplify the legal process and improve the efficiency of notification. And the debtor notification rules confirmed by the Supreme Court's judicial interpretation undoubtedly have a demonstrative effect, and can be used as a universally applicable rule, fixed in the form of law, guiding the announcement of debtors as a conventional mode of debt notification.

2. Establish a transfer system for future claims. The basic assets that are actually sold include both existing claims and claims that can generate stable cash flow in the future. Moreover, more and more asset securitization products will introduce more future claims transfer systems. However, the contract law has not yet provided a clear legal basis for the transfer of future claims. International development trends and China's current practical experience in asset securitization have determined the transferability of future claims, and the system will continue to be clarified by legislation.

4.2 The "Corporate Bankruptcy Law" should specify the bankruptcy isolation of basic assets

Although the current rule design clearly stipulates that the trust property and asset plan are independent of the self-owned assets of all parties involved, and even independent of the SPV operating business itself, the rule has not been raised to the legal requirements. Although the trust property has The "Trust Law" is used as the basis, but the issue of ownership remains unclear. The dual ownership system of the common law system makes it get rid of the above-mentioned ownership disputes. However, although my country has transplanted the trust system, it cannot provide for dual ownership. Therefore, the legal status of trust property in the civil law system always needs an appropriate solution and program.

Compared with the above problems, the asset plan is in an embarrassing situation where there is no clear law to follow. Although the regulations of the China Securities Regulatory Commission specify the bankruptcy isolation system of the asset plan in detail, its effectiveness is low, and it is applicable in the field of securities issuance rules [14]. Sexuality does not represent its applicability in the field of judicial adjudication. Once the asset plan is involved in liquidation due to disputes, the issue of bankruptcy isolation will have an indeterminate legal risk.

Moreover, in the provisions of the Enterprise Bankruptcy Law, there are not enough legal provisions to support and apply the basic asset securitization legal system of bankruptcy isolation. Take trust property as an example. Although the "Trust Law" has made clear provisions on the definition of trust, it does not discuss the ownership of trust property, which will become more entangled after the sponsor goes bankrupt. The asset plan does not even have an independent identity, let alone the determination of the ownership of the asset plan. If the "Corporate Bankruptcy Law" classifies trust property or asset plan as bankruptcy property, there is no law for investors. Level regulations can support the provision that both trust property and asset plans can be separated from the bankruptcy

property.

Due to the public nature of the basic assets carried by the SPV, the bankruptcy of the SPV should be strictly restricted. First of all, the applicant should not be the shareholder or creditor as the applicant, but should be an investor who reaches a certain proportion; secondly, in terms of reasons, unless its investment rights are subject to major threats or damages, and failure to bankruptcy cannot guarantee to prevent further damage to assets. Insolvency should not be used as a reason for bankruptcy to ensure the investment interests of more investors.

4.3 Establishment of a consortium system

The traditional civil law theory believes that the consortium legal person is initiated for public welfare or based on specific public welfare matters, or the aforementioned non-profit activities, so the consortium legal person is simply defined as a public welfare legal person. Such as public welfare fund organizations, temples and other typical consortium legal persons. However, from the perspective of the concept of a consortium, a consortium is a legal person established based on a certain purpose property [15]. A consortium refers to a property or property rights or combination established for a certain purpose. The consortium will appoint a special manager in accordance with the agreement. The purpose of management is to comply with certain institutional arrangements and regulatory requirements. From its conceptual research, it did not exclude the establishment of a consortium based on profit-making purposes. However, it is not a logical inevitable requirement and choice for consortium legal persons to be limited to non-profit purposes. Positioning a special purpose trust as a consortium legal person and extending the scope of application of non-profit-making consortium legal persons to the scope of profit-making purposes does not violate the system of the civil subject system coordination.

From the perspective of the establishment of the trust system, the trust system is transplanted from the common law system, and the concept of a consortium does not exist in the common law system, but the functions and effects of the trust system cater to the system design concept of the consortium. For civil law China, while transplanting the trust system, it did not alleviate the problem of mismatch with the overall civil law system. For example, in the common law system, the ownership of trust property can be divided into different types, and by Common law and equity law provide comprehensive mediation, while the civil law system insists on "one property, one right", so the ownership of the trust property has not been resolved. The reason why the law requires that the consortium legal person must be a public welfare legal person is only the need of legislative policies, rather than logical necessity [16]. As a special asset management plan, the first property system in China, it lacks applicable precedents. The clear concept of a consortium can solve the above problems more completely and provide a logical and institutional system for investor relief mechanisms and channels.

Conclusion

According to the tradition of the civil law system and the development experience of asset securitization in civil law countries, the rapid development of asset securitization is inseparable from the protection of special legislation. The improvement of relevant rules and systems is a huge guarantee for the interests of investors. In view of the legislative deficiencies in my country's creditor's rights transfer, corporate bankruptcy, and the positioning of consortium legal persons, it is necessary to comply with the real sales and bankruptcy isolation needs of asset securitization, modify the notification method of creditor's rights transfer, establish a future creditor's rights transfer system, and establish a consortium legal person System, and clarify the bankruptcy isolation of basic assets in the "Corporate Bankruptcy Law" to build a core mechanism for investor protection.

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