

Commercial Law Thinking and Civil Logic — — Perspective of Chinese Law

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Abstract: Civil legal relationship is a closed loop of logical relationship based on the concept of law, in which the understanding of the problem and the settlement of disputes are accomplished. Based on the relatively stable and solid civil relations, civil law scholars can extract the common factors of legal norms and form a complete civil law logic system. However, in the world of commercial law, commercial transactions are always changing, and the structure and paradigm of commercial transactions are normal. Therefore, it is difficult to construct a closed-loop logic argument from point to surface based on a definition, which makes the commercial law norms seem to be scattered, complex and difficult to have a common law. Therefore, many commercial law scholars advocate that commercial law disputes should be settled through commercial law thinking. But from this comes the question: what is commercial thinking, how is it different from civil logic, and how should commercial thinking be applied to commercial trial? This paper, through the basic comparison of civil law logic and commercial law thinking, hopes to present the characteristics of commercial law thinking different from civil law logic. Based on this, it is not an appropriate choice to understand and apply commercial law and civil law according to the relationship between general law and special law in the process of commercial trial.

Keywords: civil law logic; commercial law thinking; law application

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I. INTRODUCTION

Based on the humanistic concern of "protecting people", civil law has developed into a civil law system in which "people", "things" and "rights" are interrelated. However, the commercial law originating from the common commercial law has different values from the civil law in the aspects of subject regulation, property circulation and commercial liability. If a case is dealt with in a logical way in civil law, it seems to meet the requirements of "fairness", "equivalence" and "compensation" for individuals, but it may, to a greater extent, impair the normal flow of commercial activities and the need of commercial subjects for the establishment of freedom of exchange. It is a superficial fairness to cause a real unfair that "it will give a businessman with special property capacity and special living environment needs the same rights and obligations and responsibilities with ordinary natural persons and non-businessman organizations."

Civil Law Logic and Commercial Law Thinking

Systematization of Civil Law Logic and Decentralization of Commercial Law Thinking The logic of civil law is based on the identity and difference of concepts, which is formed by the interrelation between the upper concept and the lower concept, which is the inner connection between the civil law norms or the civil law system. In essence, the commonness of civil life is upgraded to concept and definition by means of definition, induction and summary, and the solution of civil dispute is obtained by formal derivation.

The important embodiment of the logic of civil law lies in the systematization of civil law formed by the concept. Since ancient times, the science of civil law has been studying and discussing the systematization of civil law norms, especially the basic problems of civil law norms, system, system and logic. As far as the characteristics of civil law itself are concerned, it pursues the logic of legislation and judicature carefully, emphasizes the consistency and systematicness of legal logic, and derives general principles through analysis, induction and deduction, so as to "constitute a clear and logical legal order system". In this system, the law itself is compiled into a system with internal logic, which is connected with systematic concepts and constitutes an abstract conceptual jurisprudence system. No exception shall be made unless there is a sufficient and justifiable reason. Under such a logical system, the important civil codes of the European continent took effect at different times, but their core contents showed great unity, that is, to realize the three basic principles of "equality and protection of individual rights and freedom" in civil law around "person", "right" and "legal act".

Civil Law, which is people-oriented and centered on rights, is not applicable to commercial law. From the beginning of its "Merchant law", the commercial law has a different background from the civil law, whether it is the merchant law as a rule or the commercial law which is recognized by the legislature and the judiciary later, its

value perspective is to protect the “Profit demand” and “Commercial order can be expected”, the right of “Personality” that the businessman can enjoy is not the value basis of commercial law.

Because “Civil law is only faced with the basic needs of human beings, it is much less variable than the needs of the commercial world that commercial law is faced with,” Therefore, if civil law can be systematized by summarizing and refining civil law concepts on the basis of stable civil relations, then in the face of the real commercial world, which is complex, changeable and diversified in interests, the chances of commercial law forming a stable, interlocking conceptual system are much smaller than those of civil law. In the absence of a strictly logical definition (such as the “Subjective”, “Objective” and “Eclectic” arguments about the definition of “Businessman”), commercial law often emphasizes the understanding and analysis of the norms of commercial law based on the thinking of commercial law in the application and interpretation of law.

Therefore, it is not difficult to understand, when we consider that legal thinking is only a micro-analytical way of thinking, emphasizing the specific analysis of things, not systemic or deductive, while we must consider all aspects of problems and values around the problems according to proper standards, the thinking of commercial law can only be a subjective concept, which is the subjective understanding of the principles and rules of commercial law by the legal interpreter, it is not an objective standard for the behavior pattern of commercial subject.

In this regard, we can see that “Civil law has the characteristics of ethics, more emphasis on the pursuit of handsome features, commercial law more emphasis on the pursuit of individual profit-making benefits, more pursuit of trade safety, speed and reliability”; The logic starting point of civil law is the “Equality” between the civil subjects and the “Fairness” of the transaction. The logic of civil law focuses on the fairness or equality of the individual transaction to the entity of both parties, less consideration is given to the mechanism, background and requirements of the whole transaction mechanism or the transaction habit, which is characterized by the pursuit of individual “Absolute fairness” to achieve the “Overall fairness” of the society.

However, the thinking of commercial law takes the whole transaction rules of the whole commercial society as its object of protection. It attaches importance to the protection of the impact of the concluded transaction on other transactions or parties, and emphasizes the efficiency, swiftness and security of the transaction itself, the logical premise of the existence of the thinking of commercial law is to consider the individual fairness under the consideration of the efficiency of the whole transaction mechanism. Therefore, the commercial law should be different from civil law, economic law or administrative law in the cognizance and settlement of commercial disputes.

Civil Law Logic and Commercial Adjudication The Inconsistency between Civil Law Logic and Commercial Practice

When determining commercial disputes or special institutional arrangement among merchants in accordance with civil law logic on the basis of “fairness” and “good faith”, the problems that may arise are as follows: “The maintenance of substantial justice and the static safety of property are more emphasized; the profitability, convenience and efficiency of commercial transactions are not sufficiently highlighted; even the over-commercialization of civil cases and over-civil cases have even arisen, and the lack of care for ‘human’ and lack of respect for the professionalism and efficiency of the ‘business’ coexist”:

The “person” in the logic of civil law cannot explain the status and liabilities of a “incorporation corporation” in commercial activities.

A “legal person” as mentioned in the Civil Law is a kind of fictitious person, whose capacity for rights and capacity for conduct is acquired as of the date of its establishment. On the Theory of European Civil Law, “every legal person shall establish its own form of organization. In general, the legal person body shall realize three functions, namely the function of forming will, the function of leading and the function of supervision”; in Germany, Article 22 of the German Civil Code states that “in the absence of a special federal law, associations established for the purpose of economic operation acquire the legal capacity due to the authorization of the state”. Therefore, a “company under incorporation” has no legal capacity and cannot perform any legal act or own property in its own name. It can be seen that every country of civil law system denies the personality status of “legal person” in the civil law of the company in the establishment.

But in real life, the process from the preparation to the completion of the company is not a seamless process. Most of the companies need a certain time to complete the legal establishment, thus forming a realistic “company in the process of establishment”. The “incorporated company” has not been registered, has no legal person status, nor does it have the legal capacity, but it may actually conduct business operation for the company to operate after its establishment. (This is not only the preparation activities for the establishment, but also involves specific business activities, for instance, bidding for the land in the name of the Company before the completion of the establishment of the Company, in order to obtain the land approved by the government).

The civil law system can not generalize and generalize the behavior attribute and validity of the “company under

establishment" before the completion of the establishment of the company, because the civil law system holds that "the company under establishment has not been registered to acquire the personality, so it can not enjoy the capacity of right and capacity of conduct". In order to remedy the problem that the definition of "person" fails to explain the validity of the act of "the company under establishment", the civil law theory puts forward that "for a legal person under establishment, the founder acquires rights and assumes obligations at all stages, and the provisions of the partnership may be applied mutatis mutandis; When the establishment of a legal person is successful, the rights and obligations of the established legal person are transferred directly to the established legal person because of the identity between the established legal person and the legal person who obtains the right ability afterwards. However, a problem arises therefrom: for a natural person, his/her capacity for rights exists on the date of birth, and his/her capacity for civil conduct shall be determined in accordance with the provisions of the law. For a natural person with limited capacity for civil conduct, the validity of the legal relationship between the person with limited capacity for civil conduct is finally determined based on the "acknowledgement of option" of his/her guardian. There is a parallel relation between "ratification" and "no ratification", which keeps the consistency and coherence between the legal effect and the effect of "selective ratification". In terms of "quasi-partnership", it cannot logically explain why an existing company is "the partnership liability of shareholders" one second and then "unlimited liability of the company" (in other words, "the limited liability of shareholders"). Because the transfer of responsibility between them is "leapfrog" rather than natural succession.

Moreover, we should also pay attention to the fact that once the establishment of a company is completed, the completion of the company as a legal person to the company as a legal person is completely independent of the legal person's will as a legal person. That is to say, whether the company is willing or not, it must accept the legal consequences of the actions of the company in the process of establishment.

Commercial Law Thinking and Commercial Trial: The Difference between Commercial Law Thinking and Civil Law Logic

1. Commercial Law Focuses on the Typological Study of Commercial Subject

2. The protection and cognizance rules of ownership in commercial law are different from the "ownership rules" in traditional civil law.

3. The "balanced protection" of private rights in commercial law is different from the "absolute protection" of civil law.

1. Commercial Law Focuses on the Typological Study of Commercial Subject

Rather than the Personality Significance of the Subject's Existence In the traditional civil law of the mainland, the traditional theory of civil subject focuses on the study of the capacity for rights and conduct of "person" and "legal person", The discussion focuses on the personality meaning, legal status and expression of intention of natural person or "fictitious person", and forms "unlimited liability" and "limited liability" on the way of liability.

But in the commercial legal system, the study of commercial subject is based on the response to different demands of merchant's liability scope in commercial practice. Therefore, the study of commercial subject and its legal liability is based on the variety of commercial behavior and the different willingness and ability of merchant to bear risks. For some merchants, commercial registration is not necessary for them to qualify as merchant, and even if they do not fulfil their obligation to do so, they may qualify as merchant on the basis of their profit-making activities, provided that they act in accordance with the positive elements required of such merchant.

Just because of the different research paths mentioned above, in the history of legal system, besides the concepts of "natural person", "partnership" and "legal person" in traditional civil law, a new type of subject has emerged to meet the different interests of different subjects in commercial society. For example, as a "legal act" contract as the core of the commercial trust has been regarded as a commercial subject in many countries and has been recognized and recognized by the law.

Under United States law, commercial trusts already have undisputed strong legal personality and limited liability by delegating the internal organizational matters to the trust's governing documents (articles of association). Commercial trusts can be created in a manner similar to that of publicly held corporations, with beneficiaries acting as shareholders, by means of a proper arrangement of articles of association.

Therefore, as far as the subject system in the sense of commercial law is concerned, it is no longer limited to the study of the legal personality of "natural person" or "legal person" (and the capacity for action and right generated by it), and the commercial law has transcended the discussion of the meaning of civil subject personality. On a larger scale, we study and discuss the subject system which can carry and reflect the objective demands of commercial activities.

2. The protection and cognizance rules of ownership in commercial law are different from the "ownership rules" in traditional civil law.

Generally speaking, the rules of ownership in civil law lay emphasis on the protection of "static" property right, which is based on the original right holder, and the emphasis of the right protection is on the original right holder. The bona fide third party under the "bona fide acquisition system" is only regarded as an exceptional measure to protect the balance of interests.

But in commercial law, on the basis of the liquidity and turnover frequency of "commodity", the rules of ownership in commercial law pay more attention to the redistribution of rights in the process of "dynamic circulation", which tends to protect the result of transaction rather than the original right holder.

For example, if an instrument is lost without a specific procedure for public invitation to assert notice, the instrument itself is valid so long as the holder proves continuity of the instrument, and the issuer and all predecessors to the instrument remain entitled to liability on the instrument according to the amount embodied on the instrument, whether or not there is a transaction between the bill holder and the bill obligor, or whether the bill holder has "bad faith" or "good faith" or not, this is different from the traditional civil law.

If we deal with this kind of commercial arrangement according to the rules of ownership in traditional civil law, many commercial practices which have been widely used in western market economy will be at a loss in our civil law system.

3.The "balanced protection" of private rights in commercial law is different from the "absolute protection" of civil law.

As a method to protect the right holder, the Civil Law adopts absolute protectionism for the individual private rights enjoyed by civil subjects, that is, "the sacred and inviolable private rights". The significance of the existence of civil law is to define the boundaries of various rights of civil subjects, and then to achieve the protection of different types of rights of civil subjects, no matter real right or creditor's right, the change of rights in traditional Civil Law is based on the right holder's expression of intent (such as the transfer of real right or the transfer of creditor's right). In the absence of the right holder's expression of intent, statutory conditions are required to produce the effect of change of rights (such as statutory inheritance and state expropriation).

Accordingly, "implied" cannot be a manifestation of intent of a "consent" (or "promise") in the context of civil law. No person is entitled to determine at his own discretion a transfer or transfer of a real right or creditor's right of another person on the basis of "implied consent" without the express "consent" of the parties, unless such an implied consent can be lawfully inferred from customary usage of trade or from a party's conduct. This is an important reflection of the principle of "absolute protection" of civil law in respect of private property rights of civil subjects. But from the perspective of commercial law, the circulation and complexity of transactions lead to different kinds of legal relations between commercial subjects and other commercial subjects or civil subjects (such as investment relations between companies and shareholders, tax relations between companies and government, debt relations between companies and creditors, labor relations between companies and employees, etc.). Because of the diversity and complexity of these relations, commercial law tends to balance the interests of parties involved in all kinds of legal relations, that is to say, the principle of balanced protection of risks and interests, rather than absolute fairness in the sense of private rights.

For example, in the same way, the field of contract law of commercial law may recognize that "silence" is regarded as consent in the form of agreement or in the form of an explicit enumeration of law, in order to promote the liability of a commercial subject or improve the efficiency of a transaction. Alternatively, in the field of bankruptcy law, when a company is facing bankruptcy and reorganization, shareholders or creditors may, through the "majority decision principle of shareholders" and the "majority decision principle of creditors", determine the bankruptcy and reorganization schemes generally applicable to all shareholders or all creditors such as "offsetting debts with shares", "debt-to-equity swap" and "gift shares for repayment of debts", regardless of whether a minority of dissenting shareholders or a minority of dissenting creditors oppose to the disposal of individual private rights (whether "equity" or "creditor's rights") by majority vote, which is obviously different from the absolute protection principle of civil law in terms of the principle of private rights protection and disposal under commercial law.

Codification of Civil Code and Commercial Trial

The Applicable Path of Commercial Law Thinking Confining civil law and commercial law in the relationship between "special law" and "general law" fails to respond correctly to the appeal and essence of commercial rules

Originating from the civil society, the civil law was originally intended as a "Civil law" and was intended to solve the problem of defining the rules of human rights and property ownership in the civil society, therefore, the civil law as a whole presents a single, point-to-point "Static" protection characteristics. Since the disputes to be settled in civil law do not involve too many subjects or multiple legal relationships, the latitude of value judgment

in civil law is relatively single.

But in the commercial activity, the commercial society's activity always presents with "The continuous transaction" as the characteristic, this kind of continuous transaction process leads to the balance of interests between commercial law and civil law when facing disputes. Although the individual protection of the transaction subject is also emphasized in commercial transactions, the implementation of commercial rules needs to take more account of the balance of interests of the whole commercial subject, traders must abide by and enforce the results of commercial transactions resulting from the operation of a commercial rule, even if the results of such operation may be detrimental to the interests of individual participants, that is, commercial law needs to protect the authority of commercial rules to ensure that the participants of commercial transactions have clear expectations of the results of the operation of commercial rules.

In this sense, the principle of "Protecting the result of transaction" is the primary logic of commercial law thinking, the focus of the commercial dispute settlement rules may not be whether to cancel the transaction because it is fair to the individual participant, but in the protection of the transaction results under the logic of the interests of the specific commercial subject under the "Balance of interests" principle in other ways to balance the protection of the injured interests of the parties.

Taking the relationship between "Special law" and "General Law" as the way of settling commercial disputes and disputes not only can not correctly explain the nature of commercial arrangements, on the contrary, the trial logic under the civil law will have an impact on the legitimacy of the commercial arrangement and its rules, and then affect the commercial subject's clear expectation of the results of the commercial rules.

II. CONCLUSION

The debate on the separation of the civil and commercial business can't be the combination of the civil and commercial business in Switzerland or the separation of the civil and commercial business in France and Germany, both of which may not be the result of their respective history. But after the development of the Civil Code and the Commercial Code in their respective paths, they both developed clearly for hundreds of years. Whether civil and commercial investigators should be integrated or separated has developed from a historical issue of fact to a theoretical one, and has attracted later jurists and legislators to explore and study. The differences between commercial law and civil law in the logical system are obvious. In China, many scholars have fully realized and demonstrated the importance of the thought of commercial law to the judicial practice, and put forward that "we should pay attention to discover the particularity of commercial law, respect the particularity of commercial law, and carry forward the ideas and thoughts in commercial law through commercial trial, forming the idea and thinking of commercial trial", "Commercial law takes promoting business and increasing wealth as the core system value, so the idea of commercial law should be established in commercial trial".

Therefore, if China's commercial trial is concerned, the coverage of commercial norms in the compilation of civil code may deviate from the original value and intention of commercial law, which leads to the "opposite" decision in the civil code. Because of this, this paper hopes to show the particularity of the thinking of commercial law different from the logic of civil law, and to abandon the mode of "great unification" which tries to adjust all economic and commercial legal relations. At the legislative level, the Civil Code shall also be strictly interpreted as a general term for civil laws and regulations. When encountering a specific dispute, it is up to a judge to judge whether the nature of a litigation-involved case belongs to a civil legal relationship, which shall be subject to the adjustment of the Civil Code. Otherwise, under the legislation mode of civil and commercial unification, the original civil law based on rigorous logic system will be easily broken through and challenged in the real commercial practice because of the complexity of commercial transaction and the spirit of innovation of the subject. Therefore, in order to obtain the result of adjudication, judges invoke the rules of civil law either according to the logic of the norms of civil law or compromise with the reality and allow the practice to break through the norms of civil law.

Therefore, it is obvious that the new economy and new phenomena emerge one after another in the context of China's economic development with the legislative system of "civil and commercial integration" and the path of civil law interpretation rules. Therefore, even if the independence of commercial law cannot be achieved in theory and legislation (such as the drafting of the General Principles of Commercial Law or Commercial Code), we should at least leave enough legal space for the adjustment of commercial activities at the legislative level, so as to leave enough legal and theoretical space for commercial adjudication.

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