



Negotiable Instrument Counterplea and Negotiable Instrument Counterplea Right

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Abstract

There have always been controversies upon negotiable instrument counterplea and negotiable instrument counterplea right among Chinese negotiable instruments law scholars. If legal scholars cannot clearly understand the contents of negotiable instrument counterplea and negotiable instrument counterplea right, there will be chaos in the whole negotiable instrument counterplea theory which goes against the protection of negotiable instrument obligors' benefit and the balance of negotiable instrument right system. This paper tries to accurately define negotiable instrument counterplea and negotiable instrument counterplea right by detailed analysis so as to contribute to Chinese negotiable instrument theory research.

Key words: Negotiable instrument counterplea; Negotiable instrument counterplea right; Defense cut off

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Karl Larenz thinks that definition is the foundation of system. (Larenz, 2003, p. 318) An accurate legal definition

is the premise for determining related legal system and clearly making legal decisions. There have always been controversies among Chinese instrument law scholars on the demarcation of negotiable instrument counterplea and negotiable instrument counterplea right. If legal scholars cannot clearly understand the contents of negotiable instrument counterplea and negotiable instrument counterplea right, there will be chaos in the whole negotiable instrument counterplea theory which goes against the protection of negotiable instrument obligors' benefit and the balance of negotiable instrument right system.

1. DEFINITION OF NEGOTIABLE INSTRUMENT COUNTERPLEA

In civil law theory, counterplea refers to the obligor's reply to the creditor or the claimer's plea by providing related facts or reasons to deny the creditor or the claimer's request or claim. Generally speaking, it includes the so called counterplea and the counterplea rights. Counterplea can be further divided into counterplea against right barriers and counterplea against the extermination of rights. “The counterplea against right barriers rests on requesting the totally nonoccurrence of the right of claim.” (WANG, 2001, p. 173) It is a counterplea that denies fundamentally the existence of the claimer's right, for example, counterplea against the lack of the party's capacity for civil conduct in legal act and counterplea against the failure of the conclusion of a contract; “the counterplea against the extermination of a right aims at requesting that the right of claim has been exterminated although admitting it once existed (Ibid.); and counterpleas that generated from the act of pay offs, pay offs on behalf of other people, set-off, drawings, mix-up, and the exercise cancellation right. The two kinds of counterpleas are both in lawsuits. Since the two

counterpleas will lead to the extermination of the right of claim, thus even the litigants do not put forward either of them during the course of litigation, the court has the obligation to examine related facts according to law. If the court thinks there are counterplea reasons, for the interest of litigants, it should make corresponding judgment. The counterplea right is the right for defending against other people's right of claim." (LIANG, 2001, p. 37) The counterplea right is substantive law right. Its existence is based on the right of claim and its effectiveness lies in the defense right against the existing right of claim. As long as it is a right belonging to the obligor, it is of course decided by the obligor freely on whether to use this right. During the process of litigation, when the obligor gives up his or her counterplea right, the court cannot examine it actively.

According to the above discussed counterplea and counterplea right theories, we can find out that the negotiable instrument counterplea belongs to the broader understanding of counterplea. It is because that it does not based on the existence of the right of claim, and even the counter part's negotiable instrument right does not exist from the beginning, or once exist but now exterminated, the respondent can deny his or her right of claim. Negotiable instrument counterplea includes counterpleas that totally deny the existence of the creditor's right of claim, for instance, the counterplea against the lack of negotiable instrument's absolutely necessary particulars, the counterplea against forgery of negotiable instrument and also counterpleas that deny the existence of the creditor's right of claim but aim at the defense against the excises of the creditor's right of claim permanently or once such as counterpleas of the not yet coming due date of negotiable instrument and counterplea of extinctive prescription and so on. Thus, negotiable instrument counterplea should be recognized as the broader understanding of counterplea and it must include right barriers counterplea, right extermination counterplea, and all the above three rights of defense. In negotiable instrument law, the so called negotiable instrument counterplea is a refusal conduct made by the negotiable instrument obligor against the request about certain legal issues claimed by the creditor¹. The fact that negotiable instrument counterplea lies in is the so called counterplea reason or cause. Counterplea reasons must base on the ground of negotiable instrument law and related laws, or it will be illegal counterplea which may lead to the abuse of rights and obstruct negotiable instrument creditor's exercise of rights and the circulation of negotiable instrument. The right that owned by the negotiable instrument obligor to refuse the creditor's right of exercising negotiable instrument rights is the negotiable

instrument counterplea right which is the reason and legal basis for the obligor to exercise counterplea on the court. Although negotiable instrument counterplea is based on the defense in civil law, it is quite different. For the objective of protecting obligor, civil law gives special provisions on the continuation of the right of defense. That is to say, when legal relationship changes, for example, in the occasion of assigning of debt, the creditor's rights can also be used to assignees. Compared with defense in civil law, negotiable instrument counterplea has some particularity which is mainly reflected in the cut-off system of negotiable instrument. This means that when negotiable instrument assignees obtain the rights from its remote holders, the counterplea reasons are not assigned at the same time. Usually, obligor of the negotiable instrument cannot counterplea against the assignee.

2. DEFINITION OF NEGOTIABLE INSTRUMENT COUNTERPLEA RIGHT

In negotiable instrument theory research, scholars usually understand negotiable instrument counterplea system from civil juristic acts aspect. They always give detailed definition on negotiable instrument counterplea conduct instead of understanding negotiable instrument counterplea right and not even give definition on the negotiable instrument counterplea right as a right. In fact, negotiable instrument right is the legal basis of negotiable instrument counterplea. It is because the right of negotiable instrument counterplea, the negotiable instrument obligor can use the negotiable instrument counterplea to against negotiable instrument holder, and his or her counterplea act could have legal foundation for being protected and recognized. Negotiable instrument counterplea and Negotiable instrument counterplea right are cause and effect. "If there is no definition on Negotiable instrument counterplea right, we cannot correctly understand the legality and reasonability of negotiable instrument counterplea nor the construction of complete negotiable instrument right system." (ZHAO, 2007, p. 236) Since negotiable instrument counterplea right is the legal foundation of negotiable instrument counterplea act, thus the content of the two has identity in logic. In addition, due to the exercise of negotiable instrument counterplea right is shown as the negotiable instrument counterplea act, that is to say, the realization of the function of negotiable instrument counterplea right depends on negotiable instrument counterplea act. Therefore, only when we give correct definition on negotiable instrument counterplea act's content, we can get the content of negotiable instrument counterplea right.

¹ Article 13 para.3 of Negotiable Instruments Law of The People's Republic of China (2004 Revision) stipulates: The term "protest" used in this law refers to the act of the debtor for a negotiable instrument s to refuse to perform obligations to the creditors according to the provisions of this law.

Scholars have different opinions on negotiable instrument counterplea act. Some think that “the so called negotiable instrument counterplea is a request made by negotiable instrument obligor to against creditor’s legal demand for doing certain things.” (ZHA, 1998, p. 144) Some think that “negotiable instrument counterplea is a refusal reason of obligor in negotiable instrument for refusing to perform creditor’s request.” (LIANG, 2004) And some others think “negotiable instrument counterplea is the made by obligor to refuse creditor’s demands.” (ZENG, 2005) By comparing the above opinions we can see that firstly, negotiable instrument counterplea act subject is the actor of negotiable instrument counterplea who are all obligors; secondly, the reason of negotiable instrument counterplea which is the ground of counterplea is included in some definitions but not all of them. Some definitions give further explanation on the reasons that they must be legal ones. In fact, negotiable instrument counterplea reason is the core part of negotiable instrument counterplea right and legal negotiable instrument counterplea reason is the foundation of negotiable instrument counterplea right. Counterplea reason should be specified by negotiable instrument laws and related regulations. Obligor must give counterplea reasons according to law or there will be abuse of obligor’s rights in practice. Third, negotiable instrument counterplea act’s object is recognized by some definitions as certain people or normal people and some think it should be creditor of negotiable instrument. During negotiable instrument counterplea situation, some holder has negotiable instrument rights while some do not have, for example, negotiable instrument lacks absolutely necessary particulars, is invalid, and the holder is certainly not the holder of the negotiable instrument. Therefore, the act object of negotiable instrument counterplea act is not always the creditor of negotiable instrument. It is appropriate to define the object of negotiable instrument as certain people or normal people.

After analyzing the negotiable instrument counterplea’s content, we can conclude that negotiable instrument counterplea has the following content: 1) the subject of negotiable instrument counterplea right is the debtor. Of course, the debtor here refers to all debtors reflected in the negotiable instrument including not only the principal debtor of the negotiable instrument such as drawer, acceptor, but also all debtors who sign on the negotiable instrument such as endorsers and warrantors; 2) the negotiable instrument counterplea right is used to against specific person or ordinary people who holds the negotiable instrument. The object is not limited to owner of instrumental rights; 3) the exercise of negotiable instrument counterplea right must happen under statutory or agreed circumstances. Normally, in negotiable instrument legal relations, the bearer of a negotiable instrument exercise his or her negotiable instrument rights according to the negotiable instrument he or she holds. Once the bearer asked the debtor to pay for the

negotiable instrument, the debtor has to perform his or her obligation if there is a reason or cause. However, when the negotiable instrument held by the bearer is obtained via illegal means and other similar situations, the bearer does not have the negotiable instrument rights. Thus, the debtor has the right to exercise counterplea against the bearer or it will cause damages for the real bearer’s negotiable instrument rights and also push the debtor to a very unfavorable circumstance. It is thus clear that the main function of negotiable instrument counterplea is to offer certain rights for self-protection for the debtor to protect his legal interests. Nonetheless, it is definitely not allowed for the debtor of negotiable instrument to abuse his or her counterplea right or it will bring unnecessary troubles for negotiable instrument creditors and then block the normal circulation of negotiable instrument and the existence of negotiable instrument system (GAO, 2005, p. 297). On that account, every country’s negotiable instrument law has specified regulations on negotiable instrument counterplea reasons. Only when there are statutory or promissory negotiable instrument counterplea reasons, negotiable instrument debtor can exercise the negotiable instrument counterplea right. If there is no statutory negotiable instrument counterplea reason, then the debtor must bear negotiable instrument responsibilities. Therefore, legal negotiable instrument counterplea reason is the core content of negotiable instrument counterplea right and also the basis of the establishment of negotiable instrument. 4) The aim of exercising negotiable instrument counterplea right is to protect negotiable instrument debtor’s interests. The negotiable instrument law gives negotiable instrument debtor the negotiable instrument counterplea right to against the bearer so that the debtor do not need to exercise negotiable instrument debt and stop illegal negotiable instrument bearer obtaining negotiable instrument interests. Thus, refusal to perform negotiable instrument debt is the aim for negotiable instrument debtor to exercise counterplea right. After analyzing above contents and characteristics of negotiable instrument counterplea right, we can conclude the following definition of negotiable instrument counterplea right: negotiable instrument counterplea right is a legal right stipulated by the negotiable instrument law; it offers the power for the negotiable instrument debtor to defense against certain or normal bearers’ request by providing statutory or promissory reasons to refuse to exercise negotiable instrument obligations. This concept includes such valuation: negotiable instrument bearer cannot exercise right to claim payment and right of recourse without principles; negotiable instrument debtor can use a series of self-defense means and self-protection methods, that is to say, the negotiable instrument counterplea right to against negotiable instrument creditors, to maintain his or her own interests so that to keep effective balance between various parties’ negotiable instrument relations in laws.

REFERENCES

- GAO, Zicai (2005). *Negotiable Instrument Law Practices* (p. 297). China Legal Publishing House.
- Karl, Larenz (2003). *Methodology of Jurisprudence* (p. 318). CHEN Ai'e (Trans.). Beijing: The Commercial Press.
- LIANG, Huixing (2001). *General Principles to Civil Law* (p. 37). Beijing: Law Press China.
- LIANG, Yuxian (2004). *New Theory on Negotiable Instrument Law*. Beijing: China Renmin University Press.
- WANG, Zejian (2001). *Legal Thinking and Civil Law Cases* (p. 173). Beijing: China University of Politic Science and Law Press.
- ZENG, Shixiong, ZENGCHEN mingru, & ZENG, wanru (2005). *Negotiable Instrument Law Theory*. Yuanzhao Publishing.
- ZHAO, Xinhua (2007). *Negotiable Instrument Law Research* (p. 236). Beijing: Law Press China.
- ZHA, Wei (1998). *Research on Negotiable Instrument Rights* (p. 144). Beijing: Law Press China.