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The Origin and Development of the Principle of Party Autonomy in Matters of Choice of Law Based on the Parties' Agreement

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Abstract. The question of choice of law by the parties is one of the fundamental features of the principle. This feature is one of the main components of the principle. It primarily enables us to help understand the fundamental basis of the principle.

This article discusses the issues of choice of law by agreement of the parties based on the principle of autonomy of will. One of the controversial issues is the possibility of the parties choosing the law based on their contract. The origin and development of this fundamental right requires a long period of time. In the article, the origin and development of this right will be analyzed by dividing into stages and the features of its development in each period are studied. Through long history of the principle's development, scholars studied and observed the significance of parties' intention and right to choose which law should govern their contractual relationships.

In the article, the period of development of the principle is conventionally divided into two. The first period is the stage when this principle was secondary importance to legislators and contractors, and parties' freedom to choose the governing law was limited. In the second stage, parties' freedom of choice gained paramount importance from state legislators and the restrictions on parties were notably reduced. Each stage of this development increasingly served firmly established state rules to give leeway parties' intentions to choose the governing for their contractual relationships.

Keywords: the governing law, contractual relationship, tribal laws, commercial relationships, independent party initiative, mutually acceptable rules.

The ability of the parties to choose the law depending the contract serves to ensure that the parties can participate in the resolution of disputes arising out of their free will. The parties can choose the law based on the agreement to resolve disputes that may arise not only from their contractual relationship, but also from any legal relationship. This is an example of the will of the parties. The parties participate in the resolution of these disputes by choosing their right to resolve disputes. More precisely, the parties choose the appropriate way to resolve their disputes through a choice of law. The parties choose the law that best suits their interests based on their contractual relationship. Thus, participants in contractual relations can make decisions that are beneficial to each of them.

But the parties could not always choose the right to resolve disputes arising from their legal relations. Even during the early legal system of human development, such concepts were foreign to people. The emergence and development of these concepts and explanations took a long time. In ancient times, people followed the rules set by the tribes to which they belonged. These laws or regulations are also called tribal laws. Tribal rules were also considered to be binding only on tribal members. With the collapse of tribal unions and the emergence of states that united more and more people and territories, the state laws established by them became binding on the population. Since the tribe's rules were only binding on members of the tribe, their rules were more relevant to the tribe itself. Even when tribes moved from one place to another, they did not have to change their

rules. The new state laws were thought to be more about the territory. People's observance of laws depended more on territorial affiliation than on tribal affiliation. That is, people obeyed the laws of their tribes and did not deviate from the laws of their tribes, no matter where they were in the tribal era. In the legislation of states, the principles of legal order are more territorially dependent. It was considered mandatory that people follow state laws only when they were within that state. Compliance with the laws of a state does not depend on whether a citizen is a citizen of that state or resides permanently or temporarily in that state. The laws of the place where the action or event that gave rise to the dispute occurred became binding on the parties to the dispute. For this reason, after the collapse of tribal unions and the formation of states, territorial priority became more prominent in laws [1].

At this time, the laws clearly outlined the unconditional priority interests of states. Laws are made by legislators or government administrators in the spirit of directly serving the interests of the state. State laws are considered the only valid laws for citizens. Citizens could only comply with the laws of the country where they permanently reside [2]. Most laws were formulated according to issues of religious belief. The concepts of self-interest or independent party initiative have not gained importance [3]. Disputants or persons who have violated the law have no right to participate in any way in the consideration of their disputes. More precisely, public interests prevailed over private interests. Laws that protect private interests are rare. Today, parties can legally choose to resolve disputes based on agreement. But in order for the parties to receive such a right and a legal basis, a long process was required. Below we explore these processes with an analytical framework.

As we mentioned above, in the early days the interests of the state prevailed even more than that of the interests of the parties. These processes moved from public interests to private interests and from territorial interests to principles of fairness and acceptability to independent parties. These situations are characteristic features of a long process. We can see these features at every stage of the process.

Speaking about the choice of law based on the agreement of the parties in private international law, some legal scholars emphasize that this right of the parties has always been part of private law. But this right is not in general, but only some elements of this right can be seen in the private law of early periods. Although some legal scholars believe that this right was reflected in Roman law during the Roman Empire, there is insufficient evidence for this opinion.

Dumoulin brought the idea of that parties can actually choose the law that governs their contractual relationships. He claimed that the intention of parties sustain the most important part in the scope of contracts [4]. Dumoulin also believed that in contractual relations the parties can create rules in their disputes that are binding only for themselves. Obviously, other prominent scholars and lawyers of that time impacted his convictions about parties' choice of law. During his lifetime, he also discussed opinions that contradicted the legal system of his state. What exactly made Dumoulin come up with such progressive ideas? This is due to the difficulties encountered in the trading process of foreign merchants and their trading processes. It is known that during the period when Dumolin lived, the laws of countries were based on territorial sovereignty and their laws were valid only on their territories. Non-recognition of the laws of one country on the territory of another country created economic difficulties for merchants. This is the idea that independent parties, through private agreement, can ensure that the unique laws of countries do not affect their commercial relationships. The same circumstances strengthened Dumolin's view that parties could circumvent the laws of countries based on private agreements.

Of course, these ideas did not receive support and approval immediately after putting forward. Contrary to these opinions, many scholars and legislators claim the view that independent parties

do not have the right to circumvent the laws of countries. An example is the French lawyer D'Argent. D'Argentet categorically rejects the idea that independent parties can choose law by contract, and argues that treaties and disputes arising from a treaty should be decided only by the laws of the country where the treaties were made [5]. In his opinion, the existence of the right of independent parties to choose law by agreement is equivalent to the recognition that they have the power to make laws. As a legislator, he believes that only the power of the states should be recognized.

By the 17th century, several Dutch jurists observed the idea of parties' freedom of choice depending on their contracts. Prominent jurists of this period are Paul Voeth, Johannes Voeth and Huber. These lawyers defend the freedom of the parties and their initiatives, based on the view that traditional states are the only legislative authority and that contracts should be based only on the laws of the place where the contracts are made or the place where the contracts are executed. Among them, the thoughts and ideas of the lawyer Huber serve as a program for the lawyers of the next period.

Notably, the ideas and opinions put forward by lawyers of this period do not fully reflect the principle that we understand today. Their opinions express limited autonomy of will. For example, the Dutch lawyer Huber, although he spoke in his ideas about the free will of the parties, but accepted it to a limited extent. Therefore, disputes arising from the contractual relations of the parties must be resolved based on the legislation of the countries where parties conclude the contracts. Because the parties believed that they entered into their contracts under the laws of this country in order to resolve them on the basis of the laws of this country. In his opinion, he believed that by this action the parties would demonstrate their wishes in a symbolic (not explicit) way. No matter how much Huber was a proponent of the principle of free will, he also rejected the idea that parties could choose law verbally in their express contracts. The parties choose the law by their actions, that is, by signing the contract or performing the contract on the spot [6].To further strengthen his opinion, Huber even quotes a phrase from the Law of Justinian: "Every man must make a treaty in the territory in which he fulfills the treaty" [7] to strengthen his opinion. These thoughts alone indicate Huber's limited understanding of the principle.

Huber's ideas later influenced English and American lawyers. The Scottish civil lawyer Lord Mansfield was influenced by Huber's ideas and further strengthened his ideas. In the case of Robinson v. Bland in 1760, [8] Lord Mansfield, considering how important the choice of law of the parties is to the conduct of cases, gives the following opinion to illustrate the choice of law of the parties:

Regardless of where disputes are considered, contracts should be considered based on the laws of the country in which they were drawn up by the parties

Later, Lord Mansfield puts forward the idea of revealing the symbolic choice of parties. In his opinion, if the parties enter into an agreement in one country, and its execution - in another country, then the right of the parties is the territory in which the agreement is executed. Along with choosing the place of execution of the contract, the parties also choose the right to apply it [9].

By the 19th century, it was desirable for parties to choose law by open agreement. During this period, most experts spoke in favor of regional priority. The parties could choose the available options. The available options are the drafting of a contract or the right to perform a contract. Joseph Story, a prominent lawyer in the 19th century United States, also endorsed these opinions. His ideas were modeled on those of the Dutch lawyer Huber. According to him, every country has an exclusive advantage in its own country and its laws are fully applicable in its own country. Therefore, he believed that the law of each country is binding on contracts concluded or executed

in those countries [10].Particular emphasis is placed on the power of countries, on the fact that they control any person, property and contracts on their territory, regardless of the will of the parties. According to Story, the place where a contract is concluded reflects the will of the parties more than the place where it is executed. These clauses also show that parties can only invoke the law by their actions.

Later, the German jurist Friedrich von Savigny expressed a view similar to that of the jurists before him. Savigny also accepted party autonomy within certain limits, inspired by the thoughts of the Dutch jurist Huber. He advanced the view that state laws should have an absolute force within their territories. Every citizen in the border of their countries must comply with the state laws.

As we mentioned above, the development of maritime trade relations allowed the adoption of laws that further expand the freedom of the parties, and the adoption of court decisions that give greater freedom of will to the parties than decisions that limit the freedom of the party. Back in 1875, the Supreme Court of the United States of America adopted a rule according to which contractual disputes between parties can be resolved based on the law of the country where the contract was signed and the law of the country where the contract is performed. Based on the characteristics of the contract, the courts began to be guided by the rule of resolving disputes based on the laws of the country with which the contract is most closely related. This became the legal basis for the start of the use of practices different from those that had been practiced until now.

Further development of these ideas began to assert that the parties can not only choose one of the available options, but by agreement the parties can choose the law that suits them. In In Re Missouri Steamship Company in 1889, Judge Justice Chitty proposed that the parties' contracts should be decided on the basis of the law contained in the parties' contracts [11].Through this idea, the idea is revealed that the parties can choose their own law through a contract. This makes it clear that the parties can clearly express this right by including it in the terms of the contract rather than by reference. The principle of free will has now changed from one that serves a secondary function, allowing parties to choose among available options, to one that allows parties with a primary function to choose a law commensurate with their interests based on agreement. For them, the open choice of parties, expressed in words, and not the symbolic choice of parties, acquired paramount importance. Courts have also begun to focus on identifying the symbolic choices of the parties, identifying choices that serve the interests of the parties. These changes showed that the principle had made a fundamental turn from one direction to another.

In 1897, London Assurance v. In the case of Companhia de Moaganes do Barreiro, the parties refer their dispute to the customs of Lloyd's. The courts hearing these disputes will decide the parties' cases based on these guidelines, provided that adherence to these guidelines is consistent with English law and public order. The principle of autonomy of will moves from the manuscripts of lawyers into practical life, which is now enforced by the courts. When resolving the objective side of disputes, courts also take into account the subjective wishes of the parties [12].

But even during this period, there were opinions in the form of opposition to the principle of freedom of expression of the parties. American lawyer Joseph Beal, author of the 1934 Restatement of the First Conflict of Laws of the United States [13], believes that recognition of the principle of free will is equivalent to recognition of the legislative power of these parties [14]. In his opinion, the principle of autonomy of will is equal to the equating of the parties to the legislator, and it is this reason that is the reason for the rejection of the principle. Beale believes that the principle of free will of the parties is equivalent to the legislative power of the states. That independent parties have such a right to make laws only within the country is contrary to the fundamental principles of law. Of course, the passing of laws and the establishment of a legislative branch are in the public interest. But as Beal says here, this principle prevents parties from making

laws as representatives of the legislature. The parties, based on the agreement, enter into an agreement that has a legal basis for resolving disputes that arise. They are not equivalent to or circumvent the powers of any government or legislative authority.

However, Beal's views were rejected in the Second Statement of Conflicts of Laws of the United States (1971). In this Second Statement, the law chosen by the parties is applied not because the parties are legislators, but because the agreement of the parties is recorded in the contract. The free will of these parties is generally allowed as long as it is consistent with basic principles of law.

As ideas about the principle of free will became widespread, this principle began to find expression in the legislation of many countries. In 1865, the Italian Civil Code introduced the rule that the parties may choose law by agreement. After World War II, the spread of this principle accelerated. After World War II, with the convergence of countries' policies and the expansion of international cooperation, this principle began to find its place in international documents. The 1955 Hague Convention on Choice of Laws in the International Sale of Goods includes the principle that parties may choose law by agreement.

This provision is included in the Civil Code of the Republic of Uzbekistan. According to this provision, the parties can choose the law by agreement, unless otherwise provided by law. The parties can choose the law both for the entire part of the contract and for only one part of it. The parties can choose an agreement both before and after the conclusion of the contract. Parties may choose at any time before the dispute is resolved in court.

In conclusion, we note that the choice of law by the parties based on the principle of free will is an integral part of this principle. This feature further strengthens the will of the parties. The principle went through a long development stage. The fact that the parties can, based on contract, choose the law that suits their interests, subject to the rules established by the laws of the country, shows their freedom. In the beginning, the laws of countries were of paramount importance. The parties did not have the opportunity to circumvent these rules. There was not even a thought that the will of the parties would matter when choosing the law. But changes in international relations began to change from these rules to rules that favor the freedom of the parties. The main feature of these changes is the transition from public interests to private interests in contractual relations. This has led to a greater emphasis on rules that allow parties to agree on mutually acceptable rules for independent parties, rather than on countries' laws establishing strict laws. Based on their interests, the parties agreed on the terms of the agreement and began to determine the obligations of the parties. This situation is quite different from the rule that any contract must be subject to the laws of the place where it was made in earlier periods, and this idea encourages individual initiative among the parties.

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