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The Renegotiation in Change of Circumstances

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The Chinese Civil Code has added the rule that an unfavorable party may request renegotiation in change of circumstances. However, the existing doctrines characterizing renegotiation as an obligation of performance, an obligation to oneself, or a collateral obligation are not reasonable. And the doctrine of the right to renegotiate is even more contrary to the civil law system. Renegotiation does not promote private autonomy and the principle "pacta sunt servanda", as might be expected, but rather may lead to a greater bargaining advantage for the party benefiting from the change of circumstances and increase judicial costs. The need for renegotiation cannot be justified from the perspective of legal economics and comparative law. A change of circumstances does not necessarily require renegotiation, and how to renegotiate and the consequences of not renegotiating are not clear in the current legal system. Renegotiation should be regarded as mere an appeal from the law and removed from the discussion of rights and obligations.

Keywords: renegotiation, change of circumstances, adaptation of the contract, appeal from the law

Introduction

The change of circumstances is an exception to the principle "pacta sunt servanda". According to Article 533 of the Civil Code of the People's Republic of China the aggrieved party can request the court or an arbitration institution to rectify the contract when the conditions are met.[1] However, the courts may deviate from the original contract and substitute their own value judgments for those of the parties, which violate the freedom of contracting. Therefore, the right to make a decision should be returned to the parties. So the new Chinese Civil Code introduces renegotiation for the first time in China, which is considered a major step forward. According to the prevailing opinion in China, this legislation incorporates international experience and an increasing recognition of this concept. But a few opinions have questioned whether its role is exaggerated. In this paper, we will analyze the legal nature of renegotiation, its function, and how it is enforced in the civil procedure, discuss whether the current view is reasonable, and give our own insights.

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[1] Article 533 Civil Code of PRC: After a contract is formed, where a fundamental condition upon which the contract is concluded is significantly changed which are unforeseeable by the parties upon conclusion of the contract and which is not one of the commercial risks, if continuing performance of the contract is obviously unfair to one of the parties, the party that is adversely affected may re-negotiate with the other party; where such an agreement cannot be reached within a reasonable period of time, the parties may request the people's court or an arbitration institution to rectify or rescind the contract.
The people's court or an arbitration institution shall rectify or rescind the contract in compliance with the principle of fairness, taking into account the actual circumstances of the case.

Doctrines and Rules on Renegotiation in Comparative Law

German Law

As a representative of the civil law system, the obligation to renegotiate has been recognized in a number of areas of German private law, such as Company Law, Employment Law. Whether this obligation exists in the context of changed circumstances is controversial. Before the codification of § 313 BGB, it was only affirmed in one judgment. Nevertheless, some opinions hold that the German Supreme Court (RG before 1945 and BGH after 1945) had already implicitly recognized an obligation of renegotiation (Eidenmüller, 1995, p. 1067). However, case law has not provided any clear indications in this regard.

Indeed, Paul Oertmann, the originator of today's § 313 BGB, stated that a contractual adaptation through renegotiation was the right solution. It is now recognized that the first to propose a systematic renegotiation theory was the German scholar Nobert Horn, who threw out the argument that even if there is no renegotiation clause in the contract, there exists an obligation to renegotiate in German law. That is, in addition to agreed clauses of renegotiation and obligations of renegotiation under special law, the obligation of renegotiation should also be constituted by a general statutory fact, since there is always a statutory (ex lege) obligation of renegotiation in the event of changed circumstances and an adaptation of the contract. Horn attempts to understand renegotiation of an adaptation of the contract as a general legal effect of the change of circumstances (Horn, 1981, p. 276).

French Law

The French Civil Code did not originally contain a provision about the change of circumstances, but when amended in 2016, it was added to Article 1195. Unlike German law, French law expressly provides that the party who had not accepted the risk of such a change may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligation during renegotiation. In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. Some French scholars are of the view that there is no obligation to renegotiate and that refusal to renegotiate is not a fault (Rowan, 2022, p. 186). However, the legislator is of the view that according to Article 1195 of the French Civil Code, both parties are in principle free to refuse to renegotiate, but once their refusal is recognized as "abusive", it is a breach of its duty of good faith (Article 1104 of the French Civil Code), and they have to be punished. The penalty may be that the judge will rectify the contract if the penalized party wishes to rescind the contract (Fauvarque-Cosson, 2017, p. 202).

Uniform Legislation

It is evident that renegotiation has received attention from European and international uniform legislation in recent years. For example, Art. 6.111 (2) of the PECL (Principles of European Contract Law) stipulates that the parties are obliged to renegotiate the contract in the event of changed circumstances. According to Art. 6.111 (3) PECL, the party shall pay damages if he breaches good faith and refuses or breaks off the renegotiation. The level of renegotiation was later reduced in the DCFR (Draft Common Frame of Reference). According to Art. III-1:110 (3) (d) DCFR, renegotiation is only an obligation to oneself that is unilaterally assigned to the party disadvantaged by the changed circumstances. Thus, the obligation of renegotiation does not apply to the favored

party with an interest in continuing to perform the contract. This incentive structure created by DCFR is peculiar and questionable. This regulation was not subsequently adopted by CESL. The provisions in the CESL (Common European sales law) are similar to those in the PECL. According to Art. 89 (1) CESL, both parties are obliged to renegotiate in the event of the changed circumstances in order to adapt the contract. The breach of this obligation to renegotiate leads to compensating for damages.

At an international level, the PICC in Art. 6.2.3 (1) regards the obligation to renegotiate as a legal consequence that takes precedence over the adaptation of the contract. This provision processes two features: firstly, it provides for renegotiation not from the point of view of an obligation but from that of a right; and secondly, it does not provide for the legal consequences of failure to cooperate in a renegotiation situation as in the case of the PECL.

American Law

In American law, the UCC regulates the parties' cooperation in adapting the contract if the contract is disturbed by changed circumstances in Article 2-615 and Article 2-616. Otherwise, the contract would be terminated. The renegotiation is based on a different theory, namely the theory of relational contracts by Ian R. Macneil. In his view, the will of the parties and the contractual promise are not the only contractual binding factor (Macneil, 1974, p. 693). The complex economic context of the social relationship in modern society also constitutes the mutual performance in contracts. According to this theory, the special relationship between the contracting parties is no longer a one-way process from contract conclusion to the performance of the contract, but represents a dynamic system. From the moment the contract is initiated, the parties are supposed to negotiate with each other constantly. The parties are willing to eliminate potential conflicts because they have a close social relationship and are interested in continuing this relationship. They should compromise through negotiation in order to avoid disputes over rights and obligations. In fact, Macneil himself is critical of renegotiation because there is no agreement to agree in the common law of contract. However, some Japanese scholars continue to develop the theory of relational contracts in the area of renegotiation, which is further accepted by some Chinese scholars.

The Arguments About the Legal Nature of Renegotiation

With regard to the debate on the legal nature of renegotiation, the main views are divided into two, namely, the obligation to renegotiate and the right to renegotiate. Because the concepts and systems of Chinese civil law are mainly influenced by the civil law system, the obligations can be subdivided into the primary obligation of performance, the collateral obligation, and the obligation to oneself.

The Obligation to Renegotiate

The primary obligation of performance. A renegotiation is a contractual or statutory obligation of performance which is enforceable and secured by compensation for losses, and the content of the obligation is a renegotiation. So when the party fails to perform his contractual obligation to renegotiate or his performance does not conform to the agreement, the other party may request the former party to bear default liability such as continuing to perform his obligations or compensating for losses. The German BGH, for example, has held that renegotiation creates the conditions for the continuing to perform and excludes the effect of the change of circumstances on

the contract. Therefore, the failure to renegotiate amounts to a delayed performance of the contractual obligation and the breaching party shall compensate or the damage arising from the delay.[2] In Chinese law, there is also such a view (Hao, 2023, p. 55).

The obligation to oneself. The concept of *Obliegenheit* in German civil law, also known as obligation to oneself, is a weak obligation, the result of which is not continuing to perform a obligation or compensating for losses, but rather the loss of the legally advantageous position of the party burdened with this obligation or suffering of some disadvantages, which in some cases may even be economically greater than the damages for the breach of the obligation.

With regard to the renegotiation, one could speak of an obligation to oneself, because one party is generally advantaged and the other party disadvantaged by the change of circumstances. The disadvantaged party should protect its own interests by renegotiating. If he fails to do so, he bears the loss himself. The DCFR also assumes a *Obliegenheit* to renegotiate. While Art. III-1:110 (3) (d) DCFR unilaterally assigns the renegotiation to the disadvantaged party, this obligation does not apply to the favored party. In China, those who regard renegotiation as an obligation to oneself form the predominant opinion (Wang, 2019, p. 9). Article 533 of Chinese Civil Code expressly assigns the possibility of renegotiation to the disadvantaged party. But the difference between obligation of performance and obligations to oneself does not apply in all legal systems.

The collateral obligation. Renegotiation as a secondary obligation or a collateral obligation means that there is an implicit duty in a contract to reach a necessary compromise through constructive negotiation. Participation in the reconstruction of the legal transaction is a good conduct. Just like the concept of secondary obligations, renegotiation should stem from the principle of good faith (Han, 2024, p. 37). Collateral obligations require that each party takes into account the legal interests and interests of his contractual partner and provides the necessary cooperation for the performance of the contract. This secondary obligation to renegotiate is also secured by a claim for damages. It is doubtful how the obligation of renegotiation should perform in individual cases. Nevertheless, it is clear that minimum requirements can be placed on the renegotiation, such as release of information, making of proposals, fair negotiations, and refraining from fraud and coercion (Martinek, 1998, p. 339). These dependent secondary obligations are also legal obligations. Moreover, the obligation to renegotiate was not an obligation to achieve a certain result. Otherwise, it would be a primary obligation if the parties are forced to reach an agreement on a contractual adaptation. In contrast, the content of this obligation is the negotiation itself. The party is only obliged to participate in and consider the other party's proposals for the contractual adaptation, which promotes an out-of-court settlement of the dispute.

The Right to Renegotiate

In Chinese literature, there is a view that renegotiation is a right of formation. Almost all existing theories on renegotiation consider it an obligation. The supporters of the formative right do not consider this to be correct. They are of the opinion that the obligations in the above-mentioned theories are legal obligations with a mandatory pre-litigation effect that is even stronger and stricter. The parties must then renegotiate. Only if the renegotiation fails do the parties turn to the court. The qualification of obligations to renegotiate imposes an excessive restriction on private autonomy, which is a manifestation of the "paternalism" of the law; even if the

[2] See BGH NJW 2012, 373, 376.

parties are forced to renegotiate, they could reach no agreement because they may have no will to renegotiate; but such a compulsion to renegotiate is costly and inefficient (Zhang & Ning, 2019, p. 144).

According to this view, renegotiation is a right of formation assigned to each party to the contract because the contracting parties can best protect their own interests. As long as one party exercises its right, both parties enter directly into the renegotiation procedure, and this procedure is an inevitable preliminary procedure for the judicial organization; accordingly, the other party can no longer sue directly for rectifying or rescinding of contract, which constitutes a restriction of his right in the process. In this way, a fraudulent delay in the renegotiation could be avoided, as every right to negotiate is subject to a time limit. The provision on renegotiation in Art. 6.2.3 (1) PICC supports this qualification of the right to negotiate on the basis that the wording uses the expression entitled to request renegotiation, which is different from the expression bound to enter renegotiation in Art. 6:111 (2) PECL. If a party abuses his right, the legal consequence is liability for breach of contract.

Critical Perspective

Renegotiation should be only a non-binding appeal. The reasons are as follows:

Inappropriateness of qualification as an obligation. Compared with obligation to oneself, obligations of performance are stronger in terms of sanction, intensity, and enforcement. However, the obligation to participate in renegotiation in civil law violates private autonomy and therefore cannot be enforced. As long as the renegotiation is not a compulsory process prior to civil proceedings, the law can only provide the parties with a renegotiation proposal. If the parties do not reach an out-of-court settlement by renegotiation before bringing an action, this only has consequences in terms of costs. The need for legal protection does not cease to apply. In China, the Supreme People's Court has established a rule for civil proceedings, according to which the People's Court should actively guide the parties to rectify the contract through renegotiation. This rule is only a judicial appeal.

If renegotiation is assigned as an obligation to oneself to the party disadvantaged by change of circumstances, this is also problematic. The party disadvantaged by the changed circumstances is now additionally disadvantaged by the fact that he might be unable to initiate a new transaction in good time due to an information asymmetry or external circumstances and therefore loses the opportunity to adapt the contract.

The classification as a collateral obligation appears to be appropriate. In comparison to a primary contractual obligation, it avoids the obligation to reach an agreement. At the same time, a collateral obligation is secured by the sanction of compensating for damages, which has a stronger effect than obligation to oneself. However, collateral obligations relate to the integrity interest, while primary obligations relate to the equivalence interest. When renegotiating an adaptation of the contract in change of circumstances, the parties should be guided by the original contract. The parties begin the renegotiation precisely in order to restore the equivalence in the contract. Here, the qualification as a collateral obligation is contradictory. Although as mentioned above, the collateral obligation to renegotiate merely represents a compulsion to behave, but not a compulsion to reach an agreement. However, if a compulsory preliminary procedure prior to bringing an action is not regulated by law, there are accordingly no liability and sanctions for refusal to renegotiate. Finally, the qualification as a right to renegotiate is unreasonable.

The ambivalence of the right to renegotiate. Due to private autonomy only in individual cases can the unilateral arrangement of a contracting party exceptionally affect the rights and obligations of the other party. Replacing self-determination with decision of others requires strong grounds, which usually lie in the misconduct of the other party. For example, the buyer is entitled to a reduction in price if the seller delivers a defective item. The change of circumstances normally occurs without the influence of the parties and does not constitute a breach of obligation. Even if a party is not disadvantaged or even advantaged by the changed circumstances, there is no reason for their rights to be affected without their consent.

The Functions of Renegotiation

Proponents of the obligation to renegotiate usually believe that the renegotiate has the following theoretical advantages and functions.

Renegotiation and Private Autonomy

According to this thesis, private autonomy is the cornerstone of civil law. The parties themselves are the creators and controllers of the contractual relationship. They know their own concerns and interests best, and they can choose a solution that is acceptable to both parties from the many possible adaptations. Therefore, the obligation to renegotiate as a preliminary stage of contractual adaptation is an embodiment or extension of private autonomy (Martinek, 1998, p. 374). In contrast, the adaptation by a judicial decision does not correspond to the basic idea of the legal system, which represents a heteronomous character (Thole, 2014, p. 446).

However, the question arises: In what way is private autonomy continued or extended if the obligation to renegotiate is recognized? And which party benefits from this? Both parties have freedom of contractual adaptation and can voluntarily reach an agreement on the adaptation. This is precisely the purpose of private autonomy. Usually, one party of the contract is disadvantaged by the change of circumstances, while this is advantageous for the other party. There are therefore two conflicting interests: On the one hand, the disadvantaged party has the interest to rectify or rescind the contract, on the other hand, it is the interest of the advantaged party to adhere to the original contract. The continuation or extension of private autonomy can only occur insofar as the party requesting the contractual adaptation is given the opportunity to renegotiate. In contrast, the other party has no interest in renegotiation. An obligation to negotiate contradicts the will of this party and weakens its contractual freedom.

The so-called extension of private autonomy is therefore only formal. The obligation to renegotiate is no more useful for the parties than the contractual adaptation through a legal arrangement. From the sight of the party willing to adapt, he has already suffered disadvantages due to the changed circumstances. As a result, its renegotiation position is not stronger but weaker than its previous negotiating position. He can only expect that the favored party will take his difficulties into account and agree to a compromise. In contrast, a judicial adaptation could be advantageous. This is because the court only needs to restore the disturbed equivalence structure based on the original contract without exposing the parties to the game of bargaining power (Martinek, 1998, p. 376). Conversely, the party interested in maintaining the status quo is more likely to be the party willing to renegotiate. The equivalence shift gives him an increase in power and better bargaining power. He could exploit this power and force his contractual partner to accept a tolerable minimum of adaptation. In this respect, a judicial adaptation, in which the party has to give something and make a compromise, would be more favorable

than the renegotiation route. The obligations of renegotiation turn the right into a disadvantage and the obligation into an advantage, which does not correspond to the purpose of the change of circumstances.

Renegotiation and the Principle "Pacta Sunt Servanda"

A consensual adaptation by the parties might be preferable to a non-consensual change in the legal position. An adaptation of the contract is an exception to the continuation of the unchanged contract. By the changed circumstances the unchanged contract represents an expression of the principle "pacta sunt servanda" and the contractual adaptation represents its breakthrough. The principle of contractual fidelity is accorded a higher value. With the request to rectify or rescind the contract, the party seeking adaptation is in fact attacking the counterparty's contractual fidelity. Therefore, the adaptation requires a higher standard, namely agreement between the parties.

However, adapting the contract to the changed circumstances can also prove to be an expression of contractual fidelity. If the changed circumstances lead to unacceptable results that are incompatible with law and justice and one party is burdened beyond the limit of sacrifice, adherence to the unchanged contract is contrary to the requirement of good faith. The party willing to adapt is generally aiming to realize the contractual distribution of risk by adapting the contract to reality, which corresponds to contractual fidelity. In contrast, the demand of the other party to continue to perform the original contract is an abuse of rights.

Therefore, the contractual adaptation itself is a private autonomous arrangement. There is no need to introduce an additional obligation to renegotiate.

Renegotiation From a Legal-Economic Perspective

According to the view in favor of the obligation to renegotiate, many elements must be taken into account when adapting a contract. A certain degree of flexibility as well as the interests of both parties must be taken into account. Judges cannot perform this task because they often lack commercial experience. However, if the parties can renegotiate smoothly, this can save time and costs compared to judicial adaptation, and save the judge the trouble of examining the contract (Lüttringhaus, 2013, p. 275). Renegotiation and the private autonomy behind it can realize freedom of contracting in a more economical way.

However, the argument of cost savings is doubtful. Renegotiation is not free and incurs transaction costs. If the parties have to renegotiate first, this leads to delay and unnecessary waste of resources. In some cases, the scope for negotiation for the parties could be so small that the parties themselves cannot expect to reach an agreement. Therefore, the obligation of renegotiation is not appropriate in these cases. Moreover, it has been proven that the parties tend to be over-optimistic before the trial. They are good at identifying their chances. As a result, the scope of negotiation is even smaller than it should be. The obligation of renegotiation could also induce unnecessary investments or opportunistic breach of contract. The parties could behave opportunistically in order to improve their negotiating position, for example fraudulent representation of certain circumstances (Eidenmüller, 1995, p. 1065).

There is also the opinion that the renegotiation can be based on a legal-economic thesis. From an economic point of view, it is easier for the parties than for the judge to make a decision on the content of the adaptation that maximizes the contractual benefit. By renegotiating, the parties can enjoy the so-called coordination rent and rationalize the allocation of potential factors that can create value in the moment (Thole, 2014, p. 446). Pareto

efficiency exists because both parties can benefit from the renegotiation, or none of the parties is in a worse position or at least one of the parties is in a better position. In this way, the loss of welfare due to the continuing to perform of the unadapted contract is avoided (Thole, 2014, p. 446). The theory of relational contracts is also based on legal-economic analysis. According to this theory, the parties should restore the disturbed community of interests through renegotiation. The contract is incomplete insofar as the parties cannot foresee all future developments. The question arises: to what extent the judge can carry out a subsequent reconstruction of this relational contract. According to the prevailing view, this should only happen if the courts are relatively competent and the parties are relatively incompetent (Schäfer & Ott, 2020, p. 769). As a rule, this requirement is not met because the parties are obliged to do so and the court is not.

The legal-economic consideration still raises doubts. Almost all views in favor of obligations or rights to renegotiate stipulate the legal consequences in the event of a breach of obligation. However, they do not explain exactly what type of behavior constitutes a breach. Is there already a breach if only one party completely and finally refuses to renegotiate? It is dangerous to leave the task of determining which party is behaving unreasonably to the court. This is because courts tend to recognize this on some signals (Geest, 2010, p. 123). For example, it is a signal if a party has broken off the renegotiation. But breach of renegotiation needs to be judged by the context, and simply breaking off negotiations may not be the appropriate standard. If the costs of renegotiation are very high for both parties, a court decision makes more sense. Breaking off or not starting the renegotiation could therefore be the right course of action.

In summary, it can be said that the legal economic analysis only plays a role in ideal cases in which the transaction costs are not so high and the scope of negotiation is wide enough. However, this is rarely the case.

Destructive Renegotiation

The Insufficiency of the Preconditions for Renegotiation

A prerequisite for renegotiation should be that there are several possibilities for adaptation of the contract. Only then is it necessary for the parties to choose an appropriate option through negotiation. If there is only one adaptation option, renegotiation is unnecessary. At most, there is an obligation to agree or consent, which is also pointless. However, in many cases where a fundamental condition upon which the contract is concluded is significantly changed, there is just a single method of adaptation of the contract. For example, in most cases of equivalence disruption due to currency devaluation, the contract is only adapted by increasing or reducing the price in line with the current correct index. The appropriate equivalence structure is thus achieved without renegotiation.

The Uncertainty About Content of Renegotiation

The greatest weakness of the obligation to renegotiate is that it is not clear exactly what it means in terms of content. In the judgment decided by the BGH, the party entitled to the adaptation requested the opposing party to cooperate in the adaptation of the contract. However, the opposing party did not respond to this proposal. In the opinion of the BGH, he delays his performance of the principal obligation.[3] According to the correct view, the only negative consequence of this is that the opposing party may not completely reject the negotiation. In the

[3] See BGH NJW 2012, 373, 376.

literature, the contents of the obligations of renegotiation include, for example, initiating contact, providing and exchanging information, formulating an adaptation proposal, commenting on proposals, adhering to the schedule, appearing at the place of negotiation, etc. (Martinek, 1998, p. 341). If it is only a matter of providing information, an independent obligation of renegotiation is unnecessary. This is because it can follow directly from good faith. If the content of the obligation to renegotiate is a statement or comment on proposals, what special requirements apply to it? Is a simple refusal sufficient for a breach of the obligation to negotiate? Or must the opponent of the adaptation provide sufficient reasons against the adaptation and then the court must examine whether these objections are justified? In other words, there could be a conflict between procedural law and substantive law: Is a simple denial in procedural law sufficient, or should the obligations in substantive law override and reinforce the procedural obligations? These questions are difficult to answer.

The Inappropriate Legal Consequences of the Renegotiation

If the renegotiation is broken off, this does not lead to liability under "culpa in contrahendo" (fault upon conclusion of the contract). This is because this liability only arises if the negotiating party triggers a trust, for example if he promises the other party that they will reach an agreement. But the obligation to reach an agreement should be avoided in any case. In principle, a party can break off negotiations. If there is no trust at all and the parties do not believe that an agreement can be reached, there are no liability problems. A liability of compensating for damages can only be aimed at the non-negotiation or the deliberate delay of the negotiation.

The problem with compensating for the damages arising from the delay is that the plaintiff must prove not only the existence of the specific possibility of contractual adaptation, but also the deliberate delay on the part of the opposing party. Even if the obligation to negotiate is recognized, they should not be understood as obligation of result, but as obligation of means. If no specific result for renegotiation has been provided for by the law, it is hard to judge when the delay occurs.

Conclusion

Renegotiation has no legal significance, and it is only a kind of appeal of the law, just like encouraging both parties to mediate on their own. In China the parties may only request the people's court to rectify or rescind the contract when the circumstances changed. The significance of renegotiation is only: if the parties can reach a mutually acceptable agreement about the contractual adaptation, the court can more easily and quickly recognize it without the need for substantive review. However, if no agreement can be reached, the renegotiation process becomes cumbersome. So the point of this paper is that renegotiation should be excluded from legal evaluation.

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