

China's Choice of Laws for Cross-Border Tour Contract based on the Principle of Protecting Tourist Consumer

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Abstract. Cross-border tourist is a kind of consumer; cross-border tour contract belongs to consumer contract. The principle of protecting tourist consumer should carry through the choice of laws for cross-border tour contract. Considering the legislation and juridical practice of China, compared with EU legislation and Brazil's legislation, China's choice of laws in cross-border tour contract should identify in what circumstance the conflict rules for consumer contract shall apply to cross-border tour contract, adjust the limitation on autonomy of will, and includes "favorable law", in order to further improve the protection of tourist consumer.

Keywords: Tourist Consumer; Tour Contract; Choice of Laws.

1. Introduction

Nowadays, cross-border tourism presents two notable trends. First, the amount of cross-border tourism in the world continues to grow, and the scale of cross-border tourism continues to expand. International tourist arrivals grew 7.0% in 2017, the highest increase since the 2009 global economic crisis and well above UNWTO's long-term forecast of 3.8% per year for the period 2010 to 2020.[1] Second, cross-border tourism has more diversity various destinations. It's predicted that between 2010 and 2030, the number of tourist destinations in Asia, Latin America, Central and Eastern Europe, Middle East and Africa will reach twice as fast as that of developed economies.[2] At the same time, the number and size of inbound and outbound tourism in China has continued to grow.

With the development of cross-border tourism, cross-border tour contract disputes emerge one after another. Since protecting consumers is the basic norm of international community, the choice of laws for cross-border tour contracts should abide by the principle of protecting tourist consumers. At the international level, the emergence of the principle of protecting tourist consumers stems mainly from the documents of the United Nations General Assembly. Since the 21st century, the principle of protecting tourism consumers has been further developed, mainly because UNWTO and HCCH have begun to draft a convention on the protection of tourist consumers.[3] When it comes to China's practice, it is worthy to discuss China's choice of laws for cross-border tour contract based on the principle of protecting tourist consumers from the aspects of legislation and judicial practice.

2. Relevant Legislation and Judicial Practice of the Choice of Laws for Cross-Border Tour Contract in China

2.1 Relevant Legislation of the Choice of Laws for Cross-Border Tour Contract in China

In Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (*hereinafter*, China's Choice of Law), the provisions relating to the applicable laws for cross-border tour contracts include the conflict rules of general contracts in Article 41[4] and the conflict rules of consumer contracts in Article 42 [5].

Whether the cross-border tour contract can apply the conflict rules of consumer contracts is controversial. Some may argue that cross-border tour contracts are of course applicable to conflict rules of consumer contracts. However, because China's Choice of Law does not stipulate the definition of consumer contracts and does not explicitly stipulate that cross-border tour contracts are within the scope of consumer contracts' conflict rules. Whether cross-border tour contracts can apply the conflict rules of consumer contracts, in fact, is still lack of theoretical argument.

2.2 Judicial Practice of the Choice of Laws for Cross-Border Tour Contract in China

Since the implementation of China's Choice of Law, there have been at least six cases in which the conflict rules of Article 42 consumer contracts have been applied to determine the applicable law, but none of them have been cross-border tour contract disputes.[6] Since the implementation of t China's Choice of Law, all the ten cross-border tour contract disputes apply Article 41 of China's Choice of Law, i.e., the conflict rules of the general contracts.[7]

These cross-border tour contract disputes have these following characteristics in choice of laws. First, the courts usually identify cross-border tour contracts as general contracts rather than consumer contracts. For example, in *Xian Corporation v. Dr. Börsch-Supan et al.*, the court held that the relationship among the defendant and the two plaintiffs was a foreign-related tour contract relationship, and this case was a foreign-related contract dispute case, in which Article 41 of China's Choice of Law was applicable.[8] In *Henan Travel Agency and Yongan Corporation v. Gao Lanxiang et al.*, the court stated that the case was a travel contract dispute, which was foreign-related. The parties did not expressly agree on the law applicable to the settlement of the dispute, and the applicable law was chosen in accordance with Article 41 of China's Choice of Law.[9] In *Pingan Corporation v. KELVINPHANGKONG*, the court identified the tour contract dispute in that case as a contract dispute and therefore applied the conflict rules of the general contracts in Article 41 of China's Choice of Law.[10] Second, some cases do not explain the reasons for the choice of laws for the cross-border tour contract, and it is difficult to analyze the theoretical basis of the judgment. For example, in *Jieli Corporation v. Ningxia Corporation*, the court held that because the parties did not agree or choose the applicable law, China's law should be the applicable law in this case.[11]

3. The Protection of Cross-Border Tourist Consumers in Choice of Laws for Cross-Border Tour Contract in China and its Insufficiency

From the perspective of protecting tourist consumers, China's cross-border tour contract should apply the conflict rules of consumer contract in Article 42 of China's Choice of Law, instead of the conflict rules of the general contract in Article 41. Cross-border tourist consumers are in line with consumer definitions, and cross-border tour contracts fall within the scope of consumer contracts. Moreover, although Article 42 the conflict rules of consumer contracts is not a perfect regulation, there are still many deficiencies in the protection of tourist consumers, but compared with Article 41, the interests of cross-border tourist consumers can be guaranteed by Article 42.

3.1 Protection of Cross-Border Tourist Consumers in Choice of Laws for Cross-Border Tour Contract in China

Article 42 of China's Choice of Law embodies the protection of cross-border tourist consumers in the following aspects. First of all, the application of laws at tourist's habitual residence is the general rule. Cross-border tourist consumers have a better understanding of the laws at their habitual residence and are more receptive to the concept of rights and obligations in the places of their habitual residence.

Secondly, unilateral autonomy is stipulated. Cross-border tour contracts, especially package tour contracts, usually have standard terms on applicable law that do not reflect the true intention of cross-border tourist consumers. The unilateral autonomy of consumers helps to ensure that cross-border tourist consumers truly apply the principle of autonomy of will.

Last but not least, restrictions on the scope of consumer autonomy are beneficial to balance the interests of cross-border tourist consumers and the interests of travel service providers. China's Choice of Law imposes restrictions on the applicable law that tourist consumers can choose, thus avoiding the arbitrary choices and helping travel service providers to predict the results of choices.

3.2 Insufficient Protection of Cross-Border Tourist Consumers in Choice of Laws for Cross-Border Tour Contract in China

Although Article 42 provides important protection for cross-border tourist consumers, there are still several shortcomings in combination with legislative provisions and judicial practice.

3.2.1 Uncertainty in Applying Consumer Contract Conflict Rules to Cross-Border Tour Contracts

Whether the cross-border tour contract can apply the conflict rules of consumer contract in Article 42 of China's Choice of law is uncertain. The main reason is that Article 42 of China's Choice of Law does not define the concept of consumer contracts and consumers.[12] If cross-border tour contracts can apply the conflict rules of Article 42 consumer contracts, the outcome of the cases above may vary widely, such as the amount of compensation that consumers can obtain in cases mentioned above.

3.2.2 Limitation of the Scope of Autonomy of will in Choice of Laws for Cross-Border Tour Contract

According to Article 42 of China's Choice of Law, the autonomy of will in the consumer contract conflict rules is limited to the applicable laws at the locality of the provision of goods or services. However, according to the theory of the characteristic performance, the connecting points that are closely related to the cross-border tour contract include the locality where the contract is established, the locality where the contract is negotiated, the locality of the cross-border tourist baggage, and the locality of the court. Therefore, the restriction on the autonomy of will in the cross-border tour contract cannot reflect the characteristics of different types of cross-border tour contracts, which is not conducive to the protection of various cross-border tourist consumers in different types of cross-border tour contracts.

3.2.3 Insufficiency of the Laws at the Habitual Residence in the Application of Cross-Border Tour Contract Law

Although treating the laws at the habitual residence as the general rule is helpful to protect cross-border tourist consumers, the shortcomings can't be ignored. In fact, the laws at the habitual residence cannot substantially protect cross-border tourist consumers and will bring the differences in substantive rights. The consumer protection laws of traditional tourist destination countries may be more perfect, while the law of cross-border tourists' habitual residence is not necessarily the most favorable for their protection.

4. Implications for Choice of Laws for Cross-Border Tour Contract in China

Based on the principle of protecting tourist consumers, combined with the legislative provisions and judicial practice of China, the improvement for choice of laws for cross-border tour contract needs to proceed from the following three aspects.

4.1 To Explicitly Stipulate that Consumer Contract Conflict Rules are Applicable to Cross-Border Tour Contracts

Compared to China's legislation, the conflict rules applicable to cross-border tour contracts in EU legislation and Brazilian legislation are more certain. This is because EU legislation and Brazilian legislation clearly define the definition of consumer contracts and consumers and clearly stipulate the scope of consumer contract conflict rules.[13] For example, EU legislation stipulates that the definition of a consumer contract mainly includes the element of consumption purpose.[14] Besides, regarding the substantive scope of the consumer contract conflict rules, the EU legislation clearly stipulates the conflict rules of the consumer contract are applicable to the package travel contract. Regarding the geographical scope of consumer contract conflict rules, EU legislation provides two standards, commercial or professional activities and activity orientation. In contrast, Article 42 of China's Choice of Law only stipulates the standard of commercial activities and does not stipulate the activity-oriented standard. Activity-oriented standard may include quoting, advertising, obtaining

orders, etc., or the situation where a consumer is directed or persuaded by a merchant to enter into a contract in a foreign country. The determination of activity orientation can be decided case by case through two aspects: the extent of association with the contract and the predictability of the travel service provider.[15] Adopting the activity-oriented standard can expand the application cope of consumer contract conflict rules and guarantee the predictability of travel service provider, while do not affect the importance of consumer's habitual residence.

Therefore, China should stipulate the definition of consumer contracts and consumers, and clarify the scope of application of consumer contract conflict rules. The package travel contract is explicitly included in the substantive scope. In terms of geographical scope, the activity-oriented standard should also be specified. The definition of the activity-oriented standard can be judged by the extent of association with the contract and the predictability of the travel service provider.

4.2 To Adjust the Restriction on Autonomy of will in Choice of Laws for Cross-Border Tour Contract

In contrast to China's legislation, EU legislation and Brazilian legislation have different restrictions on the autonomy of will, mainly in the two aspects, subject and scope. On the one hand, the subject of autonomy of will is different. China's legislation stipulates that the autonomy of will can only be the unilateral autonomy of consumers, while EU legislation and Brazilian legislation allow the autonomy of both parties.[16] The advantage of unilateral autonomy in China is that it is more conducive to the protection of cross-border tourist consumers, avoiding the adverse effects of the standard terms and helping to reflect the true intention of consumers. On the other hand, the scope of autonomy of will is different. China's legislation restricts the law that can be chosen to the laws at the locality of the provision of goods or services. Brazilian legislation limits the autonomy of will to the laws at the habitual residence of consumers, the laws at the place of contracting, the laws at the place of performance of the contract, the laws at the main office of the provider of the goods or services. In the Brazilian legislative the autonomy of will has a wider scope, incorporating other connecting points that are closely related to the contract. It is more conducive to adapting to different types of cross-border tour contracts and is more conducive to meeting the diversified needs of cross-border tourist consumers. At the same time, since the included connecting points are closely related to the contract, the reasonable expectation of cross-border travel service providers is taken into account. Therefore, China can adhere to the unilateral autonomy provisions, however, adjust the restrictions on the autonomy of will and expand the scope, such as the laws at the place of contracting.

4.3 To Introduce "Favorable Law" in Choice of Laws for Cross-Border Tour Contract

China's legislation, EU legislation and Brazilian legislation have adopted different rules for protecting cross-border tourist consumers. To be concrete, China's legislation relies mainly on the laws at the habitual residence of consumers. The EU legislation adopts mandatory norms to ensure that cross-border tourists receive minimal protection. However, if China draws on EU legislation, it will face great resistance. Because Article 4 of China's Choice of Law and relevant judicial interpretations currently only recognize China's mandatory norms.[17] Unlike EU legislation, Brazilian legislation adopts "favorable law".[18]

Therefore, comparing EU legislation with Brazilian legislation, the choice of laws for cross-border tour contracts in China can draw on Brazilian legislation and introduce "favorable laws" to improve the protection of cross-border tourist consumers. At the same time, in order to prevent the excessive expansion of discretion caused by the introduction of "favorable law" and maintain the certainty, unity, and fairness of choice of laws, it is necessary to define "favorable law" and limit the scope. In terms of definition, "favorable law" has two meanings. First, the "favorable law" is the law that makes the contract effective. The validity of the contract is conducive to the realization of the party's autonomy and the stability of economic order. Second, "favorable law" refers to laws that provide consumers with more appropriate protective compensation and remedy. The application of laws that provide more appropriate remedy for cross-border tourist consumers is more conducive to protecting the interests of cross-border tourist consumers. In terms of scope restrictions, the "favorable law" can

include the law of the consumer's habitual residence, the law of contract conclusion, and the law of the place where the contract is performed. Therefore, by introducing "favorable law" and defining its definition and scope, it can effectively guarantee the flexibility of conflict rules and avoid the expansion of discretion, thus further realizing the protection for cross-border tourist consumers in the choice of laws for cross-border tour contract in China.

5. Conclusion

Cross-border tourists are consumers, and cross-border tour contracts are consumer contracts. The choice of laws for cross-border tour contracts should implement the principle of protecting tourist consumers. China's legislative provisions and judicial practice in the choice of laws for cross-border tour contracts reflect the protection of cross-border tourist consumers, however, have some shortcomings to be improved, i.e., uncertainty in applying consumer contract conflict rules to cross-border tour contracts, limitation of the scope of autonomy of will in choice of laws for cross-border tour contract, insufficiency of the laws at the habitual residence. It is necessary to start from three aspects. First, to explicitly stipulate that consumer contract conflict rules are applicable to cross-border tour contracts. Second, to broaden the autonomy of will in choice of laws for cross-border tour contract. Third, to add up a "favorable laws" provision in Article 42 of China's Choice of Law. By these means, can the China's choice of laws for cross-border tour contract provide better protection for cross-border tourist consumers.

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