

Study on the Functional Orientation of Malicious Collusion

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Abstract

The malicious collusion system has a long history, but there are still many issues. What is the status and role of the functional location of malicious collusion? One of the most controversial issues is what is the relationship between the malicious collusion system and the system of public order and good morals? The ambiguous function definition makes malicious collusion not only abused in the judgment, but also appear the gray area where it is mixed with other systems, or applied simultaneously. Therefore, clarifying its functional orientation will help to define the functions of malicious collusion, address the issue of validity defects effectively and avoid confusion in the application. It is of great significance to rationalize the logic of laws and regulations and to promote the judicial practice.

Keywords: malicious collusion, *Civil Code*, juridical act

1. Problem Posing

Initially, in the *General Principles of the Civil Law* (Note 1), those that performed through malicious collusion are detrimental to the interest of the state, a collective or a third party shall be enumerated as a null and void civil act. With the promulgation of the *General Provisions of the Civil Law* (Note 2), legislators for the first time framed the applicable subject of malicious collusion as the actor and the opposite party, and amended the term “the interests of the state, a collective or a third party” to “any other person’s lawful rights and interests”, which was followed by the *Civil Code* (Note 3). The author searched for 1,433 judgments on the grounds of contract invalidity, with malicious collusion and the *Civil Code* as full-text keywords, limiting the adjudicate time to 2021 and 2022. Summarizing and comparing the judgments, it is clear that there is still chaos in the application of the malicious collusion system, and there is confusion (Note 4) with the application of the principle of public order and good morals. In the early years, some scholars also investigated and studied the malicious collusion system, pointing out that there are overlapping and unclear phenomena (Yang, D.-X., 2014) such as conspiracy hypocrisy and umgehungsgeschäft. Therefore, the purpose of this paper is to analyze the functional orientation of the malicious collusion system, in order to contribute to the proper function of the malicious collusion system.

2. The Functional Orientation of Malicious Collusion

As to the functional orientation of the malicious collusion system, academic circles mainly debate whether it is a sub-system of the system of public order and good morals. The affirmative doctrine holds that the malicious collusion system does not have an independent status, but is subordinate to the system of public order and good morals. On the contrary, the negative doctrine holds that malicious collusion is an independent system that is different from the system of public order and good morals. The author aims to collate and analyze the affirmative doctrine and negative doctrine, in order to clarify the true functional orientation of malicious collusion.

2.1 Analysis of the Affirmative Doctrine

Some scholars consider that the system of malicious collusion is a special case under the system of public order and good morals, which is based on Article 153 of the *Civil Code* (Note 5). A series of juridical acts regulated by the system of public order and good morals that are null and void, due to violation of public order, good morals, public order of the country and the general morality of society. However, the scholars of affirmative doctrine consider that the malicious collusion system is subordinate to the system of public order and good morals (Cui, J.-Z., 2019).

On the one hand, from the perspective of the comparative law, malicious collusion and public order and good

morals appear in German Law in a similar way, that is, profiteering and good morals. Paragraph 1 (Note 6) of Section 138 of the *German Civil Code* regulates that a legal transaction contrary to public policy is void, while paragraph 2 (Note 7) states that acts of profiteering shall be void in particular. Profiteering is still subordinate to the general context of good morals, but is only given extra emphasis as a special case. The majority of cases in German legal precedents violate good morals and damage to a third party (e.g., damage to creditors' interests), and the subordination of them is evident in judicial practice.

On the other hand, from a macro perspective to explore the validity defects of juridical acts, it is clear that the illegalities in the broad sense include four categories: violations of the imperative provisions (e.g., illegalities in the narrow sense), violations of public order and good morals, those that performed under the guise of legitimate acts conceal illegitimate purposes, and *umgehungsgeschäft*. The structure of malicious collusion and illegal acts is obviously different (Zhang, P.-H., 2017). Malicious collusion is not related to the form of civil liabilities and juridical acts. Therefore, it is necessary to consider whether it is the issue of defect of declaration or the problem of violations of public order and good morals. However, as false expression, that is, "conspiracy hypocrisy", has been clearly defined, it should be subordinate to the system of violations of public order and good morals (Zhu, G.-X., 2018).

From a micro perspective, that is, exploring the constituent elements of malicious collusion, the means and acts belong to be contrary to public policy. Malicious collusion requires that actors and the opposite parties to "conspire to commit a certain juridical act", and the means and acts in the whole process are still one. All of them are the nature that is contrary to public policy (Li, Y., 2017).

The scholars of affirmative doctrine also discussed the rationale from multiple perspectives, which is more complete. But in fact, the malicious collusion system in China was originally modeled on the *Civil Code of Soviet Russia*, which included collusion between the agent and the opposite party, but it was later summarized into malicious collusion as a typical situation. Besides, what is the true intention of the legislators' separate listing of the two articles?

Whether in the *General Provisions of the Civil Law (Draft)* or the *Civil Code*, malicious collusion and public order and good morals are intentionally separated in articles of the law. If they are subordinate, why are they listed in such a misleading way? Finally, in terms of the constituent elements of malicious collusion, can the extra result element, that is, "damage any other person's lawful rights and interests", still be perfectly covered by public order and good morals? It is thus clear that the affirmative doctrine still has shortcomings and needs to be improved.

2.2 Analysis of the Negative Doctrine

Some scholars consider that malicious collusion is not subordinate to the system of public order and good morals, but is a system with an independent status. It is precisely distinguished from public order and good morals, and has a special function, that is, the system that deals with its remaining problems.

From the perspective of legislative interpretation, the *General Provisions of the Civil Law (Draft) (3rd Version)* lists malicious collusion as a separate article, followed closely behind, and is stipulated in Article 157 (Note 8). It is distinguished from Article 155 (Note 9), which regulates the act of contrary to public policy. From the perspective of the legislators' purpose, the true intention is actually to make malicious collusion and public order and good morals govern different fields and perform different functions.

Therefore, malicious collusion only deals with "the situation where the parties maliciously collude a juridical act that damages any other person's lawful rights and interests" (Shu, Y.-Y., 2019). It is worth noting that other person's lawful rights and interests only refer to the interests of a specific third party. Malicious collusion will be discussed in the next third part, that is, only the case where "the malicious collusion of the parties to a legal act is the true intention and harms the interests of a specific third party" will be dealt with (Mao, S.-W., 2017).

From the perspective of comparative law, some scholars have proposed that the true origin of malicious collusion in China lies in Soviet and Russian law. In Soviet and Russian law, malicious collusion damaging the interests of the state, a collective or a third party is regarded as a special case (Note 10) where the declaration of will is untrue and the effect shall be void but revocable. The legal effect of the distinction between profiteering and good morals in German law is also not identical. It is thus clear that our malicious collusion system is not essentially the exact equivalent of any of the German or Soviet Russian regulatory perspectives, but rather takes a different approach and adopts a new perspective.

Some scholars suggested that malicious collusion is essentially a separate system from the public order and good morals system. They are not subordinate to each other, but separate (Gao, L.-M., 2020). In the *Civil Code*, which

came into effect on January 1, 2021, malicious collusion and public order and good morals are still clearly separated. If the legislators really considered that they are included and included, it is not necessary to separate the two situations in separate articles, but simply to list the special circumstances in the same article following German law.

Besides, if malicious collusion is subordinate to the system of public order and good morals, all of its constituent elements should be included in the system of public order and good morals, and should not be exceeded (Gao, L.-M., 2020). However, the malicious collusion structure is only partially consistent with public order and morals. Although it includes both elements of means and acts, they also require an additional element of the result, that is, “damage any other person’s lawful rights and interests”. The term used in the *Civil Code* is “the opposite party”, not “party”. If the scope is to be defined as between two parties, as in the case of public order and good morals, there would be no need to use a subjective term such as “actor and the opposite party”. Moreover, public order and good morals is still a term with no precise connotation at present. If we blindly escape from the general principles, most rules are easy to become a pie in the sky, which is not conducive to the construction of the legal framework (Li, D., 2018).

It is thus clear that malicious collusion in comparative law is not completely equivalent to profiteering, or even that there is a significant distinction. However, the *Civil Code* classifies the result of malicious collusion as void, which is distinguished from the revocable effect given in Soviet Russian law. From the perspective of the legislators’ intention at the macro level, the fact that the revised draft and the official code are listed in separate articles makes it difficult to assume that the true intention is to approve of malicious collusion as a subordinate concept of public order and morals. Besides, when the constituent elements are explored from a micro perspective, there are result elements that are not included in public order and good morals. Thus, it cannot be considered to be included by public order and good morals.

2.3 The Functional Orientation of Malicious Collusion

Comparing the affirmative doctrine and the negative doctrine, the author agrees with the negative view that malicious collusion system is independent and not a sub-system under the system of public order and morals.

First of all, it is clear that they have different starting points from the purpose of the construction of the law on malicious collusion and public order and good morals. Both of them correspond to private interests and public interests respectively. Malicious collusion protects the legitimate rights and interests of a third party. In the change of the articles, the terms “the state, a collective and a third party” are removed from the *General Principles of the Civil Law* to the *General Provisions of the Civil Law*, and the newly revised term “any other person’s lawful rights and interests” is also used in the *Civil Code*. The legislator intended to delimit the scope of application from public order and morals, so that the system would only deal with infringements of any other person’s lawful rights and interests.

In fact, is there any real support for this view that would constitute malicious collusion without violating public order and good morals? That is, it can be proved that the malicious collusion system exists to deal with a particular field that is beyond the reach of public order and good morals, and that they are in charge of different fields. Of course, here is an example to illustrate more vividly: if A had an antique that he wanted to sell, but he didn’t know the market conditions, so he asked his friend B to sell it on his behalf. B contacted C and said that the market price of this antique was worth 1,000,000, but the owner of the antique didn’t know how to sell it. So, he can sell it to C for 200,000, but he needed to take a profit from it in return. After that, B told A that the antique was indeed worth 200,000, and the interests of A were damaged. In this case, only three individuals are involved in the sale of the antique, and no public order is involved. It is far from the general good morals we understand and it is difficult to regulate ethics and morals. Therefore, it is clear that public order and good morals cannot be used in this situation and that the only reasonable solution to the problem of A is to determine that malicious collusion protects a private interest. From this example, it is clear that public order and good morals are created to protect public and general interests from the beginning, and are not applicable to protect the rights and interests of individuals.

Secondly, from the perspective of the legal principle, the status of public order and good morals is not consistent with malicious collusion. Public order and good morals belong to legal principles, while malicious collusion belongs to legal rules. They coexist in the *Civil Code* and are divided into different fields with no conflict. Therefore, it is not necessary to make malicious collusion under the huge system of public order and good morals. Besides, both of them are not constructed in the same way. As mentioned above, if malicious collusion is truly subordinate to public order and good morals, then each element should be covered by it. However, the result elements of malicious collusion, that is, “infringements of any other person’s lawful rights and interests”,

are not embodied in the law on public order and good morals. The constituent elements of public order and good morals are still considered to be only means and acts contrary to public policy, which in essence do not include the entirety of malicious collusion. Therefore, they shall not be integrated, and the scope of application is also different.

Finally, since the *Civil Code* has been promulgated, there is a tendency for contract interpretation to be based on the principle that “when interpreting the terms of a contract, all the terms should be valid”, and the interpretation of the law is no exception. Clarifying that malicious collusion only applies to the situation that the two parties damage the interests of a third party and public order and good morals damage the public interests. It is undoubtedly conducive to simplified diversion. Different types of cases are arranged separately, so that public order and good morals does not become a shield for all kinds of invalid situations, which makes the legislators’ initial idea of setting up the malicious collusion system come to naught.

3. Conclusion

As a long-standing but controversial system, malicious collusion is not subordinate to public order and good morals in its functional orientation, but has an independent status distinct from the public order and good morals system. Malicious collusion is a general rule with its unique function. The promulgation of the *Civil Code*, following the *General Provisions of the Civil Law*, is undoubtedly more detailed and comprehensive than the *General Principles of the Civil Law*, but there are still conflicts within the legal system that need to be improved. The significance of clarifying the malicious collusion system is to help judicial practice to avoid confusion, and also to look forward to the practical implementation of the judicial practice and the correction of the actual situation, so as to play the true role of the system.

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Notes

Note 1. Article 58 of the *General Principles of the Civil Law*: Civil acts in the following categories shall be null and void: (1) those performed by a person without capacity for civil conduct; (2) those that according to law may not be independently performed by a person with limited capacity for civil conduct; (3) those performed by a person against his true intentions as a result of cheating, coercion or exploitation of his unfavourable position by the other party; (4) those that performed through malicious collusion are detrimental to the interest of the state, a collective or a third party; (5) those that violate the law or the public interest; (6) those that performed under the guise of legitimate acts conceal illegitimate purposes.

Note 2. Article 154 of the *General Provisions of the Civil Law*: A juridical act by which an actor maliciously colludes with the opposite party to damage any other person's lawful rights and interests shall be void.

Note 3. Article 154 of the *Civil Code*: A juridical act by which an actor maliciously colludes with the opposite party to damage any other person's lawful rights and interests shall be void.

Note 4. Wu Yinjuan, Liang Yin'ai and others, Dispute over Confirmation of Invalid Contract, Jiangmen Intermediate People's Court, Guangdong Province (2021) Yue 07, Final trial of civil cases, No. 5266 Civil Judgment.

Note 5. Article 153 of the *Civil Code*: A juridical act violating the imperative provisions of any law or administrative regulation shall be void, unless the imperative provisions do not result in the nullity of the juridical act. A juridical act contrary to public order and good morals shall be void.

Note 6. Paragraph 1 of Section 138 of the *German Civil Code*: A legal transaction which is contrary to public policy is void.

Note 7. Paragraph 2 of Section 138 of the *German Civil Code*: In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.

Note 8. Article 157 of the *General Provisions of the Civil Law (Draft) (3rd Version)*: A juridical act by which an actor maliciously colludes with the opposite party to damage any other person's lawful rights and interests shall be void.

Note 9. Article 155 of the *General Provisions of the Civil Law (Draft) (3rd Version)*: A juridical act violating the imperative provisions or contrary to public order and good morals shall be void.

Note 10. Article 32 of the *Civil Code of Soviet Russian*: A juridical act by which an agent of a party colludes with the opposite party shall be claimed nullity by applying to the people's court.

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