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The Dilemma and Resolution of Expanding Dispute Resolution Clauses under "Abnormal Changes" in Contracts: A Realist Analysis

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Abstract

Following the approach of modern pluralistic legal realism, when determining whether dispute resolution clauses can be extended in application during "abnormal changes" to contracts, considerations of the "automatic transfer" rule and the "independence" principle should be excluded. "Protective" and "isolationist" thinking should be discarded in favor of "practical" and "holistic" thinking. In principle, the expanded application of dispute resolution clauses should be denied. However, in certain scenarios—such as assignment of claims or "sale does not terminate lease"—denying expanded application would severely undermine the original purpose of addressing "abnormal changes." Exceptions should be permitted, but parties must retain the right to opt out. Furthermore, when rejecting expanded application would cause grossly unreasonable harm to the original contracting parties, courts should conduct specific reviews and determinations.

Keywords

Dispute Resolution Clause, Automatic Transfer, Abnormal Change, Practicality, Legal Realism

1. Introduction

On November 4, 2022, the Supreme People's Court released the "Interpretation on the Application of the General Provisions of the Contract Section of the Civil Code of the People's Republic of China (Draft for Comment)" (hereinafter referred to as the "Draft for Comment"). In December 2023, this judicial interpretation was formally promulgated (hereinafter referred to as the "Contract General Provisions Judicial Interpretation"). It represents a synthesis and innovation of

past theoretical research, judicial practice, and contemporary legal developments, and will profoundly influence the application and study of the Civil Code for a considerable period.

Article 36 of the Judicial Interpretation on General Principles of the Contract Section provides an initial response to the issue of the effectiveness of arbitration agreements or jurisdiction agreements entered into between a debtor and its counterparty regarding the creditor-debtor relationship when exercising subrogation rights. This addresses the question of the extended application of dispute resolution clauses under "abnormal changes" to contracts. Dispute resolution clauses refer to contractual provisions specially agreed upon by parties prior to the occurrence of disputes, concerning procedures, methods, applicable laws, and choice of courts for resolving contractual disputes (Tang & Li, 1998). They generally include the following types: arbitration clauses, choice-of-court clauses, choice-of-law clauses, and clauses selecting inspection or appraisal institutions. The term "abnormal contract modification" refers to situations where a third party forcefully intervenes in the original contractual relationship without the mutual consent of the original contracting parties, thereby breaching the principle of contractual relativity and the rule of mutual agreement for contract modification. The issue of expanded application of dispute resolution clauses under abnormal contract modification arises when such third-party intervention occurs without forming a new agreement on dispute resolution with the party unaffected by the modification. This raises the question of whether the original dispute resolution clause remains applicable between these two parties. In such cases, neither party has explicitly expressed an intention to reject the application of the original dispute resolution clause. For consistency and brevity, this paper employs the concept of the "non-modifying party (or subject)" to denote the party who originally had no legal relationship with the third party but against whom the third party asserts rights. Examples include the debtor in a third-party beneficiary contract, the secondary debtor in subrogation, and the debtor in an assignment of claims. Taking the exercise of subrogation rights as an example, it breaks the principle of contractual relativity, enabling the creditor to assert rights directly against the secondary debtor without forming a new agreement with them. If the debtor and secondary debtor have agreed to an arbitration clause, but no new arbitration agreement exists between the creditor and the secondary debtor, the question arises whether the latter is bound by the original arbitration clause.

The Draft for Comment proposes two solutions: First, "if, after the creditor initiates a subrogation action, the counterparty to the debtor raises an objection based on an arbitration agreement or jurisdiction agreement concerning their own creditor-debtor relationship with the debtor, the People's Court shall not uphold such objection. However, if the counterparty applies for arbitration against the debtor or files a lawsuit with the people's court specified in the jurisdiction agreement before the conclusion of the first-instance trial debate, and asserts that the subrogation lawsuit should be stayed, the people's court shall support such assertion." The

second solution states: "After a creditor files a subrogation action, if the debtor or its counterparty raises an objection based on an arbitration agreement or jurisdiction agreement established between the debtor and the counterparty, the People's Court shall either dismiss the lawsuit or instruct the plaintiff to file the lawsuit with the People's Court having jurisdiction." The final solution in the Judicial Interpretation on General Principles of Contract Law, however, states: "After a creditor files a subrogation action, if the debtor or counterparty objects to the court's jurisdiction on the grounds that an arbitration agreement exists between them, the People's Court shall not support such objection. However, if the debtor or counterparty applies for arbitration regarding the debt relationship between them before the first hearing, the People's Court may suspend the subrogation proceedings in accordance with the law."

The expansive application of dispute resolution clauses under "abnormal contract changes" has long been a "difficult and complex issue" in judicial practice, with significant controversy. Some courts endorse expansive application, arguing that the creditor is essentially exercising the debtor's claim against the secondary debtor and thus the arbitration clause between the debtor and secondary debtor should apply concurrently. This approach also protects the "jurisdictional interests" of the secondary debtor. However, many courts oppose this view, arguing that no arbitration agreement exists between the creditor and the secondary debtor. Moreover, expanding the application of the arbitration clause would be detrimental to the creditor's ability to enforce their rights. Moreover, this issue remains a "niche area" in academic circles, long neglected in terms of in-depth, systematic research. Therefore, Article 36 of the Judicial Interpretation on General Principles of the Contract Section represents a valuable theoretical innovation and institutional advancement. The two proposed solutions, however, follow distinctly different lines of reasoning while both exhibit a tendency to affirmatively support the extended application of dispute resolution clauses. This reflects the issue's high complexity and the Supreme Court's hesitation on this matter. Which approach is superior, or are both unsatisfactory? Furthermore, beyond scenarios involving the exercise of subrogation rights, does this issue arise in other contexts? Are the approaches to resolving it consistent? Can other types of dispute resolution clauses be treated uniformly with arbitration clauses? These questions urgently require theoretical clarification.

However, resolving this issue appears difficult to achieve solely through internal legal logic. Therefore, this paper adopts a realist legal perspective, aiming to provide a practice-oriented solution that may serve as a "stone from another mountain to polish one's own jade," offering a potential breakthrough to this conundrum. Legal realism typically refers to a sociological legal theory grounded in pragmatist philosophy. Shen (1992) traces its formal inception to late 19th-century U.S. Supreme Court Justice Oliver Wendell Holmes, who once championed it as America's legal philosophy. He (2005) notes that its defining characteristic is a tendency to minimize the normative or prescriptive elements of law, asserting

that law constitutes a set of facts rather than a system of rules. Bodenheimer (2017) notes that after a period of decline and continuous scrutiny since World War II, legal realism experienced a resurgence at the beginning of this century. It has since developed richer research perspectives, evolving from traditional monistic realism to modern pluralistic realism (Deng, 2014). Reflecting on the intellectual sparks ignited by legal realism and its developmental trajectory undoubtedly offers significant benefits for legal scholarship in China, particularly in addressing practical issues. The recently revived and emphasized concept of "judicial activism" largely stems from Western judicial activism grounded in legal realism. Although differences exist in their specific content and scope of application, they share fundamental consistency, exhibiting both intellectual lineage and phenomenological homogeneity (Gu, 2010).

2. How does Extended Application Occur under "Abnormal Changes" to Contracts?

Generally, contracts possess relativity, binding only the contracting parties and not third parties outside the contract. Thus, dispute resolution clauses within such contracts cannot be extended to third parties. Only when contractual relativity is breached or contractual parties change, allowing third-party intervention, might those third parties become bound by the original dispute resolution clauses.

2.1. Circumstances Overriding Contractual Relativity

Article 465 (2) of the Civil Code stipulates: "A contract lawfully established shall be legally binding only on the parties, unless otherwise provided by law." This provision indicates that exceptions overriding contractual relativity must be explicitly prescribed by law. China's civil and commercial legal framework does indeed contain a series of institutional designs that breach the principle of contractual relativity. However, it should be noted that not all breaches of contractual relativity give rise to the issue of expanded application of dispute resolution clauses. For instance: Article 545 of the Civil Code stipulates that where a contract prohibits the assignment of non-monetary claims, such prohibition may be enforced against non-bona fide third parties. Beyond these examples, other instances of breaching contractual relativity under Articles 388, 641, and 807 of the Civil Code, as well as Articles 16 and 43 of the Interpretation on the Guarantee System, similarly do not involve the issue of expanded application of dispute resolution clauses (Cui, 2022). In summary, these scenarios share a common feature—and this is the fundamental reason why the dispute resolution clause does not extend its applicability—namely, that while third parties are to some extent bound by the original contract's terms, they have not directly entered into the original contractual relationship or become a party to the original contract. When disputes arise, third parties may only assert rights against the counterparty (a party to the original contract). They cannot "enter" the original contract or assert rights against the other party by leveraging the counterparty's contractual position. Similarly, the other

party to the original contract can only assert rights against the counterparty. The original contract typically creates an effect that is effective against third parties. Consequently, the dispute resolution clause within the original contract becomes meaningless to third parties. In other words, the breach of contractual relativity in such scenarios is less pronounced than in the opposite situation. As per the aforementioned Article 545 of the Civil Code, a malicious assignee of a non-monetary claim may only assert rights against the assignor and does not establish a relationship with the other party to the original contract. Consequently, the dispute resolution clause in the original contract naturally becomes irrelevant.

Conversely, the opposite scenario becomes clear: if a third party directly intervenes in the original contractual relationship or becomes a party to the original contract, the dispute resolution clause may become effective against that third party. Specifically, first consider the scenario where a third party directly intervenes in the original contract, such as in a bona fide third-party contract under Article 522 (2) of the Civil Code. Where the third party may directly request the debtor to bear liability for breach of contract when the debtor fails to perform the contract or performs it in a manner inconsistent with the agreement. Simultaneously, pursuant to Article 18 (3) and Article 65 (2) of the Insurance Law, as well as Article 2 of the Trust Law, insurance contracts and trust contracts also constitute genuine third-party beneficiary contracts, where the third party (beneficiary) enjoys corresponding rights to claim benefits. Furthermore, scenarios where third parties directly intervene in contracts include: The lessee's rights as a buyer pertaining to the subject matter in financial lease contracts; Joint and several liability borne by the principal contractor and the illegal subcontractor/assignee in unlawful subcontracting or assignment; Joint and several liability of carriers under single-document multimodal transport contracts; Exercise of subrogation rights.

Second, third parties may directly become parties to the original contract. Examples include: The system of undisclosed agency under Articles 925 and 926 of the Civil Code, where the contract directly binds the principal (i.e., the third party discussed herein) and the agent when the agent is aware or the principal exercises the right of intervention, or the agent exercises the right of election. All these scenarios involve the expanded application of dispute resolution clauses under "abnormal contract changes."

2.2. Scenarios Involving Changes in Contractual Parties

As previously established, the term "change in contractual parties" here refers narrowly to the assignment of contractual rights and obligations. In such cases, the third party directly becomes a party to the contract, naturally raising the issue of the expanded application of the dispute resolution clause from the original contract. According to Article 546 (1) of the Civil Code, when a creditor transfers a claim, the debtor's consent is not required, but the debtor must be notified; if the debtor is not notified, the transfer is ineffective against the debtor. Pursuant to Article 551 (1) of the Civil Code, where a debtor transfers all or part of an obliga-

tion to a third party, the creditor's consent must be obtained. Without such consent, the transfer shall be ineffective. Therefore, in the case of debt assignment, the prior consent of the creditor is required for the assignment to be effective. It is generally understood that the creditor thereby also expresses their intent regarding any changes to the dispute resolution clause, thereby reaching a new arbitration agreement with the assignee. Conversely, in the case of claim assignment, since the debtor's prior consent is not obtained, no new arbitration agreement with the assignee exists. Thus, the issue of extended application of dispute resolution clauses primarily arises in the context of assignment of claims. Consequently, the subsequent discussion in this paper will no longer address scenarios involving assignment of debts.

2.3. Summary

Based on the preceding discussions, scenarios involving the extended application of dispute resolution clauses exhibit the following characteristics: First, the contract contains a dispute resolution clause, which is the prerequisite for the issue to arise. Second, the contract undergoes a change involving a third party, who will directly interact with the "non-changing" party to the contract. Third, such changes are "abnormal" in nature, meaning they deviate from general legal principles—primarily by breaching the "consensus rule" of contracts, such as when a creditor assigns a claim without the debtor's consent or when a subrogated party asserts rights directly against a secondary debtor. Consequently, in contractual alterations, third parties typically do not form new mutual consent with the "non-altered" party regarding the dispute resolution clause. Identifying these characteristics not only precisely defines the scenarios where the expanded application of dispute resolution clauses arises but also pinpoints the root causes of the issue, holding significant implications for its resolution.

3. Deconstructing the "Automatic Transfer" Rule

Building on the preceding analysis of scenarios and causes for the extended application of dispute resolution clauses under "abnormal contract changes," a fundamental question arises: Should dispute resolution clauses undergo "abnormal changes" alongside the principal contract? If so, their extended application would be justified. This paper examines the extended application of arbitration clauses in assignment of claims scenarios. This choice is motivated by two considerations: first, such scenarios are relatively typical and possess strong universal significance; Second, legislation has already addressed this scenario, and academic research exists on the topic.

3.1. What Constitutes the "Automatic Transfer" Rule

Article 9 of the Supreme People's Court's Interpretation on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China stipulates: "Where a claim or obligation is transferred in whole or in part, the ar-

bitration agreement shall be effective against the transferee, unless the parties have otherwise agreed, the transferee expressly objects at the time of the transfer, or the transferee was unaware of the existence of a separate arbitration agreement." This provision represents one of the few explicit regulations within China's current legal framework addressing the expansive application of dispute resolution clauses. It is regarded as establishing the "automatic transfer" rule for arbitration clauses: when a creditor-debtor relationship is transferred, the relevant arbitration clause generally transfers automatically as well, while granting third parties a "right of refusal" under specific circumstances. This rule is widely recognized in the laws of multiple countries, including Germany, Austria, and Switzerland (Wang, 2013b). Furthermore, most arbitration rules with exemplary significance do not address this issue, while a few incorporate portions of the aforementioned judicial interpretation. In practice, however, arbitration institutions often favor the expansive application of arbitration clauses in the hope of broadening arbitration's scope.

Some argue that the legitimacy of the "automatic transfer" rule lies in its protection of the debtor's rights, serving as an important procedural defense for the debtor (Zhu, 2020a). China adopts the "notification principle" for assignment of claims, whereby the assignment becomes effective upon notification reaching the debtor, without requiring prior consent. This effectively sacrifices the debtor's interest in "freedom of contract" to pursue the benefit of "free circulation" of claims (Zhu, 2020b). However, the "automatic transfer" rule and the "notification-based" rule respectively grant the debtor procedural and substantive defenses, thereby restoring this imbalance of interests. Moreover, the "automatic transfer" rule is seen as safeguarding the reasonable expectations of the non-modifying party to the contract—namely, that the dispute resolution method agreed upon at the time of contract formation will be applied when disputes arise (Sun, 2002). Simultaneously, as an ancillary clause, the arbitration clause naturally transfers with the main contract (Zhao, 2010).

Of course, the "automatic transfer" rule also faces significant challenges. For instance, merely notifying the debtor without obtaining their consent lacks a new arbitration agreement with the third party, and the arbitration agreement is the most essential element for establishing an arbitral tribunal. The right to arbitration is a procedural right, not subject to the rules governing the substantive rights of the governing contract; that is, the arbitration clause is not ancillary to the principal contract and does not transfer with it (Zhao, 2010).

3.2. Legitimacy Examination

Indeed, when a claim is assigned, no arbitration agreement is formed between the debtor and the third-party assignee. However, viewed within the broader context of claim assignment, this does not appear to be a significant issue. This is because the creditor-debtor relationship, as the subject matter of the principal contract, also lacks a new "factual agreement"; both are legally deemed to constitute a "legal

agreement." Since this is a legal fiction, it necessarily involves certain value pursuits beyond the parties' agreement (Lu, 2005). The former aims to compensate for the debtor's loss of "contractual interest," while the latter seeks to promote the full circulation of claims. This implies that the construction of assignment rules (including the "automatic transfer" rule for arbitration clauses) is not driven by adherence to general contract law principles, but rather guided by specific value considerations. Therefore, arbitration clauses do not "automatically transfer" as an appendage to the principal contract; the true catalyst for "automatic transfer" is the aforementioned balancing of interests. Thus, the legitimacy of the "automatic transfer" rule hinges on whether this balancing of interests holds water. This paper argues that it is not.

First, from a legal theory perspective, this balancing of interests presents a logical paradox. Its starting point was to compensate for the absence of the debtor's consent in the assignment of claims, but the ultimate result is the creation of a new absence of the debtor's consent, as the debtor has not formed a new arbitration agreement with the assignee. Admittedly, one might argue that since a constructive agreement is established, the absence of an express agreement becomes less significant. However, it must not be forgotten that, as discussed earlier, such a lack of agreement must be supported by the preservation of higher-order legal values. Here, this means substantively protecting the debtor's interests. Extending the validity of the arbitration clause in the original contract to the assignee is beneficial to the debtor, but this conclusion is also difficult to justify.

This leads to the second point: from a practical utility perspective, extending the arbitration clause to the assignee does not always align with the debtor's interests. To explore this, we must examine both the advantages and disadvantages of arbitration—specifically, why debtors choose arbitration as a dispute resolution method and why arbitration requires a prior arbitration agreement between the parties. Regarding the former, civil and commercial arbitration, as a vital component of China's diversified dispute resolution mechanism, offers distinct advantages: professionalism, flexibility, confidentiality, expediency, cost-effectiveness, and independence (Jiang & Xiao, 2016). These characteristics often constitute the rationale for parties agreeing to arbitration. From this perspective, extending the arbitration clause to third parties might not appear to adversely affect arbitration's advantages of professionalism, speed, and confidentiality. However, such an approach overlooks the most crucial reason and interest driving parties to choose arbitration: fairness. While parties may value arbitration's expertise, speed, and confidentiality, their fundamental desire is to resolve disputes through a process that maximizes fairness and impartiality. Changes in the opposing party may compromise the fairness of arbitration by affecting pre-agreed elements such as the arbitral institution, arbitrators, venue, or applicable law. For instance, in international contracts, the originally agreed-upon governing law might grant third parties advantageous positions based on differing trade preferences. Similarly, the arbitral institution or arbitrators could potentially influence the neutrality of the

arbitration due to connections with third parties.

Addressing this, Professor Karl Llewellyn of Columbia University—a leading figure in American legal realism—noted that law, being inherently uncertain and incapable of fully or promptly addressing reality, is profoundly influenced by those who apply it. Human reasoning and decisions, in turn, are deeply shaped by various societal factors (Llewellyn, 1930). Thus, judicial activity is not a purely logical process of legal reasoning but rather a judge's contextual understanding, "derived from the judge's common sense accumulated from personal life experience and wisdom as an ordinary person, as well as from the expert knowledge gained through professional training and experience." (Llewellyn, 1962). In the context of China's vigorous promotion of active judicial development and the backdrop of profound economic and social transformation, this issue becomes particularly prominent and unavoidable. Another leading realist legal scholar, Harvard's Professor Duncan Kennedy, takes this further by outright denying the possibility of certainty in legal application. He contends that judicial decisions are not only constrained by various social realities but are also significantly influenced by judges' subjective preferences (Kennedy, 1997). How to reasonably constrain judges' subjective value judgments has become a topic that the legal community has long "enjoyed tackling" yet remains "unsatisfactory" (Sun, 2023). Admittedly, arbitration cannot be equated with judicial activities, but its adjudication pathways and logical reasoning exhibit a high degree of intrinsic homogeneity. Arbitration outcomes are often not determined solely by law and facts; their influencing factors are diverse.

The latter hinges on why arbitration agreements are essential to arbitration and why they cannot be as freely formed as in litigation. First, tracing arbitration's origins reveals its emergence as a formal dispute resolution system during the flourishing commodity economies of ancient Greece and Rome. Merchants discovered that disputes could be resolved efficiently and acceptably through voluntary negotiation, where both parties jointly entrusted a trusted, reputable, impartial third party familiar with commercial practices to mediate and adjudicate. Arbitration has inherently carried the "voluntary agreement" gene from its inception (Song, 2013). Second, the development of arbitration emerged from the ongoing struggle between civil society and the political state, with the latter conceding judicial authority and fully recognizing arbitration's advantages. Yet judicial power remains dominant, and the stringent formal requirements of arbitration (necessitating an arbitration agreement) serve to some extent to preserve this dominance. Finally, and most crucially in contemporary terms, while arbitration offers numerous advantages, its inherent flaws are equally evident—such as insufficient remedies in final judgments and overly simplified evidentiary systems (Song, 2002). These shortcomings are often addressed by litigation procedures, which in turn introduce issues like time and resource consumption. Therefore, the choice of arbitration must be left to the parties' autonomous decision-making. They must not only consider arbitration's advantages but also weigh its potential disadvantages, making a com-

prehensive judgment between the two options based on specific circumstances. This nuanced and cautious judgment faces a significant risk of disorder when the opposing party in arbitration changes. Thus, overall, maintaining the original arbitration clause's validity may not necessarily protect the debtor's interests.

It should be emphasized that this article does not deny that, in certain circumstances, the expanded application of arbitration clauses can indeed protect the debtor's interests, and such protection is legitimate. For instance, if one purpose of the debtor's original arbitration agreement with the creditor was to protect trade secrets, excluding the clause's extension to the debtor and assignee would significantly increase the risk of trade secret disclosure if the assignee opts for litigation without a new arbitration agreement. In such cases, prohibiting the clause's extension would be manifestly unreasonable. This paper will address this issue in the subsequent discussion.

Thirdly, arbitration clauses inherently possess bilateral nature. Upon agreeing to an arbitration clause, both contracting parties assume the obligation to resolve disputes through arbitration rather than litigation, mediation, or other means when disputes arise. Transferring one's arbitration obligation requires the debtor's consent under the general rules governing assignment of debt. In arbitration practice, the substantive differences in how opposing parties fulfill arbitration obligations are evident. For instance, if the assignee's financial standing or adherence to the principle of good faith arbitration is inferior to that of the assignor, the debtor may struggle to obtain genuine relief or face increased costs. Such impacts on the arbitration process indirectly affect the rights and interests of the parties involved (Yao, 2022). This point can also be viewed from the perspective of the "right-based" nature of defenses. If the applicability of an arbitration clause is regarded as a procedural defense for the debtor, then pursuant to Article 548 of the Civil Code: "After receiving notice of the assignment of a claim, the debtor may assert against the assignee any defense that the debtor had against the assignor," the arbitration clause can be extended to apply to the assignee. However, a defense typically refers to a party's right to oppose another party's exercise of a claim. Yang (2022) notes that the procedural defense in arbitration is an obligation: under the arbitration clause, the debtor must assert this "defense." Therefore, this paper argues that the procedural defense formed through dispute resolution clauses is, in essence, a false proposition.

This issue extends beyond arbitration clauses to the other three types of dispute resolution provisions: clauses selecting courts of jurisdiction, clauses governing applicable law, and clauses designating inspection or appraisal bodies. In the context of assignment of claims, expanding the applicability of dispute resolution clauses to protect the interests of the parties lacks a legitimate basis for either the debtor or the assignee. Consequently, there is no question of reasonable expectation on the part of the debtor. Dispute resolution clauses not only serve as crucial procedural guidelines but also impact substantive matters, with such impacts carrying significant uncertainty.

In summary, this paper argues that the "automatic transfer" rule lacks persuasive force. Similarly, in other scenarios involving the expanded application of dispute resolution clauses, the original contract's dispute resolution provisions should not undergo "abnormal" changes alongside the principal contract for the same reasons. This is because in other situations, the "contractual intent" of the non-amended party is also compromised, leading to attempts to remedy this through the expanded application of dispute resolution clauses. As for the argument opposing the "automatic transfer" rule based on the independence of dispute resolution clauses, this paper finds it largely inconsequential. Detailed discussion follows below.

4. Deconstructing the "Independence" Principle

Another common approach to analyzing the expansive application of dispute resolution clauses relies on their independence. Once independence is established, the clause's expansive application becomes difficult to justify. Research on the independence of dispute resolution clauses began in Chinese academia as early as the late 20th century. Today, this principle appears widely accepted, with legislative responses already in place. However, this independence typically refers to the clause's independent validity—meaning it is unaffected by the validity of the main contract, and conversely, the clause does not affect the main contract's validity. The primary reasons are as follows: First, based on the principle of party autonomy, the dispute resolution clause and the main contract reflect two distinct agreements, with no inherent hierarchical relationship between them (Liu, 2007). It is unlikely that the terms of the dispute resolution clause were induced through fraud (Zhao, 1997). Second, the two have different legal natures. Given their differing purposes, the main contract serves to realize civil and commercial rights and obligations between parties, functioning as a substantive law contract. In contrast, the dispute resolution clause aims to resolve potential disputes through agreed-upon methods and legal application, thus constituting a procedural law contract and a contract governing legal application. Consequently, the applicable laws differ: one applies procedural law, while the other applies substantive law. Furthermore, their formal requirements diverge. For substantive contracts, most countries do not universally require written form. However, for dispute resolution clauses, both international treaties and domestic laws generally mandate written form (Zhang, 2007). Third, establishing the theory of the independence of dispute resolution clauses can eliminate the need for judicial confirmation of the main contract's validity, thereby enhancing efficiency (Liu, 2005). Fourth, whether an ADR clause can exist independently of the main contract is closely tied to a country's public policy in contract law and civil procedure law, particularly its policy toward arbitration. Since World War II, encouraging extrajudicial dispute resolution methods and fully respecting party autonomy in judicial dispute resolution have become prevailing trends in the development of civil legal norms worldwide (Tang & Li, 1998).

In summary, while academia has advanced these arguments supporting the independent validity of dispute resolution clauses, the truly compelling rationale stems from the pursuit of "pragmatism"—ensuring such clauses function effectively. The core tenet of "pragmatism" philosophy centers on whether it resolves practical societal issues and yields favorable social outcomes (He, 2019). The essence of contractual independence lies solely in the independence of mutual consent, as consent constitutes the fundamental basis and most essential characteristic of a contract. Wang (2013a) notes that other elements, such as differing applicable laws or formal requirements, are merely "external to the contract." Consider an example involving differing applicable laws. Pursuant to Article 565 (2) of the Civil Code, if the principal contract contains provisions allowing parties to terminate the contract without notice, determining the termination date inevitably requires concurrent application of procedural law provisions regarding document service. Does this mean the main contract clause applying procedural law suddenly becomes independent? Clearly, this is absurd. Similarly, the formal requirements for dispute resolution clauses are fundamentally a "pragmatic" approach—by fixing the clause in writing, it reduces the likelihood of disputes arising over the clause itself.

While dispute resolution clauses and main contract clauses indeed involve separate agreements regarding content and purpose, their foundational agreement is shared: both serve to facilitate the realization of the rights and obligations between the contracting parties. Under normal circumstances, when contracting parties negotiate dispute resolution clauses, their shared expectation is that all parties will fully perform their contractual obligations—not that non-performance will trigger the clause's application. Furthermore, parties often consider the specific terms of the main contract when selecting a dispute resolution method, as differing rights and obligations inevitably influence their choice. In other words, dispute resolution clauses are not truly independent; they form part of the same overarching agreement as the main contract terms. Emphasizing differences in their specific content is meaningless, as this logic would similarly apply to all clauses within the main contract. The distinction between procedural and substantive clauses in a contract only holds significance within a "pragmatic" framework. Recognizing the independent validity of dispute resolution clauses neither undermines the substantive rights and obligations within the contract nor compromises the parties' autonomy of will. When disputes arise—particularly in cases of contract invalidity or rescission—resolving matters through prearranged methods significantly reduces time spent reviewing jurisdictional or legal applicability objections. This approach also facilitates genuine dispute resolution and enhances parties' acceptance of adjudicated outcomes. Simultaneously, this approach avoids a self-negating paradox: if the designated dispute resolution body rules the contract invalid, the dispute resolution clause becomes void; if the clause is void, the designated body lacks jurisdiction; if the body lacks jurisdiction, it cannot rule the contract invalid; if the contract cannot be invalidated, the dispute resolution clause

must apply—thus creating an endless loop (Zhang, 2007).

5. Constructing the Expanded Application of Dispute Resolution Clauses

5.1. The Developmental Trajectory and Lessons of Legal Realism

Following the developmental trajectory of American legal realism, it emerged from "the relativist cultural atmosphere after the 'First World War,' the expanding crisis of the common law, and the need for the localization of legal thought," and declined due to "the post-'Second World War' state's demand for legal normativity and its own 'unforgivable' flaws" (Lu, 2010). Specifically, it vehemently suppressed the rationality and necessity of legal concepts, legal reasoning, and legal systems while excessively exalting the decisive role of social reality. Although this broke down the self-containment of law and profoundly revealed the social foundations and operational logic behind it, it severely undermined the autonomy and objectivity of legal knowledge—the very source of legal rationality (Chen, 2023b)—ultimately leading to the collapse of the rule of law due to extensive political intrusion. Macaulay et al. (2003) sought to correct Randallian legal formalism by opposing the stripping and abstract generalization of legal principles, as the latter represented a failed response to the crisis of common law. While aspiring to the scientific discipline of jurisprudence, the unification of legal theory, and the systematization of legal institutions, it gravely neglected the diversity of social realities, leading to the rigidity and disconnect of law and its application. In this sense, legal realism essentially treads the same path as legal formalism, differing only in that formalism abstracts at the level of jurisprudence while realism abstracts at the sociological level. As noted earlier, Holmes abstracted the decisive factors of law into the will and needs of the state, while Llewellyn abstracted them into specific social common sense and professional norms—both exhibiting a singular mindset incapable of grasping the full panorama of the legal ecosystem.

The gradual decline of this traditional, singular legal realism after World War II has not diminished its profound influence on American legal scholarship and education (Lü & Fu, 2006). On the contrary, this influence continues to deepen and expand, particularly through the vigorous development since the early 2000s of the New Private Law movement, represented by figures such as Professor John C. P. Goldberg of Harvard Law School and Columbia Law School's Professor Thomas W. Merrill, has propelled traditional monistic legal realism toward the heights of modern pluralistic legal realism (Xiong, 2018). This approach no longer insists that legal determinants originate solely from social reality. Instead, it begins to value and explore the significant worth of legal concepts and legal logic, arguing that these are equally authentic reflections of real-world social life—just as much as the "state needs and ambitions" or "social common sense and professional norms" adhered to by monistic realism (Goldberg, 2012). Therefore, legal research must holistically consider all factors potentially influencing legal practice. While engaging with sophisticated theories and exemplary cases, it should advance the

constructive and effective interaction between law and society, advocating a bottom-up empirical research approach (McCauley, 2004). Only then can it be termed genuine "realist jurisprudence," aligning with its "pragmatist" philosophical foundation.

"By taking history as a mirror, one can understand the rise and fall of nations." Using "realist jurisprudence" as a mirror reveals the strengths and weaknesses of Chinese legal scholarship. While diverse forms of realism profoundly influence and reshape American legal studies, they also offer valuable insights and cautionary lessons for the autonomous development of Chinese legal research. Overall, these insights manifest in two symmetrical dimensions. First, we must steadfastly defend the theoretical ground of jurisprudence, avoiding any slide into the abyss of legal nihilism. Since the founding of New China, China's rule of law development has successively traversed stages of legal pragmatism, legal nihilism, legal empiricism, and legal idealism. The setbacks and lessons stemming from nihilism were profound indeed. Although remarkable achievements have been made in China's rule of law since the new century, the poisonous residue of legal nihilism persists, particularly in private law. This stems from its origins in the planned economy era, characterized by an excessive emphasis on individual submission to the state and collective society, and pervasive state planning and control (Xiong, 2018). Yet adherence to legal concepts and logic serves as the "ballast" for the rule of law's development; otherwise, various extraneous factors will exploit the guise of "pragmatism" to trample upon the dignity of the rule of law. Even Holmes, the founder of traditional legal realism, did not dare to completely deny the crucial role of legal theory (Hu & Wang, 2014). Second, we must acknowledge the internal supply constraints within jurisprudence and pay attention to bottom-up social realities. As China's rule of law development has entered an era of legal conceptualism, some research has become overly preoccupied with doctrinal analysis and immersed in the intricate arguments of traditional theories. This has led to a severe disconnect from social realities, with seemingly little concern for solving practical problems—a phenomenon that could be viewed as another form of legal "nihilism." To address this, we must correctly recognize the limitations of law and clearly see that some practical problems cannot be logically resolved within legal theory alone. We should approach them from multiple angles—social foundations, cultural traditions, people's behavioral habits, and social costs—and focus on the actual implementation of law and dispute resolution (Fan, 2006).

5.2. Establishing Judgment Criteria

Returning to the micro-level focus of this paper, we re-examine the expansive application of dispute resolution clauses under "abnormal contract changes" and propose solutions grounded in modern pluralistic realism.

1) Exclusion of Irrelevant Pathways

The deconstruction of the "automatic transfer" rule and "independence" of dispute resolution clauses constitutes, in many respects, the construction of solutions

to their expansive application. First, certain irrelevant lines of reasoning should be excluded, primarily including the following two points.

a) "Protective" Thinking

This line of thinking often supports the expansive application of dispute resolution clauses, viewing it as protection for the party to the contract who has not changed: compensating for the loss of "contractual benefits" through "procedural benefits," while also safeguarding "expectation benefits" and preventing improper evasion by third parties. However, advocating for the expansive application of dispute resolution clauses does not constitute a genuine defense for the parties. Moreover, such expansion does not invariably benefit the party whose contract terms remain unchanged. Thus, balancing the interests of both parties cannot serve as the criterion for determining whether a dispute resolution clause should be applied expansively.

Notably, recent scholars have attempted to reconstruct the subjective scope theory of arbitration agreements by emphasizing their dual nature as both legal acts and procedural acts. They propose: on one hand, extending the statutory "written form" requirement to infer, presume, or deem implied consent to contractual arbitration agreements through expressions of intent; On the other hand, they contend that expanding the validity of arbitration agreements can effectively alleviate litigation pressure, conserve judicial resources, and expedite dispute resolution. In other words, to protect the public interest, the freedom of expression of the parties can be sacrificed, binding them to the chosen procedure (Chen, 2023a). However, from the perspective of excluding "protective" reasoning, both arguments collapse under scrutiny. First, the former argument focuses solely on the intent of non-signatories while neglecting the intent of the party who did not alter the contract. This is because the default assumption that the expanded application of arbitration agreements always benefits them is not necessarily true. This actually touches upon the inherent flaws of formalist jurisprudence, where overly complex conceptual logical reasoning obscures the substantive judgments behind legal rhetoric. The limitations of legal knowledge clearly prevent breakthroughs from within (Posner, 2013). Second, regarding the latter argument, fundamentally, permitting parties to consensually choose dispute resolution methods represents a compromise with the state's monopoly on adjudication. This compromise stems from the significant advantages it offers in resolving disputes and conserving resources. However, as previously noted, the expansive application of arbitration agreements creates significant ambiguity in protecting parties. Parties may still pursue litigation against arbitral awards, ultimately hindering dispute resolution while wasting judicial resources and undermining public and national interests. In other words, the expansive application of dispute resolution clauses risks substantial conflict with their foundational purpose and meaning—abstractly defined as "practicality." This point will be elaborated upon in the subsequent discussion. Therefore, dismantling the "protective" mindset must be the consistent logical starting point when considering the expansive application of dispute reso-

lution clauses.

b) The "Isolationist" Mindset

This mindset opposes the expansive application of dispute resolution clauses, asserting that the independence of such clauses extends to scenarios of expansive application and emphasizing their separation from the main contract. However, this independence still revolves around "pragmatism" and cannot obscure the connection between the dispute resolution clause and the main contract. Viewed from another angle, the question of the extended application of dispute resolution clauses is whether they can potentially overcome relativity like the terms of the main contract. As discussed in Chapter II of this paper, the possibility of overcoming the relativity of main contract terms has been widely discussed and recognized both at the normative and theoretical levels. By moving beyond "isolationist" thinking, we can leverage existing theories on breaching contractual relativity to examine the impact of dispute resolution clauses on third parties outside the contract more holistically, thereby clarifying the boundaries of their extended application.

2) Exploring Relevant Pathways

Second, previously overlooked lines of reasoning should be incorporated to put the insights of legal realism into practice, encompassing the following two points.

a) "Practicality" Approach

As Holmes observed, "The life of the law has not been logic; it has been experience." The foundation of law lies not in morality or formal logic, but in the needs and will of the state. Holmes (1880) noted this applies not only to public law but equally to private law. Thus, while the extended application of dispute resolution clauses appears formally as a purely private law issue, it is fundamentally permeated by the state's needs and will. As previously noted, this state need and will manifests in the purpose behind permitting parties to negotiate dispute resolution clauses: resolving conflicts and conserving resources. This embodies the "pragmatism" that underpins realist legal philosophy.

Satisfying these needs and wills requires addressing two aspects. First, the "practicality" conducive to dispute resolution. As discussed earlier, "protective" and "isolationist" mindsets are rejected. In other words, the expansive application of dispute resolution clauses cannot be justified either from general legal principles or from a perspective of balancing interests. Therefore, we must return to the essence of the matter itself. This essence lies in the core purpose of establishing dispute resolution clauses and the legislative spirit behind national laws permitting parties to agree on dispute resolution methods—both aim to resolve disputes efficiently and effectively. This reduces the time consumed by determining jurisdiction and selecting applicable laws. Moreover, since the chosen dispute resolution method stems from the parties' autonomy of will, the adjudicated outcome is more readily accepted by them. Second, the "practicality" that facilitates achieving the purpose. This purpose does not refer to the objective of the principal contract (which essentially falls under the first aspect of practicality discussed here), but rather to

the purpose of introducing "abnormal changes" into the contract—sacrificing contractual agreement to allow third-party intervention. For instance, the design of assignment of claims rules aims to facilitate the circulation of claims; the design of subrogation rules aims to preserve debts; and the design of the "sale does not terminate lease" rule aims to maintain the original lease relationship to protect the lessee. Su (2002) While the first aspect of practicality is paramount, excessive neglect of the second aspect may hinder the achievement of the intended objectives of relevant systems, adversely affecting the stability and development of socioeconomic life—effectively rendering it "impractical." As previously noted, behind contractual "abnormal changes" often lies the pursuit and preservation of higher legal values. These changes have demonstrated their rationality and necessity through long-term judicial practice, playing a positive role in promoting economic and social development and advancing the rule of law. In other words, as discussed in Chapter III of this paper, protecting the non-modifying party to a contract does not justify the "automatic transfer" rule. However, when based on specific 'exceptional' modification objectives, the "automatic transfer" rule gains legitimacy. Therefore, in the expansive application of dispute resolution clauses, it is essential to fully respect the parties' intentions while simultaneously promoting the achievement of the corresponding objectives.

b) "Holistic" Approach

This approach also operates on two levels. First, while upholding party autonomy (i.e., requiring a genuine and explicit arbitration agreement for arbitration to apply), it integrates a practice-oriented "pragmatism" that emphasizes the practical efficacy of dispute resolution. The breakthrough of the core private law principle of contractual relativity stems from implementing this "pragmatism," but such breakthroughs cannot be unrestrained. As previously noted, in this context, the disadvantages far outweigh the benefits. Introducing third-party arbitration often serves as a moderate solution to circumvent relativity (Wang, 2021). Similarly, this issue cannot be confined within doctrinal constraints; it must maximize compliance with "practicality" standards. Since its purpose is to resolve disputes, it must not generate new ones. Second, building upon the second aspect of utility mentioned earlier, the balance between these two dimensions of utility will inevitably differ depending on the prevailing purpose. Therefore, when determining whether a dispute resolution clause should be applied expansively, a one-size-fits-all approach is inadvisable. A case-by-case analysis is required, involving a holistic examination of both the dispute resolution clause and the main contract clause, taking into account the nature of the main contract clause and the underlying institutional purpose it conveys.

In summary, the criteria established in this paper for determining the extended application of dispute resolution clauses are as follows: fully respecting the parties' autonomy of will while aligning with the objectives pursued by "exceptional contract modifications," emphasizing the relevance between the dispute resolution clause and the main contract, and abandoning the perspective of protecting the

parties' rights and interests.

5.3. Application of the Criteria

Under these criteria, the fundamental objective is to achieve efficient and high-quality dispute resolution by fully respecting the parties' autonomy of will. Therefore, in the absence of a corresponding arbitration agreement, the extended application of dispute resolution clauses should generally be denied. However, exceptions should be permitted in certain special circumstances, provided the parties retain the right to refuse. This approach embodies the essence of realist legal theory, pursuing not only procedural justice but more importantly substantive justice. It must be explicitly noted that the aforementioned principles and exceptions presuppose that neither party has expressed a clear refusal to apply the original dispute resolution clause. Where such a refusal exists, the expanded application of the clause can generally be directly rejected. The following sections will analyze specific representative scenarios.

First, scenarios where the expanded application of dispute resolution clauses is generally excluded include the exercise of subrogation rights and the exercise of third-party election rights in indirect agency. As a form of debt preservation, subrogation overrides the principle of contractual relativity, enabling creditors to assert rights directly against secondary debtors even without a direct creditor-debtor relationship. Here, the purpose of the "abnormal variation" in the contract is to safeguard the realization of the creditor's rights. Article 535 (1) of the Civil Code stipulates: "Where a debtor's failure to exercise its claim or ancillary rights related to such claim impedes the realization of the creditor's matured claim, the creditor may petition the people's court to exercise, in its own name, the debtor's rights against the counterparty, except where such rights are exclusively vested in the debtor." This indicates that disputes between parties have already surfaced when exercising subrogation rights, and creditors typically have already filed subrogation lawsuits with the court. At this stage, extending the application of dispute resolution clauses to both the creditor and the secondary debtor would undoubtedly increase procedural burdens and risks associated with asset transfers, undermining the effectiveness of debt preservation. Therefore, in scenarios involving the exercise of subrogation rights, the autonomy of both parties should be fully respected, unaffected by the purpose of "abnormal contract changes." The same analytical logic applies to the exercise of the third-party election right. Pursuant to Article 926 (2) of the Civil Code, the exercise of the third-party election right arises when a trustee fails to perform obligations to a third party due to reasons attributable to the principal. The purpose of preventing "abnormal changes" in contracts is to promote the fulfillment of corresponding contractual obligations. Excluding the application of dispute resolution clauses does not substantially impede the realization of this purpose.

Second, exceptions permitting the expanded application of dispute resolution clauses include scenarios such as assignment of claims and "sale does not terminate

lease." Assignment of claims, as a typical example, has been discussed in detail earlier. The reason it constitutes an exception is that since the purpose of contract "abnormal changes" is to pursue the free circulation of claims, rejecting the expanded application of dispute resolution clauses would likely increase renegotiation costs and the risk of disputes, undermining the objective of free circulation. The reason lies in the fact that the "consensual interest" of the party not subject to the "change" in the contract is deprived. Such a party often develops a "retaliatory" mindset and tends to assert the extended application of the dispute resolution clause. Rejecting its application may exacerbate conflicts, as evidenced by the numerous related disputes in judicial practice. Therefore, the validity of dispute resolution clauses in original contracts should be recognized as extendable to transferees. However, to respect party autonomy, such clauses should be excluded if either party explicitly objects or if the transferee was unaware of the clause's existence. The exception to the "sale does not terminate lease" principle stems from the objective of maintaining contractual stability and continuity in lease agreements. For the same reason, excluding the extended application of dispute resolution clauses would significantly undermine this objective. Consequently, the conclusion regarding applicability in such cases should align with that for "assignment of claims."

Finally, exceptions to exceptions exist beyond the "general" circumstances permitting expanded application of dispute resolution clauses. First, the issue left unresolved in Chapter II of this paper: in certain situations, the principle of excluding expanded application may cause unreasonable harm to the original contracting parties. Second, for the same reason as the first point above, where the explicit opposition of one party renders the exclusion of expanded application of the dispute resolution clause extremely unreasonable to the original contracting parties. For these two scenarios, this paper proposes maintaining the original approach while leaving the determination of whether excluding expanded application would cause extreme unreasonable harm to the "non-changing" party to the contract to the specific judgment of the court. That is, parties may raise objections before the court, asserting the continued applicability of the original dispute resolution clause. This approach both protects the rights of the parties and reduces the risk of excessive subjectivity in damage assessments and potential abuse of the rule. Furthermore, since the prior exclusion of the expanded application of dispute resolution clauses means that most parties will resort to litigation to resolve disputes in the absence of a new agreement, the court's preliminary review of objections raised by some parties regarding the clause's application will not impose an excessive burden on the court.

Of course, this approach of leaving the determination of whether unreasonable harm will occur to the specific judgment of the court inevitably raises issues of judicial subjectivity. However, this is unavoidable within the framework of modern rule-of-law nations, stemming from the inherent contradiction between the increasingly diverse and complex realities of social life and the stable, abstract nature of legal provisions. Simultaneously, it is an inherent requirement of pursuing

substantive fairness. Therefore, we should not reject this path; the key lies in how to reasonably limit judicial discretion.

6. Conclusion

Goethe (1982) stated: "To engage in the most practical tasks with an active mind and a pragmatic purpose is the most valuable thing in the world." Adopting the perspective of modern pluralistic realism in jurisprudence—rejecting "protective" and "isolationist" mindsets in favor of "practical" and 'holistic' approaches—is undoubtedly valuable for resolving the dilemma of expanded application of dispute resolution clauses under "abnormal contract changes." In this regard, the adoption of the first option from the Draft for Comment in Article 36 of the Judicial Interpretation on General Principles of Contract Law is commendable. However, the second paragraph should be amended to read: "However, if the counterparty, before the conclusion of the first-instance court hearing, raises an objection to the application of the original arbitration agreement or jurisdiction agreement on the grounds that its non-application would cause serious harm to the debtor or the counterparty, or files an arbitration application against the debtor, or initiates litigation with the people's court designated in the jurisdiction agreement and asserts that the proceedings should be stayed due to a right of subrogation, the court shall review the matter and issue a ruling." Of course, a more sophisticated approach might be to completely remove the provisions of Article 36 and establish unified rules for the extended application of dispute resolution clauses. However, how this should be achieved at the legislative technical level requires further study.

It should be particularly emphasized that although this paper primarily uses arbitration clauses as its research model, the conclusions drawn are equally applicable to other dispute resolution clauses. This is because, at their core, arbitration clauses, clauses selecting courts of jurisdiction, and clauses governing applicable law all embody the dual nature of rights and obligations, carrying the shared interests of the contracting parties.

Finally, beyond "abnormal contract changes," the issue of extended application of dispute resolution clauses also arises in related contracts such as principal-subordinate contracts, construction contracts, and subcontracting agreements. Yet the underlying logic of these two scenarios is fundamentally different. The former concerns the mutual influence among multiple contracts without direct alteration to the contractual structure. The crux lies in analyzing the parties' understanding of the relevant contracts and their genuine intent in each specific case. The latter, as previously noted, involves a value-based judgment reflecting factual intervention to balance interests. Therefore, the former issue must be addressed in a separate discussion.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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