The Preservation System of Public Order in International Private Law

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Abstract. This paper aims to analyze the connotation of the public order reservation system and explore the negative effects arising from the flexible nature of this system. In order for this system to be applied reasonably, the paper proposes some suggestions for restricting its application from three aspects: clarifying the connotation of the public order reservation system, analyzing applicable standards, and proposing relevant measures after excluding application. Furthermore, based on China's "one country, two systems" system and the current legislative situation, the paper also provides some suggestions for the improvement of legislation regarding the public order reservation system in China.

1 Introduction

With the pace of reform and the development of economic globalization, China's economic and trade exchanges with other countries have been increasing. Consequently, various civil and commercial legal relationships are established between China and other nations. As a result, there is a corresponding increase in international civil and commercial legal disputes. When handling such international cases, conflicts of laws from two or more countries often arise, leading to competing claims of jurisdiction over the same international civil and commercial legal relationships based on connecting factors. In response to this, it is essential to determine the applicable conflict norms. In accordance with the relevant provisions of private international law, the systems associated with the application of conflict norms include the identification system, renvoi system, system for avoiding laws, system for ascertaining foreign laws, and the public order reservation system. Initially, during the selection phase of conflict norms and in the handling of specific international civil and commercial relationships, the identification system is employed to analyze, qualify, and classify case facts. Subsequently, the court determines whether the law of the forum is applicable to the foreign conflict norms, i.e., applying the renvoi system. These two systems determine the conflict norms applicable to the case. In the process of invoking the choice of law guided by conflict norms, it is crucial to examine whether the parties have altered connecting points to determine if their actions constitute legal avoidance, thereby deciding on the choice of law.

While the above procedure supports and increases the opportunities for applying foreign law, if a specific foreign law is invoked, its results may conflict with the significant interests, fundamental policies, basic moral values, or legal principles of the forum country. In such situations, the court must employ a certain system to exclude the application of foreign law. This principle is one of the crucial bases for the court to exclude the application of foreign law in such cases. Its emergence provides a certain degree of regulation and protection for the application of foreign law while also promoting, to some extent, the application of domestic law. The public order reservation system has become a fundamental principle in private international law, being one of the oldest principles recognized in judicial practices worldwide. However, at the same time, the public order reservation system still poses some issues that urgently require research and resolution. Improving the public order reservation system is beneficial for handling conflicts between domestic and foreign laws rationally, thereby effectively applying legal norms to manage international civil and commercial legal relationships.

2 Overview of the Principle of Public Order Reservation

2.1 The Connotation of the Public Order Reservation Principle

Public order is a kind of order, principle, or norm that exists to maintain the smooth operation of public affairs in society. In the context of private international law, public order refers to matters related to a country's significant interests, basic policies, moral concepts, or fundamental principles in legislation or society. Mancini and his school define public order law as constitutional law, criminal law, fiscal law, administrative law, police and security law, property law, enforcement law, moral law, and order law[1]. Different countries use various terms for public order; civil law countries generally refer

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to it as "exclusion clauses" or "public order," while common law countries call it "public policy."[2] In China, public order is commonly defined as "national security" or "public interest."[2] In the field of private international law, the principle of public order reservation refers to the situation where a court cites a foreign law as the applicable law for a particular case in the process of applying conflict rules. However, if the application of the foreign law contradicts the public order of the court's jurisdiction, the court has the right to refuse or exclude the application of that foreign law. The principle of public order reservation is also known as the "safety valve" system in international justice, and its existence is to ensure the reasonable application of foreign laws. China also attaches great importance to the principle of public order reservation.

2.2 The Emergence and Development of Relevant Theoretical Roots of the Public Order Reservation Principle

In fact, the concept of public order began to emerge in the 13th and 14th centuries in the "doctrine of the ius commune" in Italy. As a representative figure of the "doctrine of the ius commune," Bartolus classified laws into personal laws and property laws. He believed that property laws have internal effectiveness, while personal laws have external effectiveness. However, those "odious laws" within personal laws, such as discriminatory legal provisions, did not have corresponding external effectiveness. Although this idea had not fully developed, it at least indicates that the concept of public order originated in conflicts between Italian cities[3]. At the same time, this idea represents the earliest form of the public order reservation.

In the 17th century, Dutch scholar Hugo Grotius initiated a systematic discussion of the theory of public order. He advocated the "doctrine of international comity," which argued that a country could recognize the extraterritorial effectiveness of foreign laws based on comity. However, the recognition of the extraterritorial effectiveness of foreign laws was subject to certain conditions, namely, it should not violate national sovereignty and should not harm the interests of the subjects. This is a condition that remains in modern private international law regarding public order reservation. By 1804, the French Civil Code first incorporated provisions related to reserving public order into civil law. Article 6 of the French Civil Code stipulated, "Individuals may not, by particular agreements, waive the legal provisions relating to public order and good morals." Later, in French judicial practice, public order was also used in cases involving foreign elements. Since the establishment of this provision in the French Civil Code, many countries have begun to incorporate public order reservation clauses into their legal systems[2]. In 1856, the German Civil Code explicitly stipulated that foreign laws could be excluded due to public order reasons. The code specified that the return of foreign laws, judgments, or individual disposals or contracts, in any case, must not contradict the country's laws on private ownership due to public order. Moreover, in 1896, as the world's first single-line law, Article 30 of the Implementation Act of the German Civil Code explicitly stated that foreign laws could not be applied if they violated good customs or the purposes of German law.

3 Restrictions on the Application of the Public Order Reservation System

Although the public order reservation system is a "safety valve" in private international law, its "flexible" nature inevitably leads to negative effects. One of the negative aspects of the public order reservation system is that it grants judges broad discretion in applying public order provisions, leading to potential abuse of judicial power[4]. One reason for this situation is the lack of explicit legal provisions specifying the content of public order reservation; instead, the discretion to use this system is directly delegated to the judges. Therefore, in many judicial practices, judges may subjectively misuse their discretion intentionally to exclude the application of a particular foreign law, using the public order reservation system as a "pretext" for exclusion. In light of this, to maintain order in private international law, there is a universal demand in the international community to impose limitations on the application of the public order reservation system[5].

3.1. Distinguishing Domestic and International Public Order, Clarifying the Connotation of Public Order

Swiss jurist Brunschwig proposed the concepts of "domestic public order" and "international public order" based on the two-part view of imperative law[4]. He believes that provisions related to domestic public order in civil law only apply to domestic civil legal relations, and may not necessarily be applicable to international civil and commercial legal relations. Therefore, international public order should be applied to foreign civil legal relations. This indicates that the conditions for applying international public order are more stringent than those for applying domestic public order. Equating the content of "domestic public order" and "international public order" would hinder the construction and development of certain international civil and commercial legal relations and is not conducive to the process of economic globalization.

3.2 Endorsing the "Objective Approach" in the Application Standards of Public Order Reservation

The "objective approach," also known as the "results approach," refers to considering both the appropriateness of the content of foreign law and whether the application results comply with the domestic public order when a court decides whether to invoke the public order reservation. In contrast, the "subjective approach" in applying the public order reservation system focuses

solely on whether the content of foreign law conflicts with domestic law. Some scholars believe that, in order to make the application of the public order reservation system more flexible and effective, the "objective approach" and the "subjective approach" should be combined[6].

However, the author believes that the "objective approach" is more scientifically reasonable, conducive to the positive development and maintenance of public order in various countries, and respects the fundamental policies, values, and moral concepts of each country. This approach is currently recognized and adopted by most countries in the application of the public order reservation system. The "objective approach" to some extent restricts the application of the public order reservation principle. This application standard implies that judges in the jurisdictional country cannot simply apply the public order reservation system just because there is a conflict between the foreign law to be invoked and domestic law, treating it as a "tool" to exclude the application of foreign law. Instead, they must consider whether the application of a particular foreign law will genuinely harm the public interest or other significant interests of the jurisdictional country. Thus, the "objective approach" to some extent restricts the application of the public order reservation system, raising the "threshold" for judges to apply this system. Therefore, countries in legislation and judicial practice increasingly support the "objective approach."[4]

3.3 After Excluding the Application of Foreign Law, Internal Law Should Not Be Universally Substituted

The traditional view generally holds that if the public reservation system can exclude the application of foreign law, domestic law can be directly applied. However, if after excluding the application of foreign law, domestic law cannot be universally applied, it means that even if the judge excludes the application of foreign law, it may not be able to smoothly apply the domestic law of the jurisdictional country. For example, Article 5 of the "Turkish International Private Law and International Procedural Law" stipulates that if foreign law should apply and it violates Turkey's public order, it shall not be applied, and if necessary, Turkish law may be applied. The term "if necessary" implies that Turkish courts may not necessarily or must apply domestic law in the absence of the application of foreign law. This provision to some extent inhibits judges from abusing the public order reservation system because it weakens the incentive for judges to apply the public order reservation system. The author believes that this provision is reasonable. When a court decides to apply a particular foreign law based on the guidance of conflict rules, it indicates that the application of foreign law has a certain role and significance in specific judicial decisions. Assuming that after excluding the application of foreign law, it is directly assumed that the court can invoke the domestic law of the jurisdictional country is not scientifically sound. Instead, a reasonable judgment should be made based on the specific circumstances of the case.

4 Current Legislation and Improvement of the Public Order Reservation System in China

4.1. Current Legislation

With the development of China's reform and opening-up, increased international exchanges, and the manifestation of the trend of global economic globalization in recent years, various foreign-related civil and commercial legal relations related to China are continuously being established and developed. In response to this, China has been continuously developing legislation related to private international law, and regulations related to the public order reservation system have also appeared in China's legal documents. According to China's basic national conditions and relevant policies, the public order reservation system can be applied to exclude the application of foreign law if the result of applying foreign law would harm China's sovereignty and integrity, violate the spirit of China's constitution, harm national unity, violate the basic principles of sectoral laws, or if applying foreign law would violate obligations China has entered into in certain international treaties or contravene internationally recognized principles of fairness and justice. Additionally, if foreign courts unreasonably exclude Chinese law in judicial practice, China can also exclude the application of foreign law based on the principle of reciprocity.

Looking at the development of China's public order reservation system, this system first appeared in Article 4 of China's "Foreign Economic Law Contract" in 1985: "Contracts must comply with the laws of the People's Republic of China and must not harm the public interests of the People's Republic of China." From this perspective, China began to pay attention to the public order reservation system in the 1990s. In addition, Article 150 of the "General Principles of Civil Law" in 1986 made relevant provisions on this system from the perspective of legal application: "If foreign law or international practices are applied in accordance with the provisions of this chapter, it must not violate the public interests of the People's Republic of China."[7] Furthermore, there are also relevant provisions in China's Maritime Law and Civil Aviation Law. Therefore, China's relevant legislation on this system is relatively comprehensive, with broad coverage. However, there are also some defects, such as certain concepts being vague and provisions being overly broad. To address these shortcomings, improvements can be made in the following areas.

4.2. Current Legislation

In response to the broad provisions related to the public reservation system in China, it is advisable to provide

more detailed explanations for the relevant clauses. For matters not explicitly addressed in current Chinese legislative documents, further detailed regulations can be established[8].

4.2.1 Improve Legislation Related to the Public Order Reservation System in China's Private International Law

Firstly, enhance legislation related to the public order reservation system in China's private international law. In the short term, it may not be feasible for relevant legislative bodies in China to immediately formulate specific standalone laws. Therefore, improvements to the public order reservation system can be made in the following ways. First, before the enactment of the Private International Law Code in China, the relevant legal provisions regarding the public order reservation system in existing laws should still be effective. However, for vague or overarching provisions in the current laws regarding public order legislation, the Supreme Court can further interpret and clarify them to make their content more explicit. Second, for public order reservation matters that are not currently specified in existing laws, the Supreme Court can establish certain judgment criteria through relevant judicial practices. Additionally, when China formulates standalone laws in the future, it should consider the existing relevant provisions in current laws to avoid duplication or conflicting regulations. Regarding the application standards, the author suggests adopting the "objective approach." For defining and applying the public order reservation system, comprehensive provisions should be made from the perspectives of substantive law, conflict law, and procedural law.

4.2.2 Improve Legislation Related to the Public Order Reservation System in China's Interregional Private Law

Secondly, given China's policy of "one country, two systems," high attention should be given to the public order reservation system in interregional private law. Due to historical factors, China resumed sovereignty over the Hong Kong and Macau regions in the late 20th century, and there is also a trend of sovereignty returning for Taiwan. Considering the differences in ideologies and legal concepts between the mainland and the Hong Kong, Macau, and Taiwan regions, the concept of "one country, two systems" was born to respect the customs and views of people in different regions of China. However, even though these regions have different ideologies from the mainland, they still belong to China. For the public order reservation system, it needs to be reasonably applied, limited in its application, and should not undermine the fundamental issue of national sovereignty. Therefore, in the improvement of relevant legislation, the following considerations can be made. Firstly, in terms of the application standards, strict adherence to the "objective approach" ("results approach") should be maintained. When formulating legislation in the mainland, it should be explicitly stated that the application of relevant provisions in Hong Kong, Macau, or Taiwan can only be excluded when it "seriously violates" the mainland's public order, and the application results would significantly undermine the mainland's public order. Secondly, in judicial procedures, when there is a legal conflict in interregional cases that requires the invocation of the public order reservation system in private international law, the case can be transferred to the Supreme Court for determination.

5 Conclusion

This paper focused on the public order reservation system, interpreting its connotation, analyzing its shortcomings, and emphasizing the necessity of limiting its application. Suggestions for three ways to restrict its application were proposed. Moreover, considering China's emphasis on openness to the outside world and the trend of economic globalization, the paper analyzed the current legislative status of China's public order reservation system and provided relevant recommendations. It is believed that through development and improvement, the application of China's public order reservation system will become more standardized, scientific, and reasonable.

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