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论国际私法中外国直接适用的法的适用

A Study of the Application of Foreign Directly Applicable

Law in Private International Law

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内 容 摘 要

“直接适用的法”因不依赖于冲突规范的援引，直接适用解决当事人之间的权利义务关系而表现出它的独特性。多边案件适用直接适用的法的情况一般分为适用本国直接适用的法和适用外国直接适用的法。由于直接适用的法的特性，其在本国的直接适用一般无争议。在理论和实践上争议较多的是外国直接适用的法的适用情况。外国直接适用的法的适用一般又分为准据法国直接适用的法的适用和第三国直接适用的法的适用两部分。我国关于直接适用的法的研究起步较晚。2010年出台的《中华人民共和国涉外民事关系法律适用法》（以下简称《法律适用法》）首次规定了本国直接适用的法的强制适用，对外国直接适用的法的适用却只字未提。但是，在全球化推动下，国际交往日益拓展和加深，外国直接适用的法的适用情况已然成为一个无可回避的问题。鉴于此，本文选取外国直接适用的法的适用这一角度，在讨论外国直接适用的法可适用性法理基础之后，考察各国对外国直接适用的法的适用情况，以期对我国在适用外国直接适用的法的理论和实践方面有所裨益。

本文分为三章来阐述国际私法中外国直接适用的法的适用。

第一章是对直接适用的法基本问题的澄清。本文的研究对象虽然旨在探讨外国直接适用的法的适用。但是对于该问题进行论述的前提离不开对其母体——直接适用的法的基本问题进行界定和澄清。本部分主要采用对比分析的方法。通过对比分析直接适用的法与国际私法中和它容易混淆的其他制度，我们可以更加清晰的认识直接适用的法的渊源、特征、结构、功能等问题，为下文对外国直接适用的法的适用分析做铺垫。

第二章是本文的重心，研究外国直接适用的法的适用。该部分首先从法理上分析了外国直接适用的法为何具有可适用性。接着从理论争议、立法实践、司法实践这几个角度，分别对准据法国直接适用的法的适用情况和第三国直接适用的法的适用情况进行了分析。对于准据法国直接适用的法的适用，在理论上得到了较为广泛的支持，但是有关国家的立法和司法

实践相对保守。而第三国直接适用的法的适用不仅在理论上较多的争议，各国的立法和司法实践也大相径庭。

第三章在以上分析的基础之上，阐述中国是否应接受外国直接适用的法的适用。该部分首先回顾了我国立法中直接适用的法从无到有的历史沿革。接着讨论了我国对待准据法国直接适用的法的应有态度。以及在适用准据法国直接适用的法的时候，哪些条件应成为适用的必要限制。最后结合我国司法实践现状，讨论了我国接受适用第三国直接适用的法的难处，并提出相应的替代解决思路。

关键词：直接适用的法；外国直接适用的法；《法律适用法》

ABSTRACT

"Directly applicable law" should be applied directly to multilateral cases regardless of choice-of-law rules. This kind of character shows its special values. We usually divide directly applicable law into two categories: directly applicable law of forum and directly applicable law of foreign countries. Due to the characteristics of directly applicable law of forum, the application of directly applicable law of forum is generally uncontested. Otherwise, no matter on the theory or in the practice, the application of directly applicable law of foreign countries usually brings a lot of debates. Foreign directly applicable law in general is divided into directly applicable law of governing law countries and directly applicable law of third countries. Our country starts studying the directly applicable quite late. In 2010, our country promulgates The Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China, which provides the country's directly applicable law for the first time, meanwhile, it said nothing about foreign directly applicable law applies. However, , driven by the expansion and deepening of globalization, foreign directly applicable law applicable has become an unavoidable issue. Thus, this paper selected foreign directly applicable law as the study point that wants illustrate the legal basis for the application of foreign directly applicable law and study this kind of issue in other countries. Finally, we expect what we get above could benefit the study and judicial practices of our country as refer to the application of foreign directly applicable law.

This article is divided into three chapters to illustrate the application of foreign directly applicable law in private international law:

The first chapter is the clarification of some basic issues on directly applicable law. Before studying foreign directly applicable law, it's necessary to clarify some basic issues on directly applicable law. This section mainly uses

the method of comparative analysis. Through comparing directly applicable law with the other similar concepts in private international law, we can have a clearer understanding of directly applicable law's origin, characteristics, structure, function and so on. Moreover, these discussions would also pave way for the following studies of foreign directly applicable law.

The second chapter is the focus of this article, which would have a research on the application of foreign directly applicable law. First, it would analyze the Applicability of directly applicable law. Then it would individually study the application of foreign directly applicable law in the views of theoretical arguments, legislative practice and judicial practice. The application of directly applicable law of the governing law country gets a widespread support, meanwhile, countries practice it cautiously. As to the application of directly applicable law of the third country, there are much controversial on theory and in practice.

The third chapter mainly analyses whether china should accept the application of the directly applicable foreign law. In this part, it has a review of our legislation on directly applicable law at first. Then, it discusses whether china should apply directly applicable law of the governing law country. If so, which restrictions should be put on its application . At last, it discusses the difficulties of applying directly applicable law of the third country and puts forward an alternative method.

Key words: directly applicable law; foreign directly applicable law; China's applicable law

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