

Analyzes the Problems and Improvement of the Application of the Principle of the Closest Connection in China

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Abstract

The principle of the closest Connection was formally born in The Second Restatement of The Law of Conflict compiled by Ronald Reagan. Once this principle came into being, it immediately had a great influence in the international community and was praised and adopted by countries all over the world. With the increasing frequency of international exchanges, the principle of closest ties is also playing an increasingly important role in this "global village". In 2010, China promulgated the Law on The Application of Laws concerning Foreign-related Civil Relations, which established the principle of the closest connection as one of the basic principles of China's private international law, showing the important position of the principle in China's legal choice in dealing with foreign-related civil relations. However, as a "imported", even in the exquisite perfect, but also with our country's actual combination, cannot blindly take doctrine, this will only cause "imported" "not acclimatise to the soil". After a series of judicial practice, the principle of the closest connection is found to have many problems in the implementation process, such as the uncertainty of the closest connection, the uncertainty of the legal basis, the obvious territorialism of judges and the lack of professional quality of judges in the implementation process. These problems seriously reduce the functional applicability of the principle of the closest link and sometimes increase the complexity of the case, which is the opposite of the principle's original purpose. Therefore, in view of the problems and reasons of the implementation of the most closely related principle in Our country, this paper puts forward some rough views and suggestions to improve the implementation of the most closely related principle, hoping to help these problems.

Keywords

The Principle of the Closest Connection; China; Application; Problems; Perfection.

1. Introduction

The principle of closest connection refers to that when the court tries a foreign-related civil and commercial case, it does not judge the applicable law by one factor, but balances various factors related to the parties and finds out the factors most closely related to the case to determine which country or region the applicable law of the foreign-related civil and commercial case should apply.

Its theoretical origin is Savigny's theory of legal relations. The theory holds that every legal relationship has a corresponding "we", which should apply the laws of the place where the "we" are located, and these "we" are unchangeable and unique. However, this "constant" and "only" relationship is too rigid, and its disadvantages are gradually exposed with the increasing prosperity of international trade. The most closely related principle, which is a critical inheritance of "the relationship between laws", holds that legal relations and corresponding laws are determined by the most closely related place rather than fixed, which greatly increases the applicability of legal choice.

Therefore, the creation and application of the principle of the closest connection shows that nothing remains the same and needs to evolve in practice. The application in our country should be the same. This paper first summarizes the problems in the implementation of the principle of the closest relationship in China, and explores the causes of the problems, and references the experience and lessons of the United States in the use of the principle of the closest relationship, and finally puts forward some rough suggestions on improving the judicial application in China.

2. Problems and Analysis of the Application of the Principle of the Closest Connection in China

In the Law on the Application of Laws concerning Foreign-related Civil Relations, the principle of the closest connection is clearly stipulated as a supplementary principle, the "special guiding principle". The promulgation of the Law on the Application of Laws in Foreign-related Civil Relations has greatly promoted the frequency and scope of the application of this principle, which is known as the "imperial clause" or "supremacy Clause" and is highly favored. but at the same time, its disadvantages have also been amplified. The principle of the closest connection is a double-edged sword. If it can be correctly grasped and the reasons in the application of law can be clarified, the rule of law can be regularized, the adaptability of conflicts to cases can be enhanced and the justice of individual cases can be realized. Otherwise, it may go the wrong way of unilateralism and overturn the whole system of private international law. Therefore, as written in the previous article, it is not correct to copy "imported products", according to the specific implementation of the situation to find out the problem, solve the problem, in order to improve the efficiency and accuracy of China in the face of foreign-related civil law issues. This process cannot be achieved overnight success, continuous improvement is inseparable from continuous exploration, continuous practice. Therefore, we should first pay attention to the problems existing in the application of the closest association principle, to achieve "precise policy" and effectively play the role of the closest association principle. I have summarized the following problems when applying the principle of closest ties in China:

2.1. It is Difficult to Determine the Most Closely Related

The determination of the closest connection is particularly important in dealing with such cases and is the first thing judges should have in mind when applying the principle of closest connection. This requires the judge to make a comprehensive analysis and judgment of the specific case, not only to make an objective judgment, but also to fully consider the subjective factors of the parties, and to decide which country or region applicable law by combining the subjective and objective factors. The author by browsing in recent years, however, by the most significant relationship principle also handles the foreign-related civil and commercial cases found that most of the cases in determining the most closely related to a lot of great randomness, while the judge in the process of determining, not only consider the subjective factors of the parties, also add their own subjective judgment too much, however, their subjective judgment and lack of legal basis, Even as long as there is one connection point in China, the relevant laws of China are directly applied regardless of many other connection points. This leads to the possibility of the same case, under the view of different judges, there will be different laws, the most closely connected will appear to be particularly confusing, several areas of uncertainty. Thus, it can be seen that it is very difficult to determine the most closely related place for the application of the present principle. But determine the most closely related to the whole foreign civil and commercial cases and its important part. If the first step is not correct in determining the closest connection, there will be great deviation in the application of the law, so that the essence and original intention of the closest connection principle cannot be brought into play, further leading to inaccurate trials, and thus contradicting the "people-oriented" of China's

socialist society under the rule of law. Therefore, I think, to determine the closest connection is the most urgent problem to be solved in the application of the current judicial trial.

2.2. The Judge has a Clear Tendency of Territorialism When Deciding Cases

As the most closely related principle of "imported goods", some judges may not master the essence of it, and they are not skilled in applying the laws of other countries or regions. As a result, some judges would like to preferentially apply the laws of their own country as soon as they see a connection with their own country. As some scholars have said, "In the application of foreign law, he is only a beginner who knows a little and treading on thin ice, but in the application of court law, he is a skilled expert, a dominant and dominant judge. The application of foreign law in the courts is not of the same quality as its application in the home country, because the danger is obvious that the judge does not live in the social environment in which foreign law arises and applies dead foreign law rather than alive. "It is natural, but not justified, that judges sometimes find it more convenient to apply their own laws than those of other countries or regions. This practice is, in fact, an expedient application for the purpose of using national law and is far from the principle of the closest link. with the continuous development of economy, there will be more and more foreign-related civil and commercial cases, which requires relevant judges to improve their professional quality, to adapt to the development of society, rather than "kneading the soft persimmon", adopt ostrich tactics, not to face problems and challenges.

2.3. Relevant Laws and Regulations are not Detailed and Lack of Operability

There are fifty-two articles in the Law on the Application of Laws in Foreign-related Civil Relations, but there are only five articles about the closest connection principle, namely article 2, Paragraph 2, Article 6, Article 19, Article 39 and Article 41, which are not comprehensive and detailed introduction of the closest connection principle. Although it is a basic principle, it can be seen from the Law on the Application of Laws in Foreign-related Civil Relations that the principle of the closest relationship does not run through the whole system of laws, but is only scattered in a few brief provisions. Moreover, as mentioned above, its interpretation of the principle of the closest connection is not detailed, but rather very general, which is difficult to help judges understand and judge, so it cannot be applied to complex foreign-related civil and commercial cases. There are laws to follow, but there are laws to follow. It is precisely because of the lack of detailed legal guidance that the subjective arbitrariness of judges is expanded and the discretion is rampant, which makes the justice violate the basic principle of fairness and justice and cannot really solve the conflict problem.

2.4. The Legal Basis is Unclear

After the principle of the closest connection became the basic principle of the Law on the Application of Foreign-related Civil Relations, it was favored by judges because of its flexibility, and was one of the main methods in the trial of foreign-related civil and commercial cases. However, as a legal person, it should also be clear that only by speaking out fully clear legal basis can the masses believe that judicial activities are fair and just, otherwise the consequence is the decline of judicial credibility. However, after reviewing the cases, the author found that although the judge actively applied the principle of closest connection, the legal basis was inevitably biased. For example, the General Principles of the Civil Law, the Contract Law, etc., and some judgments do not indicate the legal provisions cited at all. This shows that when the principle of closest association is applied in foreign-related civil and commercial cases, judges do not have an accurate understanding, or think that there is no need for legal basis if the principle is applied. This has exposed the most closely related principle and its related laws and regulations have the problem characteristics of ambiguity.

2.5. Abuse of the Judge's Discretion

The author believes that the greatest advantage of discretion in judicial judgment is that it has strong flexibility, which overcomes the rigid mechanical shortcomings of the original use of sudden method and has strong flexibility and adaptability. Therefore, judges can easily apply this principle even when they encounter complex exceptions. However, this "fast track" also exposes its drawbacks, which undermine the uniformity of the law. Therefore, when countries adopt the principle of the closest association, they generally impose necessary restrictions on the excessive discretion granted to judges by the principle, so that the discretion of judges can be exercised within a reasonable and legal range.

3. Our Country Most Closely Applies the Principle of Perfection

The United States is the birthplace of the closest connection principle, which has early development, mature theory and rich experience. For China, which is relatively late in application, we can learn from it and absorb it. However, we still need to find the most suitable closest connection principle based on China's judicial practice. The following are my suggestions for the application of the principle of the closest ties in China.

3.1. Enhance the Certainty of the Most Closely Related Areas

As mentioned above, the first problem in applying the principle of closest association is to solve the problem of determining the place of closest association. The author believes that judges should first master how to determine the most closely related procedures and guidelines, including specific guidelines. Only when the detailed and perfect relevant procedures and regulations are stipulated, can the judge's discretion be limited, so that the judge cannot arbitrarily determine the closest connection and cannot arbitrarily cite the law. First shall organize the relevant case points, so you can determine the jurisdictions involved, then finishing each connection point in this case the important degree, namely to find the key points, which need to take into account the different social relations, the countries of the parties related policy, judicial convenience, etc. Moreover, in different foreign-related civil and commercial cases, the legal relationship is different, and its judgment is most closely related to the different starting point, such as property disputes and custody disputes, the scope of consideration and starting point is very different. In different legal relationships, the importance of connection points often varies. Finally, the judge, after determining the closest point of contact, should explain the relevant reasons in accordance with the procedure. In the United States, although there are no clear legal provisions, the judge will add the reason to determine the closest contact place on the judgment document, which can not only effectively prevent the judge from arbitrarily determining the closest contact place, but also help the parties to better understand the judicial process, thus improving the credibility of China's judiciary.

3.2. Improve Relevant Laws and Enhance Operability

It is also mentioned in the previous article that the judge lacks operability due to the current relevant laws and regulations. Because the determination of applicable law according to the principle of closest connection is a process of selection, only in this "process" strict requirements can achieve the accuracy of selection. According to the experience of the United States, improving the relevant provisions of the closest association principle greatly improves the operability of the closest association principle. The author believes that China can also learn from the experience of the United States in improving relevant laws and regulations. First, the article clearly lists the factors that judges should consider when applying the closest association principle. In this way, it can provide a correct and normative guide for the judge to apply the principle of the closest connection, improve its operability, and provide a regulation to limit the

judge's excessive discretion, to ensure that the discretion of the judge is within a legal and reasonable range.

3.3. Develop Detailed Laws that Provide a Clear Legal Basis

It has been mentioned in the previous article that when judges in China try foreign-related civil and commercial cases, the legal basis is chaotic and disorderly, or they simply do not use the law and completely rely on the "free play" of judges. The author thinks that the reason for these situations is that the relevant laws in Our country are too simple, which makes judges "have laws to follow". Therefore, it is particularly important to develop more detailed legal norms. In addition, compared with the society, the development of law always lags behind, because the society needs new situations and new problems to promote the law to constantly adapt to the development of society. The solution of the existing problems shows that the law is more perfect, but the emergence of new problems will promote the continuous development of the law. Therefore, while summarizing the conclusions and learning experience, we should look forward to promote the principle of the closest connection to constantly adapt to new needs and new requirements.

3.4. Limit the Application of the Law of Court Place

Because at this stage, the judges may appear territorialism tendency, the most significant relationship principle in positive reference, will be more active and the applicable court of law, in the paper also mentioned before, this is human nature, not only in our country has, the rest of the country will appear this kind of situation, because for the judge, his most handy law, is, of course, the country's laws. Can draw lessons from America tort conflicts with the latest progress of the infringing act of choice of law and other contract request, we can't all negative applicable law court, but to make clear rules, in which case applicable law court, as applicable to method can improve the accuracy and convenience of the trial court, which is cannot replace by other method. Secondly, after making clear provisions on the application of the law of the place of the court, the application of foreign or regional laws shall be considered in other cases, and judgment shall be made step by step in accordance with the procedures and finally determined. Whether according to the law of the court or the law of other countries or regions, the basis for the application of local law should be indicated in the judgment document.

3.5. Improve the Professional Quality of Judges

As for foreign-related civil and commercial disputes, the law that the judges have been exposed to may not be in the scope that the judges have been involved in before, so it is a good choice to strengthen the training of foreign-related laws for judges. Moreover, with the construction of China's socialist society ruled by law, private international law has developed better and better, and the gap with the relevant laws of developed countries is also continuously narrowing, but we still need to sharpen our eyes, learn from experience and sum up lessons. With the construction and development of "One Belt and One Road" economic belt, there will be more and more foreign-related civil and commercial cases in the future. Our judges should also speed up the progress, keep up with the pace of social development, become the elite of law, and turn to drive the construction and development of the society ruled by law.

4. Conclusion

The principle of the closest connection is an important theoretical tool in dealing with foreign-related civil and commercial disputes in China. With the more and more extensive application of this principle, it also indicates the continuous development of China's foreign economy. However, while appreciating our progress, we should also pay more attention to our weak spots. Our country at presents the most significant relationship principle applies when exist with the

problems mentioned in the article, but there are more problems waiting to explore, to solve these problems is to reduce the value of the most significant relationship principle, played a block in the foreign-related civil and commercial law of development of our country, more played a negative impact on the development of China's international economic. With the continuous development of "One Belt and One Road" economic belt, it is more necessary to have a perfect foreign-related civil and commercial legal system, a correct, detailed and most closely related principle with China's national conditions, to play its greater value and escort the development of China's foreign economy.

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