

Comparison between Chinese Contract Law and English Contract Law on Third Party's Right of Action

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Keywords: Doctrine of privity, Right of action, Third party, Contract law.

Abstract. A strict interpretation the doctrine of privity in contract law will always deny a third party's right of action. However, more and more exceptions have emerged with the development of the society. The tendency of the socialization of contract is discovered through the comparison between Chinese contract law and English Contract Law, which are representatives of the two main legal jurisdictions in the world, although some differences exist in the forms and conditions. It is predicted that third party's right of action will continue expanding as social benefits are getting increasing attention the field of contract law.

1. Introduction

The doctrine of privity in contract law provides that a contract cannot confer rights or impose obligations on any person or agent who is not a party to the original agreement. The doctrine of privity originates from Roman Law, in which this principle is called the privity of debt. This principle requires that the contract should be reached between the offeror and offeree (inter stipulantem et promittentem negotium contrahitur). It is also required that nobody should make the contract for the other person (Aheri stipulafi nemo potest). "Debt" was called "juris vinelum" in Roman Law. So the contract can bind the parties only [1]. However, with the development of the economy and society, there are many breakthroughs to this principle. But the doctrine of privity is still an important principle in contract law since contracts are the outcomes of the intention of the parties. The person who is not a party to a contract is not bound by the contract which would otherwise hurt the freedom of will of that party. But since where there is a principle there is an exception, so it is with the doctrine of privity. The exception is that a person who is not a party to a contract can enjoy the benefit of the contract according to the intention expressed in the contract [2]. So the third party is the third party beneficiary. Perhaps there exists a presumption of the will of the third party to get the benefit of others' contracts. However the question is whether the third party who was not a party to a contract can sue upon the contract in order to get the promised performance, even when the contract was entered into with the very object of benefiting him. If we observe the principle of privity strictly, there seems little possibility for the third party to obtain that right, but both in common law and Chinese law there are many acts and institutions which can protect the rights of the third party [3].

2. Third party rights in English contract law

Judicial recognition of third party rights in Common law is usually traced to *Dutton v. Poole*. It is a family dispute in which the father wanted to cut and sell wood to raise a dowry for his daughter. The eldest son who expected to inherit the wood objected and promised his father that he would pay his sister a certain sum if his father would not sell the wood. But after the father died, the eldest son who inherited the wood refused the payment of the certain sum. The question on appeal was whether the daughter should be allowed to recover on the judgment entered by the trial court when the promise on which she sued was made to her father rather than to her. The court held that suit on a promise was not restricted to a promisee. The third party intended by the original parties to benefit from the promise could sue in her own name. In twentieth century terminology, the daughter (sister) was recognized as

a donee beneficiary [1]. Simply stated, the principle was that an intended donee of an enforceable promise had a legally recognized right to enforce the promise. Of course, the case by its facts was limited to an intra-familial promise [4].

The principle was reaffirmed in *Martyn v. Hind* in which Lord Mansfield expressed surprise that any doubt should have arisen about the correctness of *Dutton v. Poole*. But in the nineteenth century, the development was brought to a halt in *Tweddle v. Atkinson* (1861). In this case John Tweddle and William Guy entered into an agreement under which they all promised to pay a certain sum to William Tweddle on the occasion of William's marriage to William Guy's daughter. The agreement between them further stated that it is hereby further agreed...that the said William Tweddle has full power to sue the said parties in any court of law or equity for the aforesaid sums hereby promised and specified. But William Guy failed to pay the promised sum and, on his death, William Tweddle sued the executor of William Guy for the promised sum of money. It was held that he could not maintain such a cause of action. The reason is that he had provided no consideration for William Guy's promise. The consideration had been provided by John Tweddle. The consideration must move from the party entitled to sue upon the contract [5]. If a person furnished consideration, that person could sue on a promise given in return for the consideration; conversely, a person giving no consideration for a promise had no standing to sue [1]. This view was deemed to have a solid moral underpinning. So the second rule which is called the benefit rule is that a person who was not a party to the contract could not sue upon the contract [6].

The Contracts (Rights of Third Parties) Act 1999 has brought a fundamental change to English contracts law in which it enacts a substantial exception to the doctrine of privity.

Third party can sue if (a) contract explicitly says so or if (b) contract purports to confer a benefit on third party unless the contract provides otherwise. Section one of this Act stipulates that:

(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract

According to this section one, there are two situations where a third party can sue upon the contract. One is when the contract expressly provides that third party can do it. The other is when the term purports to confer a benefit on the third party. In fact, the second situation is the one when the third party is a third party beneficiary. A third party beneficiary, in the law of contracts, is a person who may have the right to sue on a contract, despite not having originally been a party to the contract. This right arises where the third party is the intended beneficiary of the contract, as opposed to an incidental beneficiary.

3. Third party rights in Chinese contract law

3.1 The transference of the right and liability of the contract

The transference of the right and liability of the contract is expressly in the Chinese contract Law. As stipulated by the Chinese contract law, the parties to a contract can transfer his obligation or right in the contract to the third party. When the owner of a contractual right transfers his right, the debtor should only observe this transference provided that the debtor has been noticed this transference, but when the debtor transfers his obligation under the contract, he should obtain the consent of the creditor. In this case the third party will take the place of the debtor or the creditor, but the question is whether the transferee of the right or the obligation can sue upon the contract entered into by the parties to the contract. In fact, this question is different from the question whether the third party can

sue upon the contract. The reason is that the transference of the right and liability of the contract is to some extent the change of the content of the contract if we regard the parties as the content of the contract [7]. When the transference comes into effect, the parties to the contract have changed. The transferee becomes one of the parties to the contract. But strictly speaking, the third party is different from parties in the assignment of contractual rights or obligation. When the contract is formed in which one party's performance is to be directly rendered to or indirectly confers a benefit upon a third party, this kind of third party is called third party beneficiary.

3.2 The preservation institution of creditor's rights

The preservation institution of creditor's rights is another institution which is an exception to the principle of privity. This institution can be divided into two different kinds of institutions. The first institution is about the rescission right of the creditor. The other is about the subrogation right of the creditor [8]. Both of these two institutions concern two or more contracts but we can not say that there exists a chain of contracts, because, there is no third party beneficiaries. Every one except the debtor is a stranger to the other contract, so we can call them pure third party. But the existence of some situation makes the creditor in one contract no longer having nothing to do with the other contract. That special situation can be caused either by the debtor's behavior or omission. In article 74, it says that if the debtor waives his claim that has matured or gratuitously transfers his property, thereby causing damage to the creditor, the creditor may apply to the people's court revocation of the debtor's act. If the debtor transfers his property at an unreasonably low price, thereby causing damage to the creditor, and where the transferee is aware of such circumstances, the creditor may also apply to the people's court for the revocation of the debtor's act [9]. Thus, if the debtor makes a contract with a third party to the original contract and this contract can cause injury to the creditor's right, then the creditor can sue to rescind the later contract, this right is called as the right of rescission. Analyzing through another perspective, we can find that the creditor in the former contract is a third party to the later contract, but the debtor's new contract make the creditor's right in a danger, at this time the creditor can sue to preserve his rights [10]. The other situation where a third party to a contract can sue against a party to the other contract is a creditor in a contract to sue against the debtor's debtor. The application of this situation requires the expiry of the debt and the debtor is not positive to realize his rights as a creditor in the other contract.

3.3 Article 64 and 65 in Chinese contract law

In fact, the typical provisions concerning the question that whether the third party can sue or can be sued are stipulated in article 64 and 65. In article 64, it says that the debtor shall be liable to the creditor for breach of contract in case of non-performance. In this case, the third party is a typical third party beneficiary when he has no obligation under the contract. But, unfortunately, this article doesn't mention whether the third party can sue against the debtor when the latter fails to perform his obligation according to which the creditor shall perform an obligation to a third party. However, we can predict that when the debtor has already made compensation to the creditor for breach of contract in case of non-performance, the third party can no longer sue against the debtor. The other kind of contract directly concerning third party is a contract which provides the performance by a third party. When the contract provides that a third party shall perform an obligation to the creditor, this kind of provision may be regarded as having no bonding force towards the third party, since the third party makes no promise and thus he can always has the freedom to choose to accept or deny this obligation. As a result, when the third party refuses to perform that obligation, he cannot be sued by the debtor or creditor just upon the provisions of this contract to which he is not a party. This rule is also applied in common law system. Although a contractual relationship will be formed between the creditor and the third party if the third party does perform, or promises to perform, the obligation. In that case the third party may be liable to the creditor for breach of contract in case of non-performance if it receives consideration for the performance or promise or, if it does not, in accordance with 'gift contract' provisions. But in this case, the third party is actually a party to a new contract which was made either through the behavior or a new promise given by the third party. At this time, the answer to the question that whether the third party can be sued by the creditor when he fails to keep his promise

seems to be beyond the question as we have known that the third party has already taken the place of the debtor of the contract to be the new debtor. But the debtor may be able to delegate the performance of its obligation to a third party in certain circumstances and will remain liable to the creditor for any non-performance by the third party.

3.4 Construction Contract

The Supreme People's Court Interpretation on Several Issues in the Application of Law Concerning the Trial of Construction Contract Disputes was proclaimed on October 25, 2004, which has made significant influence and adjustment, to the benefit relations of the correlative parties. In article 25, it says that when a dispute on the quality of the building work, the party issuing the contract of building work can bring an action with the head-contractor and illegal sub-contractor and the actual constructor as co-defendant. This provision is close to the provision of the consumer law which allows the consumer to sue against either the manufacturer or the retailer. The other provision concerning the third party is article 26, and according to this article, the actual constructor can sue against the party issuing the contract of building work. This provision brings a breakthrough to the principle of privity. It is always the case that there is a contract between the party issuing the contract and the head-contractor while there is another contract between the head-contractor and the actual constructor. Before this interpretation, the actual constructor can only sue the head-contractor to obtain his payment, but now the actual constructor can also sue the party issuing the contract.

4. The differences between Chinese contract law and English contract law

Based on the analysis aforesaid, we can find that although there are many exceptions to the principle of privity both in Chinese contract law and English contract law, the differences between them is obvious.

The first difference lies in the form of law concerning third party right. The Contracts (Rights of Third Parties) Act 1999 is a special Act to make provisions for the enforcement of contractual terms by third parties. But there is no special statute concerning the right of action of a third party to a contract. Although this is a difference in the form, it reflects the difference of attitude towards the third party rights and the principle of privity. What's more, In the Contracts (Rights of Third Parties) Act 1999, it says that "a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if the contract expressly provides that he may", thus there is no other special conditions concerning a third party when there is expressed terms providing that the third party can sue upon the contract. This provision reflects the freedom of contract as well as the freedom of the will of the parties. In Chinese contract law, provisions concerning third party rights are scattered in different laws or interpretations. Article 64 of Chinese does not say whether the third party beneficiary can sue against the debtor for breach of the contract in case of non-performance. So we can say that China is more conservative towards the principle of privity [9].

The other difference between Chinese contract law and English contract law is their opinion on the chain of contracts. According to The Contracts (Rights of Third Parties) Act 1999, When the parties do not make their intention express and the contract term purport to confer a benefit on' the third party (s.1(1)(b)). In such a case the third party may have a right to enforce the term. However, there is an important limit on the right of the third party to enforce the term in such a case. In Contracts (Rights of Third Parties) Act 1999, it says that "Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party". However, a chain of contracts will be an obstacle for the third party beneficiary to enjoy the right of action. By contrast, as we have mentioned above, according to "The Supreme People's Court Interpretation on Several Issues in the Application of Law Concerning the Trial of Construction Contract Disputes Case", the party issuing the contract can bring an action with the head-contractor, the subcontractor and the actual constructor as co-defendants while the actual constructor can sue against the party issuing the building work contract directly, although there is a chain of contracts between these parties [10]. This provision is just contrary to English contract law which regards the case of building work contract as a typical example of a chain of contracts where the third party can

not sue upon contract. The reason for the latter right of action given to the actual contractor may lie in the need to protect workers who are the disadvantaged to some extent.

5. Conclusion

With the needs of the economic life, more and more breakthroughs to the principle of privity arise. Many jurisdictions in the world are creating more exceptions to this principle, although they may have differences in the extent and aspects. Through the measures adopted by Chinese contract law and the English contract law, we can find that China is more conservative towards the principle of privity while measures taken by English contract law bring a fundamental change to this principle. But in construction contract, Chinese contract law creates a great breakthrough to the principle by allowing the actual constructor to sue against the party issuing the contract. Although there are still many differences between Chinese contract law and English contract law, we can predict that third party's right of action will continue expanding in the future, since the value of the law are putting more and more stress on the social benefits.

Acknowledgement

This research was financially supported by the Social Science Fund Project of Shaanxi Province (Program No. 2018F013); and Scientific Research Program Funded by Shaanxi Provincial Education Department (Program No. 18JK0728).

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