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A Study of Legal Choice Model for Worker Protection

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Abstract**:** *The freedom of contracting and the freedom of employment of workers are regarded as the roots of the development of a commodity economy society. Under the influence of the trend of economic globalization, the transnational movement of workers has brought about conflicts in national laws for the protection of workers. The U.S. follows the traditional case law model of not legislating specifically on employment contracts, but rather, protecting workers' freedom to choose their law and excluding the improper application of the governing law through the public policy of "no discrimination in employment". The EU rules are based on the Rome Rules, which provide for separate principles of law and peremptory norms for labor contracts, thus achieving a balance between autonomy and public interest.*

Keywords**:** *employment contract, employment at will, employment discrimination, the principle of party autonomy*

I. Introduction

In recent years, along with the momentum of China's sustained high economic growth, more and more people from Europe and the United States are choosing to work in China. According to data released by the Chinese Ministry of Human Resources and Social Security (MHRSS), the total number of foreigners working in China in 2009 was 223,000, and this number rapidly increased to 231,700 in 2010, an increase of 9.4%. The Forbes article says that as more and more professionals go to China. As more professionals seek opportunities in China, multinational executives will pay more attention to China's needs, and it may not be long before multinationals develop merchandise with marketing plans that take China's needs more into account than those of the United States or Europe. Headhunting managers for foreign companies. According to managers, more and more people from Europe and the United States are choosing to work in China, mainly because China's economy has been growing strongly for a long time at 8-10 percent, and China means a broader market and a higher platform for development, especially in many high-end areas such as finance and services sector which means more opportunities. On the other hand, the main form of direct investment by Chinese enterprises abroad in corporate M&A. The management field requires a large number of foreign professionals, and multinational companies set up by Chinese investors abroad also have a strong demand for talents. As a result, it is often the case that Chinese companies send their employees overseas to develop in the face of the promised high standards of salary and benefits, fast-growing experience, and the possibility of rapid growth. With the promise of high pay

and benefits, fast-growing experience, and the possibility of a fast-promoting position, many young people are willing to take the plunge, as is often the case with controversial companies like Huawei, where employees are required to apply for passports to work abroad as soon as they report to work. However, labor disputes have also emerged. How to better balance the interests of employers and workers, and to promote the development of enterprises without harming the interests of workers, is the focus of legislative consideration and judicial treatment in the context of economic globalization.

II. Internationalization of the Special Nature of Labor Contracts and Workers' Protection

2.1 The special nature of the employment contract

From an economic point of view, a worker is a person who participates in the labor force and uses the income from his or her labor as the main source of livelihood. In the legal sense, "worker" means a natural person (Chinese or foreign natural person) who has reached the legal age, can work, earns income as the main source of living by performing some kind of social work, and performs work under the management of the employer and receives labor remuneration according to the law or contract. However, not all natural persons are legal workers. To be a legal worker, one must have certain conditions and acquire labor rights and labor capacity, thus distinguishing them from "illegal workers", such as stowaways.

Freedom of contracting and freedom of labor and employment are considered as the foundation of economic and social development, so the function of labor contracts is to provide labor for industrial development while ensuring the livelihood of workers on the one hand, and to provide legal guarantees for regulating employment conditions, on the other hand, the two aspects of the first function are limited by the structure of the entire socio-economic life. Social policies and movements often target unfair individual labor contracts, even when they are in place but still fail to protect vulnerable workers, such as child labor, or regulate specific types of labor, such as night work. Thus, on the one hand, collective contracts signed by workers together can compensate for the inequality and lack of independence of individual workers in their labor contracts with their employers, and on the other hand, labor protection and social security norms are legislated separately from the labor contract to include social security, with the involvement of the national government.

In essence, the trends in labor protection legislation are due to the nature of the labor contract itself. According to the common law theory of contract causation, the contractual consideration of the labor contract is not property, but the labor provided by the worker, and since the labor provided by the worker cannot be separated from the worker himself, it means that the ultimate object of the contract is the worker himself. The worker's work is not completely independent but is subject to the authority of the employer, who directs and controls it. In other words, the three elements of the labor contract are the performance of the work, the remuneration, and the legal subordination of the worker1. Due to this inequality, special protections are needed to ensure that the worker's choice to enter into a contract is a genuine, free-will one. If the labor contract is interpreted as a private relationship based on private law, where labor and remuneration are exchanged equally, the lack of independence of the worker's work will not be properly balanced (Cao 2019).

2.2 Conflict of laws arising from the internationalization of workers

When an enterprise sends its employees to work in different countries since the standards of worker protection vary greatly from country to country, is it necessary for the enterprise to study the current status of legislation in different countries and then formulate different new regulations according to local standards, or to compare and analyze which country's protection standards are the most reasonable and then formulate a standard that is common worldwide? Obviously, the latter approach is the future development trend, but now it involves the cultural sensitivity and social conditions of each country, it is difficult to achieve this result overnight.

U.S. federal labor laws provide for their extraterritorial application, thereby ensuring that U.S. employees enjoy the same rights and benefits when working in non-U.S. territories as they do when working domestically. Section 7 of the U.S. Civil Rights Act of 1964, for example, prohibits employment discrimination against employees (Kevin & Natasha 2019). In 2006, the U.S. Congress explicitly amended Section 7 of the Act to make employment discrimination and Section 102 of the ADA applies to U.S. citizens working abroad, even if a company doing business in the United States is not registered in the United States.

If a U.S. female employee is sent to work in Saudi Arabia (where the law prohibits men and women from working together), the U.S. employer is required by U.S. law to ensure equal access to employment for men and women and to establish measures to prohibit gender discrimination. In this case, the U.S. federal labor law applies to the employee who is sent abroad, which would conflict with the scope of application of the Labor Contract Law in China, and the extraterritoriality of one country's law conflicts with the extraterritoriality of another country's law, thus requiring a choice of law. However, if a U.S. employer hires a non-U.S. citizen and assigns him or her to work abroad, the rights and interests of the foreign employee will be protected under the laws of the host country, and U.S. federal labor law will not apply to the non-U.S. citizen outside the jurisdiction. In this case, the employee's interests should be protected by local law or by the local choice of law based on local conflict of laws rules.

III. Legal Choice Model of Worker Protection in European and American Countries

3.1 Legal Choice Model of Worker Protection in the United States

As mentioned above, the U.S. labor protection system is a two-pronged and balanced development. On the one hand, labor contracts are not singled out for special provisions to protect the interests of workers, but rather emphasize freedom of contract, and all contracts are uniformly governed by the U.S. Uniform Commercial Code. On the other hand, the U.S. has enacted and amended the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Fair Pay Act to prohibit discrimination, and the current body of statutory and case law constitutes a complete body of law prohibiting discrimination in employment. In summary, the employment relationship is based on the free will of both parties, and both the employer and employee may terminate the employment relationship at any time for any or no reason, but the terminated party may seek redress in court whenever he or she believes that the termination was unfair, based on

the prohibition of employment discrimination mentioned above. Some states have even stricter prohibitions on employment discrimination, such as California, which states that workers cannot be discriminated against because of an employee's marital status, ancestry, sexual orientation, and medical condition (Dong 2009).

Also, employment contracts with foreign elements are still governed by the UCC, although due to the federal structure of the United States, the foreign elements involve different states and different countries. Article 1-105 of the UCC provides that

If a transaction has a reasonable connection with both this state and an out-of-state or foreign country, the parties are free to agree that the laws of this state, the out-of-state, or the foreign country will apply, and in the absence of such agreement, the law will apply to the transaction that has a proper connection with this state. The preamble to the Second Restatement of the Conflict of Laws of the United States emphasizes that the choice of law applicable to that transaction should take into account the important value element of the legitimate expectations of the parties, and Section 187 is a specific articulation of the choice of law principle for foreign-related contracts. Article 187 of the Second Restatement of Conflict of Laws (2) states that the choice of law of the parties must take into account the legitimate expectations of the parties. In Article 187 of the Second Restatement of Conflict of Laws,2 the parties' choice of law must have a reasonable basis, not a physical connection with the contract as some scholars understand it. The autonomy of the parties in the field of contracts must not circumvent what the courts consider to be the fundamental policy. Also, comment an of Restatement 187 indicates that the parties' choice of law is not limited to express, but that the judge may also determine the law that the parties intend to apply using special legal terms and principles in the contract.

Comment b also emphasizes that the parties must be truthful and that "a choice of law clause will have no legal effect if it is the result of misrepresentation, coercion, undue influence or misunderstanding.

The general principles of state jurisprudence are similar in that the law of the parties' choice applies to the employment contract, and when the parties do not choose, the law of the worker's place of employment applies, and when the worker's place of employment is within more than one state, the closest connection doctrine applies to determine the law of the place of performance. For example, in Robert McCarthy v. Cycare Systems Inc. (3), the plaintiff, a resident of Illinois, was employed by the defendant company (headquartered in Dubuque, Iowa, and incorporated in Delaware). Claiming that the defendant fired him without cause in retaliation for exposing the company's violations of Federal Space Commission safety protocols, the plaintiff sued the company for damages in Illinois state court and sued the company for defamation and slander. Applying the state's conflict rules, the Illinois court held that the law of the place of performance of the contract should apply to determine the formation, validity, and rights and obligations of the parties to the contract. If the place of performance of the contract is in a different state, the closest connection doctrine applies. The court did not uphold the defendant's claim that the law of Iowa, which was the place of performance of the employment contract, applied, and the plaintiff's claim that he, as a pilot, frequently flew his aircraft through different states and therefore the applicable law should be determined by the closest connection doctrine.

It is thus clear that the parties' freedom of contracting in the field of substantive law still needs to be limited,

and the parties' meaning in the field of conflict of laws The autonomy of the parties in the field of conflict of laws also has certain limitations. Section 187 of the U.S. Second Restatement of Conflict of Laws provides that the law chosen by the parties will be applied to regulate their contractual rights and obligations, even if the contract involves special issues that cannot be regulated by the express terms of the agreement. (a) the law chosen by the parties is not substantially related to the parties or the transaction and (b) the application of the law chosen by the parties would be contrary to the law of the state in which the case has a substantial and material connection (b) the application of the law chosen by the parties would be contrary to the fundamental policies of the state with which the case has a substantial and material connection, and in the absence of a valid choice by the parties under section 188, the law of that state would apply. The law of that state will apply in the absence of a valid choice by the parties. It can be said that the Second Restatement of Conflict of Laws limits the principle of autonomy to two areas First, the choice of the governing law of the contract must have a substantial connection with the parties or the transaction, which has been gradually relaxed with state legislation on The other is the restriction of the freedom of choice of law by public policy (Li 2011). When the choice of the parties is invalid, the provisions of the law of the state with the more substantial and important interest in the transaction will be applied. In other words, the interests of the government legislation of the state with which the transaction has a substantial connection outweigh the interests of the forum state. The states' public policy emphasizes the protection of the weak - the worker - in the choice of labor contract law, and its operation depends entirely on the judge's discretion, a point common to case law states.

3.2 EU Model of Choice of Law on Worker Protection

The EU countries, most of which have a legal tradition of statutory law, have made rapid progress in the process of harmonization of private international law in recent years, the notable landmark being the Rome Rules I (hereinafter referred to as the Rules of the Parliament and of the Council of the EU of 17 June 2008 on the Law Applicable to Contractual Obligations, hereinafter referred to as "Rome Rules I"). "). First of all, Article 3 of this rule provides for the principle of party autonomy, which applies to all choices of law for contractual obligations. The content of this article includes the time, manner, and scope of the choice of law by the parties, as well as the conditions of whether they can make changes after the choice, and most importantly, the restrictions of the freedom of the parties to choose their law by mandatory norms. In the author's opinion, these peremptory norms that can protect workers can be divided into three types: domestic peremptory norms, priority peremptory norms, and protective peremptory norms.

Article 3, paragraph 4 of the Roman Rule I provides that the parties to a contract choose the law of a country as the governing law of the contract, but if, at the time of the parties' choice of law, all the elements relating to the contract are linked to a country other than the country of the governing law, the parties' choice cannot exclude the application of the peremptory norms of that country. For example, if a purely domestic labor contract stipulates foreign law as the applicable law, such stipulation obviously cannot exclude the application of peremptory norms of domestic legislation protecting the rights and interests of workers. Paragraph 4 applies to the issue that the peremptory norms of a forum state cannot be excluded by the choice of the parties.

IV. Current Situation and Suggestions For Improving Legal Options of Foreign-Related Labor Contracts In China

4.1 Legal definition of foreign-related labor contracts in China

Article 2 of China's Labor Contract Law provides that enterprises, individual economic organizations, private non-enterprise units, and other organizations (hereinafter referred to as employers) in the People's Republic of China shall establish labor relations with workers and enter into, perform, change, terminate or terminate labor contracts. This Law shall apply to the conclusion, performance, modification, termination, or termination of employment contracts between enterprises, individual economic organizations, private non-enterprise units and other organizations (hereinafter referred to as employers) and workers in the People's Republic of China. This means that the labor contract is an agreement between the employer and the worker to establish labor relations. The employer includes enterprises, individual economic organizations, and private non-enterprise organizations. Even if an enterprise in China employs

The Labor Contract Law of China still applies to labor contracts entered into by foreign employees. However, in addition to the provisions of China's Labor Contract Law, foreigners working in China must also comply with the Regulations on the Administration of Foreigners' Employment in China, which requires foreigners to apply for employment permits, as reflected in Article 5 of the Regulations: The employer must apply for an employment permit for the foreigner and obtain a Certificate of Employment Permit for Foreigners in the People's Republic of China (hereinafter referred to as the "Employment Permit") upon approval. The employer must apply for an employment permit for the foreigner and obtain a Certificate of Employment of Foreigners in the People's Republic of China (hereinafter referred to as (referred to as the permit certificate) before employment.

4.2 The Status and Suggestions for Legal Options of Foreign-Related Labor Contracts in China

Through the above definition of the concept of foreign-related labor contracts, it is clear that China's Labor Contract Law has determined that it applies to foreign-related labor contracts performed in the territory of the People's Republic of China, i.e. it is a unilateral conflict norm that directly stipulates that foreign-related labor contracts performed in China can only be applied to Chinese law. Moreover, the Law on Mediation and Arbitration of Labor Disputes also clearly stipulates that this Law applies to disputes between employers and workers that occur within the territory of China. Article 43 of China's Law on the Application of Foreign-related Civil Relations provides that the law of the place of work of the worker shall apply to the labor contract; if it is difficult to determine the place of work of the worker, the law of the principal place of business of the employer shall apply. In the case of labor dispatch, the law of the place where the labor service is dispatched shall apply. From this article alone, combined with the comparison of the European and American models, it is easy to find that China's labor contracts do not provide for the principle of autonomy of meaning, nor do they have the underlying set of the principle of closest connection, and the French expression of the protective mandatory rules is missing. Thus, in the context of China becoming the second-largest economy in the world and the increasing internationalization of corporate employment, it is imperative to improve the legal options of

foreign-related labor contracts in China.

Long before the enactment of the Law on the Legal Application of Foreign-related Civil Relations, there was a controversy in the academic circles as to whether the principle of autonomy of meaning applied to foreign-related labor contracts. The dominant view was that the parties were allowed to expressly choose the law in the foreign-related labor contracts, but the scope of the choice was limited to the place of work of the worker, the place of the worker's habitual residence, or the place of employment or habitual residence, and the choice of the parties should not derogate from the protection of the mandatory legal norms provided by the applicable governing law that should have been applied to the parties. Usually, the content of these mandatory norms relate to labor safety and security, minimum wage standards, etc., but some scholars have pointed out that the general provisions of the oath provisions have little practical significance, which does not indicate that the principle of autonomy of meaning is the basic principle of the Law Applicable to Foreign-related Civil Relations [8]. Article 6 of the Judicial Interpretation (I) of the Law adds that the law of the People's Republic of China does not expressly provide that the parties may choose the law applicable to foreign-related civil relations, and if the parties choose the applicable law, the people's court shall hold that the choice is invalid. Thus, it is further clarified that labor contracts without express provisions do not allow the parties' autonomy.

V. Conclusion

The choice of law model for the protection of workers differs between the EU and the US, as the EU has a special type of individual labor contract in the Rome Rules I, which provides for its application separately: (1) the parties are allowed to choose the law applicable to the labor contract autonomously. (2) If the parties do not choose the law autonomously, the law of the worker's regular place of work applies, and the place of temporary assignment to a country is not considered as the worker's place of work. (3) The law of the employer's place of business shall apply if the place of regular employment of the worker cannot be determined. (4) If special circumstances are indicating a closer connection between the employment contract and another country, the law of the place of closest connection shall apply. However, none of these provisions can exclude the mandatory provisions. The EU has a strong system of rules to classify mandatory rules, especially the characteristics of the EU's unified labor market, resulting in the uniform application of mandatory norms of priority in the EU. The U.S., on the other hand, follows the principles of traditional case law countries, which do not provide for separate labor contracts, but rather, under the premise of protecting freedom of contract, restrain the freedom of contract based on the statutory and case law system of "prohibition of labor discrimination" to protect the interests of workers in the weaker side of the contract, and the choice of law is to use The choice of law is based on the use of "public policy" to restrict the parties' right to choose the law, to achieve a good balance of the interests of the states involved in the case.

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