

## The Perfection of the Third Party Revocation Lawsuit System in China: Analysis of the Revocation by the Third Party in Foreign Countries

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### Abstract

The frequent appearances of fraud litigation make the necessity of the revoked suit of the third party more and more prominent. Starting from the extraterritorial provisions of the relevant countries and regions, this essay comparatively analyzes the independent revoked suit of the third party and the revoked suit of retrial third party, and comes to their same points and different points. Then combining with China's basic national conditions and legal environment, this essay reveals the legislative defects of our type choice, and puts forward specific recommendations to improve the legal system and build a sound one for the protection of the rights of a third party.

**Key words:** Revocation suit of the third person; Retrial appeal; Extraordinary appeal

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### INTRODUCTION

Generally speaking, the judgment of res judicata is only related to the parties. However, with the increasing complexity of social relations, the effectiveness of the judgment will also spread to the persons not involved in the case. When a civil case have damaged or may damage the interests of a third person, what ways can the third

person take to protect their own interests? China's Civil Procedure Law provides a third person to participate in the system of litigation and outsider dissidence, and their application stages are different: the former applies to legal proceedings, and the latter applies to the procedure execution. But after the effective date of the referee and before the start of the procedure execution or after the execution, how does the third person relieve when finding the valid judgment undermine his own interests? Countries like France, Japan, Taiwan, Macau and other civil law countries and regions established the revocation of the suit of the third person, which allows the third person to request the court to revoke the judgment among others that is already in force but involves the interests of a third person in order to protect their own interests. In the year of 2008 our country also confirmed the policy through a judicial interpretation. But whether it is rational or not, what are the weaknesses and how to perfect it are the problems needed to be solved. The author primarily discusses the problems regarding these as starting and end points in order to initiate more scholars to pay more attention to and study the system of revoked suit of the third party. Before studying our country's legislative status quo, the author would analyze the other countries' relevant provisions firstly because the system of the revoked suit of the third party comes from foreign countries.

### 1. THE EXTRATERRITORIAL PROVISIONS OF THE REVOKED SUIT OF THE THIRD PARTY

All the Common Law countries did not make provisions on the revoked suit of the third party, and only some countries of Civil Law have the system, such as France, Taiwan, Macau, Japan, and Italy and so on. The revoked suit of the third party can be divided in two kinds, independent one and retrial one, which is based on the

standard of whether attaching to the suit of retrial or not. Independent one does not attach to the retrial suit and it has its own hearing rules which are applicable to the system of the countries such as France and Macau; but retrial one attaches to the retrial suit and it applies the relevant provisions of the retrial suit when there are no special restrictions in law. Countries who adopt this way include Taiwan, Japan, and Italy and so on. The article below, starting from these two perspectives, will introduce two types of specific systems and do a comparative analysis based on them.

## 1.1 The Independent Revoked Suit of the Third Party

### 1.1.1 France

About the extraterritorial provisions of the revoked suit of the third party, undoubtedly the law in France is the oldest and the most comprehensive one. The revoked suit of the third party is called “the objection action of the third party” “objection action forwarded by the person not involved in the case” or “the objection action of the person not involved in the case” by the Civil Procedure Law in France, as specified in the avenues of appeal of the Chapter XVI. The avenues of appeal include ordinary appeal and extraordinary appeal. The ordinary appeal is the appeal to the Court of Appeal and the default judgment objections; the extraordinary appeal is the third party objection, retrial suit and appeal to the Supreme Judicial Court. We can see that it is independent and coordinate between the third party objection and the retrial suit, and both of them are extraordinary avenues of appeal. So the objection of a third party in the French civil law is the independent revoked suit of the third party. According to the provisions of Article 582 of the new French Code of Civil Procedure, the objection of a third person means that the third person attacks the judgment to request to cancel or change the judgment which damages his interests, and makes the dispute get re-hearing referee both in law and in fact. From the Article 582 to 592 in the new French Code of Civil {2} Procedure are about the system, including the concrete issues of the objection of a third person, object, term, jurisdiction, procedures, force and remedy. We will analyze one by one.

#### 1.1.1.1 The Subject

Who can propose a third person objection? ‘The article 583 in French New Code of Civil Procedure provides: “Any person who gets interests involved it can be allowed to propose a objection to the judgment, but it is based on the condition that the third person is neither the party nor a attorney entrusted by the third person for lawsuit in the proceedings of the attacked judgment. However, creditors and other successors of title of the party can also put forward the third party objection if they are attacked by the judgment or they can provide their own causes. In the non-litigation cases, only the third person who does not get the judgment notice is authorized with the submission

of the objection of a third person; On the final judgment, even though the third person has its judgment notice, he is also allowed to raise the third party objection. We can understand the meaning of the rule from the following three aspects.

Firstly, the third person who raises objection must be entitled to litigation interests. A third person for objection has the right to litigation benefit, but it does not mean “the judgment which is attacked has made a trial and a judgment on the rights and obligation of the third person who raises his objection” (Luo Jiezhen, 2008). It only requests that the third person is harmed by the original judgment. Viewed from the relationship between the loss and the third person, it should be a personal and direct loss. For example, the third party objection which is raised by the daughter of the adoptive parents of minors on the court’s verdict that the minor should be given back to her illegitimacy parents will not to be handled. (Ibid) Because it is indirect relationship between the daughter and the original judgment, she does not enjoy the litigation interest; in the view of the nature of loss contents, it can be a material loss and also a spiritual loss, such as the judgment of the court terminating the parent-child relationship may damage the qualification of a third person-the grandparents, so the grandparents can be brought against the judgment of the objections of the third person; in the view of the time, it can be current and possible, even it is in the future.

Whether a third party for objection litigation enjoys the litigation interests depends on the judgment legally decided by the judge who accepts the third person objection. If the other party challenges to this verdict, the judge should explain it.

The second aspect refers to the definition of a third person. The subject of the third person objection is strict to the person not involved in the case, and it should be under the condition that the third person is neither the party in the procedures of the verdict which is attacked nor a legal representative he entrusted for lawsuit.

If the third person has participated in the litigation judgment which is attacked to be a party of the litigation, including the first-instance trial of the case and the hearing of appeals, he or she can no longer submit the objection of a third person. However, the person who has submitted claims in the first instance and was declined by the Court still enjoys the qualification of the third person; similarly, the person who is a party in the first instance but not in the appeal proceedings also can raise the objection of the third party. In the event of litigation taking on, which means during the litigation, due to the emergence of some kind of special reasons, the litigation rights and obligations of the parties transfer to the party not involved in the case, and he or she continues to engage in a lawsuit as the party of the case. For example, when the citizen party dies, the successors are entitled to obtain a corresponding right of action and bear the corresponding obligations of litigation,

at this time, the heir is a party to the case and he shall not bring a third party objections to the judgment. In addition, despite the absence of default judgment, he or she is still a party to the case and has no ways to raise the objection of the third party.

If the third person has an agent on the proceedings, he or she can not challenge to the court's decision, and this rule applies to both statutory agent and conventions agent thereto. However, "the agent" here should be understood in a board sense, and it not only includes the agent of usual sense and also all the situations of "one person's interests depend on a defender in fact". (Ibid) For example, in general, the lessee is deemed by the agent of the lesser; the guarantor is deemed by the agent of the principal debtor; joint and several creditors or joint and several debtors are deemed by mutual agents; creditors are deemed by its debtor agent. But according to the last paragraph of the Article 1397 of French Civil Code, the creditor may submit the third party objection on "the judgment of approving to change the matrimonial property system"; the successor of title is deemed by the source of power people, but it only applies to the actions of source of power people before the occurrence of the right transfer. Therefore, under normal circumstances, creditors and rights successors shall not submit the third party objection, because they entrust the agents of the debtor and the source of power people to participate in the proceedings. But in exceptional circumstances, they can still raise the third party objection on the judgment which does harm to their interests. If there is a fraud, which is the agents and other party's malicious collusion that damages the clients' interests, the agency shall cease. Then, the client can bring a third party objection. Although the third person has entrusted agents for litigation, but if they can make their own reasons, they also can obtain the qualification of a third person and raise objections. "Kauf bricht nicht MieteTrading" is the best proof. Kauf bricht nicht Miete, which means that during the term of leasing, although the lessor transfers the leased property to another party, the presence of such trading does not break the lease and the lease relationship continues to exist, which is to say that the buyer cannot deny the original lease relationship by the reason that he or she has become the owner of the leased property and require the lessee to return the lease. As noted above, under normal circumstances, the lesser is deemed by the lessor agency; However, if the lessee takes advantage of "the confrontation effect of the lease contract to the successful bidder in a auction of real estate" for "their own reasons" to file the objection of a third person, the court should accept it.

The court will reject the objection if it does not apply to the rule of the third party objection. The court can reject the objection of a third party according to the application of the party, but the applicant should provide testimony; the court can also reject the case ex officio, but it should allow the parties to give their explanation.

The third aspect relates to the special provisions of non-litigation cases. How to relieve if the third party is not satisfied with the judgment of non-litigation case? For the first trial judgment, if the third party has received convicted notice, he can appeal to the Court of appeal; if the third party has not received notice of judgment, it may bring to the objection of third party proceedings. But for a final judgment, whether the third party has received the convicted notice or not, the third party can institute the third party proceedings.

#### **1.1.1.2 Object**

Which legal documents can the third party challenge? French New Code of Civil Procedure section 585 provides that: "Any judgment may be subjected to third party proceedings unless the law provides otherwise."

First, the third party proceedings can only put forward for the judgment, not for the settlement agreement, the settlement agreement does not have the characteristics of a judgment. Meanwhile, the third party proceedings can be aimed at the main body of a court verdict judgment and not for the reason of judgment.

Second, whether it is permitted to appeal to the Court of Appeal judgment or final judgment, the third party may put forward proceedings; however, when the judgment has been appealed to the Court of Appeal judgment, it does not allow the third party raise proceedings because it can be participated in litigation of appeal trial.

Finally, for emergency trial judge, the third party proceedings are permitted.

#### **1.1.1.3 Period**

Do the Third party proceedings have time limit? French New Code of Civil Procedure section 586 proposed three rules. First, third party proceedings are available for thirty years from the moment of the judgment made unless provided by the law. Second, it may be brought without any bar in time against a judgment given in the course of another proceeding by the person against whom enforcement is sought. Third, as for a third party to whom the judgment has been notified, it is permitted only within two months as of the notification, provided that the same states clearly the time-limit available to him as well as to the terms and conditions according to which the action for review may be brought. It will be likewise in non-contentious matters where a decision of final instance has been notified.

In addition, the French Civil Procedure Law has some special provisions for the third party proceedings' duration. For instance, the judgments of the property litigation and commitment of the changing matrimonial property system litigation between husband and wife, respectively, should be within 1 year; the period the referee of reforming and liquidation in the bankruptcy proceedings should be 10 days; the verdict of preserving the name of the passed-away stakeholders of the company, should be within 1 year.

#### 1.1.1.4 Jurisdiction

Which courts can the third party put forward proceedings? New French Code of Civil Procedure section 587, 588, 589 made a rule respectively from the request of the complaint and incidental request. The third party proceedings raised outside of any litigation is a lawsuit request; proceedings of a third party in the litigation which has begun and rose when a party is against the other party, is an incidental request.

When the third party objection is incidental request, and if the court which accepts the dispute is superior to or in the same level with the court which has made the attacked judgment, which does not violate the jurisdictional rules of the public management order, it will be heard directly by the court which accepts the dispute; on the contrary, if the court which accepts the dispute is in the lower level of the court which has made the attacked judgment, the court can reject the case or delay the trial in accordance with the case, and the third person should submit objection to the court which has made the attacked judgment according to the relevant rules of the request of the complaint.

#### 1.1.1.5 The Procedures

After the third person submits the objection, how should the court hear the case? According to the third paragraph of article 587 of New French Code of Civil Procedure, even though the third person submits objection for the judgment of non-litigation case, the case still should be judged according to the legal procedures.

#### 1.1.1.6 Validity

According to the provisions of the new French Code of Civil Procedure section 581, 590 and 591, when the court accepts the third person objection cases, three legal effects will be produced.

First, when the Court accepted the third person objection (including the plaintiffs' prosecution and the incidental claims), judgment on the implementation of the attack may be suspended.

Second, support will be given if the court considers the third objection reasonable. Moreover, revocation or change on the judgment of attack which is not conducive to the matters of the third person shall be made. At this point, what kind of effect will be produced by the decision? In principle, the original decision has no effect against the third party, as well as legal consequences arising from the revoked and changed original judgments. However, the original judgment retains the effectiveness amid the original parties even if facing the third party objection (as opposed to the third person) which is revoked or changed. In some exceptional circumstances, when the matter which has been revoked or changed cannot be separated, the judgment that court supports the third person disagreement is also effective towards the original litigant and a third party. For example, A and B dispute over the ownership of a house, court decides that the house belongs to A. Third person C proposes

ownership of the controversial house, thus raises the third person objection to the original judgment. If the court supports this objection, the judgment is effective to the three parties for absolute and exclusive ownership of the house, and ultimately C obtains ownership.

Third, if the court considers that the objection is untenable, it will dismiss the third person objection. If it is identified that third objection is to delay the proceedings or appeal indiscriminately, third person will subject to a fine of up to € 3,000 and compensate for the damages of other parties.

#### 1.1.1.7 Remedy

French New Code of Civil Procedure section 592 provides: the judgment of the third person objection should be made the same appeal as all the decisions reached by the court which has made the same judgment. Accordingly, appeal to a court on judgments of the third party objection is permissible provided that avenues of appeal are identical to those of judgments made by the court.

#### 1.1.2 Macao

Macao has put the suit of third party discharging the judgment into extraordinary appeal procedure and called it "the appeal filed when the third party is against", which is similar to the France Law of Civil Procedure. In the Law of Civil Procedure of Macao, the judicial procedures include preliminary procedures and appeal procedures. Macao has established the primary courts, intermediate courts and Court of Final Appeal and it follows the system of third instance being the final instance. If the party is not satisfied with the verdict made by the lower court, he may appeal to a higher court for a new hearing. In accordance with the Law of Civil Procedure of Macao, appeals can be divided into ordinary appeal and extraordinary appeal. The distinction standard is that whether the judgment is definitive or not. If the judgment is not definitive, the party may file the ordinary appeal to the court; otherwise, the party may file the extraordinary appeal to the court. The extraordinary appeals include retrial appeals and the appeals filed when the third party is against. Similarly, the appeals which are filed when the third party is against in Macao also belong to independent suit of the third party revocation, while the Article 664 to Article 669 of Law of Civil Procedure of Macao have defined this system in detail. (Chen & Lin, 2005)

#### 1.1.2.1 Conditions

In accordance with the Article 664 of Law of Civil Procedure of Macao: if the controversy is caused by the false behavior of the two parties and the court does not exercise power according to Article 568 because it does not know the false behavior, then after the judgment takes effect, the person who has an adverse effect by the judgment may file an appeal through the appeal filed when the third party is against. The Article 568 regulates: if the behavior of the parties or the case make it clear that the plaintiff and defendant have false behaviors or attain any

ends which the law forbids, then the relevant judgment should prevent such behaviors.

Thus, the appeal filed by a third party should meet two conditions. Firstly, the controversy is caused by the false behavior of two parties and their behavior has damaged the third parties' interests. Secondly, the court did not be aware of such behaviors and renders a judgment which damaged the interests of the third party. The third party may file an appeal only if it has both of the conditions.

#### **1.1.2.2 Subjects**

In accordance with the Article 665 of Law of Civil Procedure of Macao, there are only three kinds of eligible third party. Firstly, the party did not participate in the judicial procedure and not agent the losing party. Secondly, the party is incapable of litigant action and only his legal representative participates in the lawsuit. Thirdly, if the party's interests were damaged by the false behaviors of other parties, the successors and creditors of the party may file a suit.

#### **1.1.2.3 Duration of the Suit**

The precondition of the third party revocation is that the controversial judgment has taken effect less than 5 years. Then, the third party should know he may file an appeal within 3 months after the judgment. But the party who is incapable of litigant should appeal in one year after he terminates this condition.

#### **1.1.2.4 Jurisdiction**

According to the first paragraph regulation of article 667 of Law of Civil Procedure of Macao, the third party may file an appeal to the original court. If the files are in another court, the third person may apply for an appeal to this court and make a copy of those files, then hand into the original court which has jurisdiction.

#### **1.1.2.5 Procedure**

The second and third paragraph of article 667, as well as article 668 and 669 of Law of Civil Procedure of Macao state: the appellate court may announce the appellee that he should reply to the accusation in 20 days. After the appellee has replied or is at the expiry of the term, the court may verify the truth of the statement by the party and determine whether the appeal should continue or not. If the suit continues, the case may be heard in accordance with the procedure of original judgment.

If the third party files an appeal to a higher court, the case may be heard in accordance with the ordinary appeal procedure in intermediate court or final appeal court, and the third party should cooperate with the appeal procedure. However, if the third party can not verify its authenticity in the higher court, the higher court may ask the lower court to take necessary measures.

#### **1.1.2.6 Legal Effects**

The fourth paragraph of Article 667 and Article 663 in Law of Civil Procedure of Macao state that once the third party file an appeal, the original judgment should stay enforcement and it may continue only if the executor or the creditor can provide any guarantees.

## **1.2 Third Party Revocation Proceedings**

### **1.2.1 Taiwan**

The current Civil Procedure Law of Taiwan was promulgated on February 1<sup>st</sup> of the 24<sup>th</sup> year of Republic of China (i.e. 1935) and implemented on July 1<sup>st</sup> of the same year. When amended in the 92<sup>nd</sup> year of Republic of China (i.e.2003), this Law was added a system of "Third Party Revocation Proceedings" as one of the fifth chapters.

The usual trial proceeding of Civil Procedure Law in Taiwan includes the procedure of the first instance, appellate procedure, counter-appeal procedure, retrial procedure and third revocation procedure. The second chapter of Civil Procedure Law of Taiwan is the procedure of the first instance; the third chapter is appellate procedure. As Taiwan implements the three-level three-trial system, that is, ordinary civil cases can be brought to trial in the District court, High court and Supreme court, and the party, in the case of refusing to accept the judgment of the procedure of the first instance, he or she can appeal to the procedure of the second and third instance among which the third procedure is legal trial. The fourth chapter is the counter-appeal procedure. The difference between counter-appeal and appeal lies on the object. If party refuses to accept the court decision, he or she can only retrial through appellate procedure; if party refuses to accept the adjudication, he or she must retrial through counter-appeal procedure. The fifth chapter is the retrial procedure. If party is not satisfied with the final judgment of the court, he or she can request the court to a retrial. There is a difference between retrial and appeal. If the final court decision is not made, party can only institute an appeal, and party can apply for a retrial in the condition that the court decision is made.

One part of the fifth chapter is the third party revocation proceeding. Under certain conditions, the third party may institute a revocation proceeding like the retrial procedure after other party's final court decision. There are similarities between third party revocation trial and retrial. They all aim at the revocation of the final judgment. Therefore, in the structural arrangement of the Civil Procedure Law, as one of the fifth chapter, "Third Party Revocation Proceeding" is placed ahead of "The Fifth Chapter of Retrial Procedure".

Besides, the fifth paragraph of article 507 in Taiwan's Civil Procedure Law clearly defines that the third party's revocation time limit, institution program, illegal judgment, hearing range, appealing procedure and the protection of the benefit of the third party shall apply to the relevant provisions of retrial appealing. This shows that the third party revocation proceeding of Taiwan's civil procedure law is attached to retrial procedure, which is a typical third party revocation retrial. Although they have much in common, the third party revocation retrial has its own specialties which will be clarified below.

### 1.2.1.1 Subject

The first rule of article 507 of Taiwan's Civil Procedure Law defines: "if the third party is legally related to the case and does not show in the court for some impersonal reason so that he or she cannot put forward any evidence to influence the court decision, he or she can institutes a retrial appeal to the final judgment to cancel the adverse judgment. But procedures following other legal proceedings must be excluded from this".

Not all third parties who are legally related to the case are qualified to institute a revocation appeal. They need to meet two conditions. First, the third party does not show in the court for some impersonal reason so that he or she cannot put forward any evidence to influence the court decision; second, the third party have no other access to remedy the disadvantages caused by final judgment according to the other proceedings except the third party revocation. The third party revocation appeal should treat the two parties of the final judgment as co-defendants.

### 1.2.1.2 Jurisdiction

The second rule of the article 507 of Taiwan's Civil Procedure Law defines the court of competent jurisdiction of the third party revocation.

The third revocation is a special relief program, in principle under the jurisdiction of the original court which makes a final judgment, for the dissatisfaction of law interested person towards the final judgment.

As to the third revocation appeal, things which should be taken into consideration are that if the third party being legally related to the case, if the third party failing to show in the court for impersonal reason, if the ideas the third party mentioned influential to the final judgment, and if the final judgment being adverse to the third party. It is usually the case that they involve fact-finding and evidence investigation. In order to avoid the conflicts between the final judgments of different courts, the results of courts in different levels can be combined to institute a third party revocation appeal. Or when instituting a third party revocation appeal as to the so-called final judgment of the higher court, the case will be under the trial of court of second instance which has the last fact trial. If the case is not judged by the court of second instance, it will be under the trial of the court of the first instance.

### 1.2.1.3 Effectiveness

The third rule of the article 507 of Taiwan's Civil Procedure Law defines the effectiveness of the third party revocation appeal. The third party revocation appeal is a special procedure endowed the third party who missed the trial for some impersonal reasons. It does not influence the effectiveness of the original judgment for the parties of the case. So the appeal instituted by the third party does not interfere with the execution of the original judgment.

However, in order to avoid the case of execution ends before the judgment of third party revocation appeal is made, resulting in third party interests jeopardized, in

the case necessary or when the third party apply for and provide certain guarantee, the court which deal with the third party revocation appeal should stop the part of execution of judgment which may be adverse to the third party. When the court decides to stop the execution of original judgment or reject the application of third party, as it is involved in the interests of the original parties and the third party, the third party is allowed to institute a counter appeal as to the judgment.

The fourth rule of the article 507 of Taiwan's Civil Procedure Law defines the effectiveness of the third party revocation appeal. When the third party institutes a revocation appeal and when the court admits its justifiability, parts of the original judgment which are adverse to the third party should be repealed. The court can also make changes in the limitation of the revocation which the third party has applied for, when the third party apply for changes of the original judgment, apart from repealing those parties which are adverse and when the court deems it is necessary to protect them.

The third party revocation appeal aims to remove judgment which is adverse to the third party, but not completely negating the execution of original judgment. So even if the original judgment is repealed or changed, its effectiveness still applies to the original parties of the case. In other case, however, if the effectiveness still applies to the original parties and the interests of third party cannot be saved, the original judgment loses its effectiveness to the original parties after the negotiation between the original parties and the third party is done.

### 1.2.2 Japan

The Civil Procedural Law of Japan was promulgated in 1890 and the retrial procedure ordains "the suit of the third party discharging the judgment". But in the amendment it had deleted this article so it is incomplete to protect the third parties in system. This should be the shortage in the legislative history in Japan. While in the law circle, most of the scholars admit the meaning and value of this article. According to the Civil Procedural Law of Japan, the action for retrial can be divided into two parts: lawsuit for cancellation and in integrum restitutio. The lawsuit for cancellation is the cancellation of the judgment when the form of prosecution is wrong or illegal; in integrum restitutio is the cancellation of the judgment when the basic facts for judgments are illegal. (Gaomu, F.S., 2006)

The article 483 of The Civil Procedural Law of Japan stipulates that "the third parties advocated by the efforts of the plaintiff and the defendant, the judgment in order to break the third parties' creditors' rights, the party who does not agree with the judgment can appeal the in integrum restitutio. In this case, the plaintiff and the defendant can be seen as a common defendant." The suit of third party discharging the judgment in Japan is simple and there is only one article about it. When the third party is involved in the legally effective judgment

and his interests had been damaged, then the third party can protect his rights by civil retrial suing action, so this system in Japan also belongs to the retrial judgment of the revocation action by a third party.

### **1.3 Comparative Analysis of the Separate Judgment and the Retrial Judgment of the Revocation Action by a Third Party**

According to examining the legislation in different countries and areas above-mentioned, we could see that there are many similarities and differences in the separate and retrial suit of the revocation action instituted by a third party.

#### **1.3.1 Similarities**

##### **1.3.1.1 Concept**

As for the extension of *res judicata*, and in some cases, the outsider objects are bound by the decision. But if the original judgment is acquired by cheating (the two parties colluded in bad faith, thereby harming the interests of a third person), then the third person can petition the People's Court for cancellation or change the original judgment to protect his interest. Both the separate revocation action by a third party and the retrial judgment of the revocation action by a third party are all belong to the safeguard measures after the facts. That is, the third party cannot do the suit of the third party discharging the judgment only if the court decision is effective and the third party believe that the decision has damaged his legal rights. If the third party found that judgment had been acquired by cheating, he can file a request to participate in the proceeding as a litigant and provide any methods of offensive and the defensive in order to protect his own interests before the decision.

##### **1.3.1.2 Subject**

On one hand, the plaintiff who does the suit of the third party discharging the judgment should be an outsider objects. The third party himself or his litigant representative did not participate in his original judgment proceeding. Some areas and countries have special rules for it. For example, there are no demarcations for the third party in non-contentious case in France; the third party includes persons with no capacity in Macao; the third party cannot protect their interests by using other statutory procedure in Taiwan.

On the other hand, the plaintiff who does the suit of the third party discharging the judgment should be the two parties in original judgment.

##### **1.3.1.3 Object**

The object of the revocation action by a third party must be decree absolute, whether it is the decision of original proceeding or the decision of last resort. The third parties' interests are damaged only if the decision was effective, and then the third party can protect his legal rights to remedy afterwards. In addition, Law of Civil Procedure in France regulates that the third party can interpose an

objection when the trial is heard and decided in emergency.

##### **1.3.1.4 Forum Competent**

In which court the third party can file the suit of discharging the judgment? Most of the countries and areas have sanction that the original court which did the decision has exclusive jurisdiction, but it has some exceptions to this rule. For example, France distinguishes the original suit and collateral suit. Macao has special treatment about the files which are in another court. Taiwan has defined the issue on jurisdiction when the third party interposes an objection simultaneously against the decision by different court about the same case. While Japan has special rules for making a command executed.

##### **1.3.1.5 Legal Effect of the Judgment**

If the court upheld the suit of the third party discharging the judgment, then the court should cancel or change the original judgment which has damaged the third parties' interests. If the judgment which has been canceled or changed has no relation to the two parties, the original judgment still has legal effect for the plaintiff and defendant. If the two parties are involved in the judgment which has been canceled or changed, then the original judgment lose its legal effective for them.

#### **1.3.2 Differences**

##### **1.3.2.1 Applicable Procedure**

The retrial suit of the revocation action by a third party belongs to special case of retrial suing action. Taiwan and Japan are all put the suit of the third party discharging the judgment into the retrial procedure, which means that the due plaintiff in the retrial suit includes any interested third party. So the legislation is simple in Taiwan and Japan. And the court can judge the case under the relevant procedure when it has no special regulations. Separate suit of the third party discharging the judgment is no longer belongs to the retrial suit. While, with retrial suit they can constitute the extraordinary appeal procedure in France and Macao. As a result, the separate suit of the third party discharging the judgment has its own procedure and it is more complete than the retrial suit.

##### **1.3.2.2 Prosecution Duration**

Exertion of authority is limited by time and different countries have different rules. Firstly, the prosecution duration is different. In France, it is 30 years; in Macao it is 3 months; in Taiwan it is 30 days and in Japan it is one month. Secondly, the starting-point of the prosecution is different. France and Macao start from the date the judgment becomes final; while Taiwan and Japan start from the point where parties are aware of the cause for cancellation. Finally, in terms of both the deadline and the start-point of the prosecution, there are some exceptions rules in France, Macao, Taiwan and Japan.

##### **1.3.2.3 Suspension of the Execution**

It is a question that whether the suit of the third party discharging the judgment would cause the suspension of

the original decision. According to The Civil Procedure Law in France and Macao, once the court accepts the suit of the third party discharging the judgment, the original judgment should be suspended. It cannot continue until the party required execution or the creditor can provide guarantees. But Taiwan has made the opposite rules. The court can continue the original execution when the third party appeals the suit of discharging the judgment. However, the court should suspend the execution which harmed the third person's interests when the third person applies and provides any guarantee.

#### 1.3.2.4 Punitive Measures

Law of Civil Procedure of France enforces the punishments for those behaviors such as the litigant delaying the action or abusing the right to appeal. For instance, the maximum penalties are a fine of 3000 Euros and an award of damages for the opposite party. However, there are no such rules in Taiwan, Macao and Japan. The existence of the punitive measures makes the suit of the third party discharging the judgment become more serious and necessary; therefore the judicial sources can be used reasonably and scientifically. Meanwhile, this system also shows the justice of procedures and it can provide useful experience and lessons for many other countries and areas.

## 2. ANALYSIS ON PRESENT CONDITION OF THE SUIT OF THE THIRD PARTY DISCHARGING THE JUDGMENT IN CHINA

In 2008, the Supreme People's Court of the People's Republic of China issued an explanation on the suit of the third party discharging the judgment. In accordance with the stipulations of Article 5 of the Interpretation of the Supreme People's Court on Several Issues about the Procedure for Trial Supervision in the Application of the Civil Procedure Law of the People's Republic of China: if the outsider objects are claimed to the rights of the subject matter of the original judgment, adjudication and the conciliation statement, they may appeal to the trial court or a superior people's court within two years after the judgment or the ruling becomes legally effective or when they become aware of their interests been damaged. In the procedure of execution, if the outsider objects raise objections in writing to the people's court, then the court should deal with it in accordance with the Article 204 of Law of Civil Procedure.

On one hand, this judicial interpretation has a positive significance. It confirms the right of the third person who may lodge an appeal which supplemented the law of protecting the third parties' rights after the judgment took effective in Law of Civil Procedure. On the other hand it corresponds to the suit of third party discharging the judgment and lawsuit filed by an outsider in the procedure of execution.

But on the other hand, there are also some important weak points and defects about this regulation, as follows

Firstly, the subject qualification is unclear. The 2008 judicial interpretation only set two conditions on the qualification of the third party who applies for a retrial: one is to perform a claim on the subject matter; the other is not be able to resolve the dispute by a new appeal. Some other significant matters, however, are not clearly defined. For example, whether the third party mentioned has participated in the proceedings of the original parties? If he hasn't, what's the reason? Is he deliberate or just negligent? Besides, what do the new procedures which the third party can't conduct to resolve the dispute specifically include? Because of the serious vagueness of legislation, the criteria is not fine and the discretion is larger when the judges deal with the third party's application for a retrial of a case, which are not conducive to the realization of the value of fairness and justice and are easy to cause dangerous situations of a third party's excessive litigations.

Secondly, the object scope is too narrow. The judicial interpretation stipulates the object that the third party can apply for a retrial including only the judgment, ruling and mediation book. However, in fact, in the judicial practice, in addition to these three legal instruments of the court, there are arbitration award and arbitration mediation of arbitral agency, administrative adjudication and administrative mediation of administrative organization, notary document of notary organization and other legal instruments which have the authority to resolve civil disputes and can become the basis for enforcement. So because of *res judicata* expansion, all these instruments are likely to cause damages to the third party's lawful rights and interests. However, the 2008 judicial interpretation omits these important legal instruments, which leads to the object scope of the third party who can apply for a retrial incomprehensive.

Thirdly, the types of proceedings are slightly single. The 2008 judicial interpretation stipulates that "the person other than involved in the case perform the claim on the subject matter determined by the original judgment, ruling and mediation documents". The use of "the implementation of the subject matter" limits the type of the third party applying for a retrial to action of enforcement which has the peculiar compulsory executions. However, the judicial interpretation neglects a point that the third party should also have the right to call in question for a relief as action of confirmation and actions of alteration are likely to affect the third party's interests on some circumstances. We take the negative action of confirmation for example. Male A brings a lawsuit of annulment of marriage against a female B for the reason of untrue grounds. Then if the court affirms that the marriage is invalid, the son C of the male A and the female B will then lose the identity of born in wedlock. At this point, it is necessary to give C the plaintiff qualification to conduct the action of cancellation. If C



wins the lawsuit, the original court decision of annulment of marriage then doesn't produce resistance effect on C, that is to say, the marriage of A and B is still valid to C while marriage between A and B indeed ends. And C is still a member of those who born in wedlock and can enjoy the corresponding rights. (Huang Guochang, 2005)Therefore, in order to protect the third party's rights, the lawsuits should not only include the action of enforcement but also include the action of confirmation and action of alteration.

Fourthly, the choice of system type is inappropriate. As already mentioned, the third party's action of cancellation is divided into retrial type and independent type according to whether it attaches to the action of retrial. As we can see from the provisions of the 2008 judicial interpretation, China has established the retrial type of the third party's action of cancellation. Action of retrial and the third party's action of cancellation are systems which make a retrial possible in order to protect some relevant subjects' lawful interests when the substantive justice is affected seriously by significant flaws. The author thinks, although they are both directed against the judgments which are already effective and they both make the breakthrough of the *res judicata*, they still have many differences. And because of these differences, they cannot be compatible and cannot be combined as well, as follows:

First, their basic ideologies are different. In China, retrial procedures are also called procedures for supervision upon adjudication. By observing the legal subject, reasons of application, competent court and proceedings related to retrial procedures in the civil procedure law, it is not difficult for us to find that the basic ideology of China's retrial procedures is correcting errors. But the basic ideology of the third party's action of cancellation is protecting rights as the action of cancellation is meant to cancel the original unfavorable judgments in order to protect the third party's legal interests. Most of the domestic scholars currently argue that we should revise the ideology of retrial procedure from correcting errors to protecting right to make sure that the subject's application for a retrial is the only way to start the retrial procedure. However, this argument is just academic perspective and is not given legal force by government yet. So the theoretical basis is not solid to attach the party's action of cancellation to action of retrial and to creating a retrial type of the third party's action of cancellation. What's more, this kind of change also doesn't accord with China's legal environment.

Second, their suitable subjects are different. The plaintiff of retrial litigation is the party and its successors who believe the judgment is indeed wrong, and the defendant is the other party and its successors. The plaintiff of the third party's action of cancellation is the third party other than the original two parties; the defendant is the original two parties.

Third, the reasons for application are different. As long as the subject believes that determined facts, applicable

law, trial procedure and other aspects of the original judgment are wrong, he can then apply for a retrial, but the third party can conduct the action of cancellation only when the original judgment has significant flaws and damages their own legitimate rights and interests. In contrast, the retrial reasons are more extensive than the reasons of the third party's action of cancellation, for the former includes not only entity but also includes procedure problems, while the latter is only limited to the entity.

Fourth, the inquisition stages are different. Retrial is consisted of two stages. The first stage is that the court examines the reasons for the retrial applied by the party and decides whether or not to bring to trial again. If the court decides to retrial, the second stage will be started. In the second stage, the Court of Retrial will rehear the case and make a new judgment. However, the suit of the third party discharging the judgment has only one stage. If the court deems the application reasonable, withdrawing the part which is not favorable for the third party in the original judgment; otherwise, it should reject the application.

Fifth, the judicial review scopes are different. In retrial, the court should rehear the whole case after making the decision of retrial. But in the suit of the third party discharging the judgment, the court only need to examine the part which is not favorable for the third party in the original judgment.

Sixth, the validity of judicial decisions is different. If after examining the Court of Retrial decides to support the application of the party, it should make a new judgment to replace the original one and the new one takes absolute effects on all parties involved. Different from the former, the suit of the third party discharging the judgment, if recognized by the court, makes the part which is not favorable for the third party in the original judgment invalid to the third party and the court should withdraw this part in the original judgment. But this part still takes effect on other parties. It is thus clear that the judgment of the retrial takes absolute effects but that of the suit of the third party discharging the judgment only takes relative effects.

In view of the above, retrial and the suit of the third party discharging the judgment have great differences in either the basic abstraction or the concrete system design. But the most obvious and direct difference lies on the validity of judicial decisions. Both cases deal with the effective legal documents belong to post relief approaches. The changes of original effective legal documents should be avoided in order to maintain the judicature authority and secure the definiteness of the judgments. In the case of judicator expansion, when the effective legal documents damage the interests of the third party, the big moves should be avoided if the problem can be eliminated by withdrawing only some part of the judgment without negating the entire thing. The relative effects of suit of the third party discharging the judgment work well in this kind of situation, compared with the absolute effects of the retrial. For the reasons mentioned, the author thinks that

it is not appropriate to graft the two systems together in judicial interpretation in 2008. The suit of the third party discharging the judgment should be an independent part in Civil Procedure Law. In this way, the three systems, including the third party appearing in the litigation, the suit of the third party discharging the judgment and the outer party dissidence, call for each other to compose a complete third person protection system together.

### 3. THE PROGRAM DESIGN OF CHINA'S THIRD PARTY REVOCATION LAWSUIT

The above illustration has combed the other countries and regions' third party revocation lawsuit, referring to the legislation of these countries and considering the practical situations of our country, and then we can talk about the concrete construction of China's third revocation lawsuit system from the subject, the object, prosecution period, competent court, judgment effect, and the implementation in detail.

#### 3.1 The Subject

Who can file the third person dissent?

There is no doubt that the plaintiff of the third party revocation lawsuit should be a third person. So, can all the people outside the parties that listed in the original judgment stated file the third person dissent? Obviously the answer is no. Based on France, Macau, Taiwan, and Japan's related legislation and considered the provision of the parties in China's Civil Procedure Law, the author thinks three conditions should be met to be a qualified plaintiff of the third party revocation lawsuit. First, not the parties in the original lawsuit or having equivalent status of the parties, the former includes the plaintiff, the defendant, co-litigants, litigation representative, the third party with independent right of claims, the third party with no independent right of claims; the latter includes legal representative and entrusted agent. Second, the benefit of the revocation litigation can be enjoyed. If the validity of the original judgment expands to the third person, and the judgment has some adverse effects on him, the third person can file the revocation lawsuit to repeal the adverse decision and relieve their own rights. Third, because they are not responsible, they did not participate in the proceedings. The court did not find the existence of fraud, failed to notify the third party to participate in the proceedings as well as exercise their litigation rights, proposed attack or defense method in time. The plaintiff qualification was examined by the court when they accept the case. But this phase is only a preliminary form of review and whether the plaintiff suffered damage from the original judgment will be judged in the trial stage. The defendants of the third party revocation lawsuit should be the parties of the original effective verdict

#### 3.2 The Object

Which legal instruments can the third party challenge?

Combined with China's judicial system and legal

practice, the author thinks, the object of the third party revocation lawsuit can be defined from three levels. Firstly, the object of the revocation lawsuit includes the judgment, ruling, the conciliation statement made by the court and the arbitration award, arbitration conciliation statement made by the arbitration institution. In 2008, judicial interpretation approved the judgments, rulings and conciliation statement, but omitted the arbitral award and the arbitration conciliation statement. Arbitration agency's legal instrument also has rechtskraft, res judicata and execution effectiveness, which is likely to damage the interests of the third party, At this point it makes no essential difference with the legal document made by the court, so it should be included with the object. Secondly, these legal instruments can be produced in Action of performance and also can be produced in confirmation suit and action of formation. Confirmation suit is to confirm the existence of a legal relationship and the action of performance change a legal relationship. Both the two judgments are likely to have an adverse impact on a third party, so, in 2008, the judicial interpretation confined the type of complaint within the action of performance; it was too narrow and should be expanded. Finally, the revocation lawsuit only can be aimed at the text of judgment other than the reasons for judgment, because the sentence reason is just the basis of the text of judgment and does not have a direct impact on the third party.

#### 3.3 The Prosecution Period

Is there a term limit for submitting the objection of the third party?

The prosecution term of the third party revocation lawsuit can be confirmed by the period, the starting point and the special provisions. However, the legal environment and citizens' legal consciousness is not same in different Countries, so it's unnecessary for us to reference other Country's legislation examples, and we can combine the specific conditions of our country with the limitation of actions, appeal, apply for a retrial period, apply for compulsory execution period, prescribe the prosecution period of the third party revocation lawsuit and make the startup- time of different programs stay the same in the Civil Procedural Law. According to the General Principles of the Civil Law section 135, 136, 137, the limitation of actions is 2 years in general condition, 1 year in special situation. They both begin from the time he knows or should know that his rights have been infringed upon, but the court will not protect his rights if it has been more than 20 years from the date on which the rights were violated. According to the article 147 of the Civil Procedure Law, if someone refuses to accept the judgment, he can appeal in 15 days, if someone refuses to accept the decision, he can appeal in 10 days, both starting from the date of service of legal instruments. The article 184 of the Civil Procedure Law stipulates: "A party shall apply for a retrial within two years of the date on

which the judgment or ruling becomes legally effective; the legal documentation relating to the original judgment or ruling is invalidated or amended after the two year time limit, and if the judicial panel has acted corruptly, accepted bribes, practiced graft or made a judgment that perverted the law, a retrial request may be submitted within three months of the date on which the party knew or should have known the relevant facts. "According to the article 215 of the Civil Procedure Law, the time limit to execute a judgment is two years, and it shall commence from the last day of the time limit for satisfaction of the judgment specified in the legal documentation; when the legal documentation provides for satisfaction of the judgment in stages, the time limit shall commence from the last day of the period for satisfaction of the judgment at each stage; when the legal documentation does not provide a time limit for satisfaction of the judgment, the time limit shall commence from the effective date of the legal documentation. Apart from the shorter time limit for appeal of the second instance proceedings, the time limit for appeal of other programs is normally 2 years. Because the appeal is submitted for the judgment that is not effective by the court of first instance, the time limit for appeal is very short in order to solve and affirm the controversial legal relationship as soon as possible. The revoked suit of third party and retrial suit are both submitted because the judgment is effective is not perfect, so in terms of the time limit for appeal, the former can be a mirror to the latter. On these grounds, the author believes that the time limit of the revoked suit of third party should be 2 years, moreover, it shall commence from the effective date of the legal documentation. If the third person knows the legal documentation after 2 years, he should submit within three months from the date he knows or should know the legal documentation.

### 3.4 The Competent Court

Which court can the third person file objections to?

Foreign legislation considers that the third party revocation lawsuit should be heard by the original court. According to China's judicial interpretation in 2008, the retrial should be heard by the court at the higher level, and this rule applies to the retrial that filed by the third person or the parties. The author suggests that this is not the right way. As mentioned before, the function of the retrial is to correct errors, so it is contribute to the achievement of the internal supervision and the internal error correction of the court system. But the purpose of suit of the third party discharging the judgment is to protect the legal rights of the third party, so when the effective judgment has damaged the interests of the third party, they can protect their rights through discharging the judgment which is unfavorable. Because the original court which makes the effective judgment held the suit materials and the documents of the case, it is more suitable for the original court to rule the suit of the third party discharging the

judgment in order to save the judicial sources and increase the efficiency of proceeding. The third party files an appeal to the intermediate people's court for discharging the arbitral award or the mediation agreement, the suit should in accordance with the court which confirms the validity of the arbitration agreement, applies to set aside an award or not execute the verdict.

### 3.5 The Effective of the Judgment

When the court believes it is reasonable for suit of the third party discharging the judgment, it should discharge or change the original judgment which is unfavorable to the third party. The purpose of the suit of the third party discharging the judgment is to eliminate the unfavorable judgment but not to negate the whole effective of the original judgment. Thus, it still has legal effective to the original parties. If the original judgment which involves the parties also damaged the interests of the third party, then it loses its legal effective. For example, the ownership of a house is in dispute between Party A and Party B, and the court judge the house belongs to Party A. while, the Party C claims that the house belongs to him and file an appeal to the court. If the court sides with Party C, then the judgment shall be effective as to Party A, Party B and Party C because of the exclusiveness and absoluteness of the ownership. Finally, Party C gets the house.

The rules mentioned above not only protect the legal rights of the third party, but also defend the certainty and authority of the effective judgment. They are much more reasonable and we should learn from them. If the court uphold the suit of the third party discharging the judgment, the court should discharge or change the original judgment which unfavorable to the third party. If it does not involve the two parties, then it is still effective to the two parties. If the original judgment which involved the party also damaged the interests of the third party, then it loses its legal effective.

### 3.6 The Execution of the Judgment

The author believes that although the law allows the third party to appeal for discharging the judgment to protect his rights, it is an extraordinary remedy measure after all. So it should minimize the influence of this procedure to the original parties. The suit of the third party discharging the judgment has relative effect. As we mentioned above, if it does not involve the two parties, then it is still effective to the two parties. Therefore, the execution of the judgment should not stay execution of the original judgment. While in exceptional cases, the court may suspend the execution if it may damage the interests of the third party by forcible execution.

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## CONCLUSIONS

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It is an accepted fact to protect the third parties' legal rights in the civil proceedings. The implementing of the

judicial interpretation in 2008 has solved the problem of damaging the third parties' right by the res judicata extension of effective judgment in some extent. But it is not practical because of the flaws and drawbacks in system design and choices of ways. This paper provides a new remedy approach to protect the third parties' legal rights by comparing the retrial appeal and revocation by the third party. In a word, the new method is to build an independent third party revocation lawsuit. Since the legal system in France, Taiwan and Macao is sounder, we can refer to the overseas experience and unifies the conditions of our country to build a more suitable and complete legal system of the third party revocation in the future.

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