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Decline of Party Autonomy Principle in International Private Law

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Abstract: The economic base determines the superstructure, the changing of legal principles closely linked with economic development. Party autonomy principle has been a supreme scepter of entire private law domain for a long time since its birth, for the centuries-long history, it has been regarded as sacred and unshakable legal norms. To the beginning of the 19th century, as the theory of party autonomy principle is consistent with the personal-based thinking of European capitalist countries' laws, it has been fully reflected firstly in the French Civil Code. Then the change of economic base makes party autonomy principle began to decline in the area of international private law, such as: more and more peremptory norms, development of directly applicable law, the protection of the interests of the weak and so on, to lead to the exclusion of party autonomy principle.

Keywords: Party Autonomy Principle; Proper Law; Peremptory Norm; Directly Applicable Law

1. Introduction

Party autonomy principle has been a supreme scepter of entire private law domain for a long time since its birth, for the centuries-long history, it has been regarded as sacred and unshakable legal norms. Principle of autonomy is founded as one of the most important cornerstones of Western countries civil law system during the liberal capitalism. Party autonomy principle is based on the clients are in accordance with self-awareness and to clearly constitute a complete legal acts. German scholar Enneccerus in his book On Act of Law published in 1889 claims that all the attitudes seceded from the party autonomy principle are to belittle the value of legal acts. Starting from this value concept, it will inevitably come to the conclusion of the established process of declaration of will, which constituents are namely first, the real will, and second is declaration.

The economic base determines the superstructure, the changing of legal principles closely linked with economic development. Party autonomy principle is produced conform to commodity economy. As the superstructure of a certain economic base, law always reflects the changing objective world. The emergence and development of the party autonomy principle is a certain stage of the commodity economy inevitably reflects on the law. In 16th century, some Western European countries have frequent business contacts, and the prosperity economic basis has played an important role for founding of party autonomy principle. Therefore, the party autonomy fit in easily with the need for liberal capitalism people-based thought. Party autonomy historically been selected as the most sacred and important legal principle in private law area. However, as a high-level overview of civil relations with legal norms, in a certain historical period, the party autonomy principle contains one of the most universally applicable theory, which is the most scientific explanation to the various specific legal phenomenon and legal questions, and also produced a very important role in guiding for civil legislation and judicial practice of Western countries. Especially in system of contracts, party autonomy principle gained the most adequate performance: as one of the most important principles in capitalist democracy law, the party autonomy principle occupies a dominant position in the entire Western private system.

Similarly, in the area of international private law, especially the applicable law of contract, the party autonomy becomes the highest priority and the most important principle. In 16th century, French feudal separatism was serious, their laws are different, which is extremely unfavorable for business contacts and caused extreme dissatisfaction in merchant class, seriously impeded the development of commodity economy. Therefore, French international private law scholars Dumoulin proposed contract applicable law of parties' freedom of choice in order to conform to actual needs, which has become famous "party autonomy theory" in the field of international private law. Adam Smith's laissez-faire economics not only made a strong theoretical support for liberal capitalist economic development, but also played a great role in promoting the development of the theory of party autonomy. Later, Ricardo's economic thought greatly opposed to state's economic intervention and Savigny legal doctrine, with the ongoing correction of party autonomy in liberal capitalism evolvement for centuries, it has always been in a dominant position in private sector.

2. Economic Reasons of the Decline of Party Autonomy Principle

It is also because the economic base determines the superstructure, so the liberal capitalist economic development hit a bottleneck and showed a lot of problems. From 1929 to 1931, the greatest degree of capitalist economic crisis made the economists began to examine the disadvantages of liberal capitalism, that is unrestricted freedom would bring disorder competition and waste ultimately lead to economic crisis. Therefore, Keynesian economic doctrine began to show its function. After the economic crisis the country's capitalism began to rise, the country began economic intervention which gradually replace the previous absolute laissez-faire. Directly applicable law is a kind of new concept and theory came into people's horizon since the 1950s. In comparison with the 19th century, 20th century is a century of national public authority frequently intervene private relations. The global economic crisis of 1930s forced the state power made a lot of interference in private liberal economic life with the consideration of the social public interests. Since then, the law of state power intervention in liberal economy gradually became reasonable. After World War II, along with the rise of the modern welfare state, the concept of state interventionism occupy a dominant position, state's control of economic life in all areas also increases. In the field of private law, legislators of Western industrialized countries are trying to regulate economic life, and to adjust the social relations of various imbalances, leading to the involvement of state's intervention in all aspects such as the production, distribution, exchange, and consumption. This shows that the market economy system does not mean the abandon of state's intervention, especially when it comes to national and social basic interests.

Keynes advocated the state should adopt fiscal policy, monetary policy, etc. to strengthen the government's economic management and control, and to limit some certain economic activity. Keynes' interventionist makes Western capitalist economic growth continues to rebound and effectively overcome inflation. Keynesian state intervention economic thought gradually replaces the national laissez-faire attitude toward economy and life in liberal economic times, state capitalism hands stretched longer and longer. The economic base determines the superstructure, the free thought of legal field begun to be restricted, naturally, party autonomy was restricted, for example due to a variety of formats contract as a result of more and more monopolistic groups made the parties have no right to negotiate the content but only have the right to choose to sign or not. Since there have been norms reflected the national interest and policy advocate in the field of law, international private law can not be an exception that unaffected by this theory and policy. National intervention in social and economic life is also extended to foreign-related civil and commercial relationships. However, the law of conflict resolution through traditional conflict of laws can not meet the requirements of national direct intervention in social and economic life. Because the applicable law of traditional conflict rules was cited by the area of international private law. Likewise, restrictions of party autonomy are more and more from the interventionism, which reflected in party autonomy principle of international private law, is restricted on party autonomy. This relatively slowed action pace in the field of generalization, which even became one of the largest problems of international private law.

Although the limitation of party autonomy principle is a problem of international private law, but the decline of party autonomy principle in the area of international private law is an unstoppable trend. The common trend of party autonomy's development of contract showing gradual relaxation over the world is not accidental, but its reason can be explored from the perspective of justice value and efficiency value of conflict of laws. Requirement of the party autonomy principle refers to goals of conflict justice and substantial justice which are pursued by conflict of laws; it will satisfy the parties to the utmost extent. So as long as the parties choose the law which does not violate the public interests and third party's interests, they will be limited. Similarly, party autonomy principle can achieve the conflict efficiency of conflict of laws and entities efficiency; external theory can provide reasonable grounds for whether it should be able to expand party autonomy of the parties.

The basic reason of the limitation of party autonomy principle is the economic base, and the most direct reason is determined by justice value and efficiency value of conflict of laws. This thesis will show how the party autonomy principle has been restricted and its performance from two aspects of justice value and efficiency value. In order to achieve substantial justice, it will be necessary to ensure appropriate restrictions on party autonomy to make the weak apply their law, so as to ensure the protection of the interests of the weak to achieve substantive justice. From an efficiency standpoint, because of the special contracts, such as the problem of asymmetric information in various formats contracts between the parties, if the parties want to achieve autonomy, they need to spend a lot of time to customize contracts and make judgment, which consumes a lot of time costs and money costs. This shows party autonomy is not economically efficient, which need to limit the party autonomy from the law, such as parties need to sign a formats contract, so that the application of party autonomy can achieve legal efficiency target.

3. Expression of the Decline of Party Autonomy Principle

Justice and efficiency is the value target of all legal pursuit, and there is no exception for conflict of laws. In China, current academic discussion on the value of conflict of laws is basically focused on the field of "justice". However, the belated justice is non-justice, without efficiency, justice may lose its proper value; therefore, the efficiency value orientation of the conflict of laws is also worth of attention. This thesis will explore the reasons of relaxation trends of party autonomy in the field of common contract from the perspective of justice value and efficiency value of conflict of laws.

Party autonomy does not mean that a party can freely choose applicable laws without any restrictions. In general, the freedom for parties to choose the law is relative; most countries have to put restrict on that freedom. Many countries' legal provision is that the parties can not select laws with no actual contact.

Same as the basic principles of international private law, party autonomy is reflected in the rights of the parties to choose, while public order is reflected in the demands in terms of ethics, moral standards, and national interests within the country. Party autonomy principle is the private demands, while public order is the public power. Therefore, when the two conflict, party autonomy principle will certainly be limited by the public order, of course, this restriction is conditional restriction. Party autonomy is the right and process to legally choose foreign-related legal relationship of the parties' vital interests. Only when the applicable law they choose is foreign law, and the application of the foreign law go against the local moral standards, the national interests, and the public order, can have the possibility that the public order principle may exclude the application of foreign law. Only in such conditions, may public order principle limit the application of party autonomy principle. But from another perspective, only when the choice of party autonomy is foreign law, and the application of foreign law would damage the public order of the country, can party autonomy principle be limited by public order principle. Therefore, the restriction of party autonomy by public order principle is limited and conditioned.

If the parties' choice of law is in violation of the public order of the state, it would be excluded from application, it is very easy to understand, and each country will not bear the violation of public order. However, if the parties' choice of applicable law is not in contrary to the public order of the State Court, but is in contrary to the public order of a third country, at this time whether the forum State invoke the application of applicable law that public order principle exclude the parties' choice? In practice, most countries will do so. The main reason is in efficient considerations to save judicial resources. If the public order of a third country is not take into consideration and judged by the law chosen by the parties, then this decision will be difficult to be implemented in third countries, in fact, this judgment does not make any sense and wastes judicial resources. As Professor F. Vischer has pointed out, for another country's public order consideration limits the application of law, which limits the party autonomy principle.

The component of directly applicable law is becoming more and more important in international private law, which is also one of the signs of gradually decline of party autonomy. Francesca Keith believes that with the change of state's role and the improvement of its functions in economic life, the state's intervention in economy increases day by day. In order to better protect the interests of the state and society in international civil and commercial communications, the coercive legal norms established by the State can bypass the traditional legal choice norms and directly apply in adjustment of foreign civil and commercial relations. This norm is the directly applicable law.

Since the 1930s, with the country's strengthen intervention of economic life, arbitrary norms of international private law was constantly being challenged by peremptory norms, the number of peremptory norms were increasing, and the range are becoming more and more wide. This phenomenon attracted a number of international private law scholars' attention that they started an in-depth research on the issues of peremptory norms. In the research field of peremptory norms, study on the "directly applicable law" is the most conspicuous. In particular transnational civil and commercial cases, when involving the phenomenon that the country has legal norm of mandatory application, there is no need to quote a bilateral conflict rules of the forum, but directly apply the peremptory norms into the case, which is the legal norm of "directly applicable law." As a typical representative of peremptory norms, directly applicable law has many similar concepts or categories, such as norms limited its own scope, norms regulated space, particular choice of law clauses, obligatory applicable law, and police act and so on.

Strengthen the protection of the weak is a common trend of modern law, so international private law holds the same value judgments, that is to protect the weak can sacrifice some party autonomy as the price. In the EU, consumer contract parties' choice of law must not deprive the consumers' special protection given by law of peremptory norm of habitual residence, employment contract parties' choice of law must not deprive the applicable law if the parties do not choose the law, insurance contract parties' choice of law should be limited within a certain range, which aims to protect the interests of the disadvantaged party. However, the US legislation does not explicitly make special restrictions on consumer con-

tracts, employment contracts and insurance contract of party autonomy, but in judicial practice, the court uses public policy to exclude choice of law clause that go against the weak parties, so that the interests of the weak party can get real protection.

Peremptory norms are another kind of limitation of party autonomy, for example, the maintenance of major social welfare in Germany, particularly its economic and social policies, and the necessary domestic relations as application conditions. Criterion for judgments of international peremptory norms mainly lies in whether it pursues the public interest. The international peremptory norms in German law concentrated in the field of specific provisions of contract law, labor law, competition law, trade control, monetary and foreign exchange control law, etc. German courts have taken in the application of the articles with cautious and restrained attitude, and strictly limited the scope of international peremptory norms, in order to maintain an international consensus and conflict rule system. France, the Netherlands, and the United Kingdom, these countries have made mandatory provisions on field involved of public interest factors with different levels. Mandatory provision is applicable in the specific areas of concerning the national and social interests, and the specification purpose and legal effect should be paid more attention behind it. As time goes on, social welfare factors of mandatory provision will gradually change, and begin to decline or increase in some areas, while in some areas of public welfare will, which need to reconsider the social policy embodied by mandatory provisions. Private law to be public has become a trend; mandatory provisions not only concerned about the public, but may also concern about the public and private interest. To protect the legitimate rights and interests of the weak party, the mandatory provisions may appear tilt phenomenon in some areas, which need the judge takes the case based on its own national interests, social political discretion and correct application.

No matter which country can not give unlimited rights of the parties to determine the choice of laws, and also the party autonomy principle is subject to be limited, each national legislation makes appropriate limits to a certain extent on the party autonomy principle, especially with the mandatory provisions to play better results. Party autonomy principle, especially in contract law, is applicable as arbitrary rules, which plays a supplementary defect role. But still there are some mandatory provisions, such as Japan in its 2006 "General Rule of Law "Article 11, paragraph 1 states that the establishment and validity of the contract, if the parties do not choose the law of consumers' habitual residence as the applicable law, as long as consumers have expressed the meaning of mandatory provisions in their habitual residence applicable law to companies, the mandatory provisions should be applicable. "Treaty of Rome 2", Article 14 also provides that the parties' choice of law can not exclude mandatory provisions of other countries' law, and also can not exclude derogated part in common law implemented in Member States courts, in order to negate the mandatory provisions effectiveness of the EU member states and the European Community law. Meanwhile, in "Rome Convention", both Article 3 paragraph 3 and Article 7 paragraph 2 made mandatory provisions. In which states that if the parties select a foreign law, no matter whether or not they also choose a foreign court; if selected, all other factors associated with the circumstances will only have contact with one state-owned, and this situation should not affect the country's laws that the derogate part of the contract shall not apply with legal norms, which is called mandatory provisions.

Efficiency is another important value goal pursued by international private law. Since the 1960s, foreign scholars began to apply legal economics to the field of conflict of laws, thereby began to focus on the efficiency analysis of conflict of laws. To be specific to the party autonomy principle of contract law of conflict field, legal economics should be used for efficiency analysis, which related to two issues: First, freedom of the parties to choose contract applicable law can whether or not achieve the efficiency value of the conflict of laws; Secondly, the expansion or limitation of party autonomy for the parties have whether or not the availability of economic justification. However, the efficiency analysis of conflict of laws is different from national perspective and personal perspective. The efficiency value from the national orientation perspective pursues to maximize the national interests (government benefits), while the efficiency value form the individual orientation perspective pursues to maximize the personal benefits. In consideration of the current legal experts and economists' gradually increasing focus on the personal interests rather than the government interests in conflict of laws of contracts. Since the problem of contract conflict completely comes from the conflict between private disputes, this paper will mainly give efficiency evaluation on party autonomy principle of conflict law of contract from the perspective of personal interests, which is from the perspective of individual choice and maximizing the wealth. Party autonomy principle itself can promote the development of foreign-related civil and commerce in application. Party autonomy facilitate judges for foreign-related contract cases' resolve, making the applicable law of foreign contract more confirm, and is conducive to resolve the dispute case more quickly. However, party autonomy principle likely to lead to random selection for the applicable law, so that the contract applicable law's departure from the facts of the case itself. For example, the departure of foreign contracts consensual election law with contract connection point such as place of contracting and place of contract performance, causing the lack of communica-

tion between applicable law with the contract itself. Meanwhile, some scholars pointed out that this principle emphasizes too much on the parties' selective rights and the certainty of applicable law, ignoring the applicable law of local court and the public interest. Therefore, for party autonomy principle, nowadays each country clearly defined limitations in legislation and judicial practice.

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