

# Research on Evasion of law in Private International Law

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**Abstract.** Legal evasion is a long-standing problem in the judicial practice of private international law. This article intends to introduce the concept and method of legal evasion, define the legal evasion and its effect and application, then get the legal reason to avoid, and our country facing the law to avoid the present situation the analysis, and then put forward some suggestions.

**Keywords:** Private international law; Evasion of law; Judicial practice.

## 1. Introduction

Evasion of law often occurs in the judicial practice of private international law, which is a long-standing problem. This article will explain the concept and methods of legal evasion, define the legal evasion, judge the effect and scope of application of legal evasion, finally analyze the causes of legal evasion, and summarize the dilemma of legal evasion in China and put forward some suggestions.

## 2. The concept of law avoidance

Legal evasion can be explained simply from two aspects, which are broad and narrow respectively. Firstly, in a broad sense, avoidance of legal act is not only reflected in the application of legal act, but also includes avoidance of legal act in the jurisdictional stage, avoidance of legal act in the application and implementation stage, and avoidance related to the execution of judgment stage, which almost covers the whole process of law implementation. In the narrow sense, the applicable time range of the avoidance of legal act is generally narrow, which only includes the stage of law application. Second, in a broad sense, the avoidance of law refers to the act of avoiding the law, which is very general. The narrow sense of circumvention of law refers to the circumvention of law in private international law, which is exactly what this paper will study. The former is divided by the scope of the applicable stage, and the latter is divided by whether it refers specifically to the field of private international law. The object of this paper is the narrow definition of evasion of law in the second interpretation method -- evasion of law in private international law.

Private international law in practice, we commonly used is the evasion of law, or sometimes some people called the law of fraud, generally refers to a foreign related contract or other civil relationship of the parties in order to avoid the legal norms of a particular concrete conflict, deliberately designed to create a connection point, to avoid the governing law should be universally applicable. In the history of the development of the whole field of private international law, some people began to conduct some in-depth research on the issue of marriage avoidance, probably from the 1870s. The case that led to a more extensive and detailed study of the relevant issues has been described in the course, namely, the divorce case of Prince Baufuremont of France in 1878 [1]. The French princess fell in love with another Romanian prince, Bibesco, and in order to marry and have children with the other Romanian prince, she had to divorce the French prince, which was completely prohibited by French law at the time, but allowed by German law. In order to achieve her goal, she chose to settle in Germany and became a naturalized German citizen. Germany allowed divorce, so she got an easy divorce from a French prince and later married a Romanian prince in Germany. Therefore, it can be seen that no matter it is only because of the subjective intention of both parties at the level of their own consciousness of conflict behavior.

### 3. The method of legal avoidance

At present, in some foreign civil and commercial cases in our country, there are often a lot of parties in order to avoid the applicable law, to artificially create a connection point, will cause this illegal behavior occurs frequently, one of the fundamental reasons is that only through the connection point we can find the relevant applicable law in practice, There are also many western countries have tried to prevent the occurrence of this illegal behavior through many methods, for example, many European countries have a common provision, after obtaining the right of residence should be required to stay for at least two years, as a condition to prohibit people through the use of other people's legal residence address to evade the law.

There are usually four ways to evade the law as follows: 1. Change the place of conduct: If a new type of foreign general civil and commercial legal relation provisions should be adjusted by the original law of the place of conduct, then as long as the place of conduct is changed, the applicable substantive law will also change. 2. Changing the place of real right: some lost property from return period is longer than the other countries to those who return time is generally shorter the transfer behavior of other countries, are ways of changing the domicile of the property right. 3. Change of domicile or nationality: In applying for change of nationality or legal domicile in accordance with the relevant applicable laws of the country, it generally refers to the act of intentionally changing the original domicile or nationality of the party in order to avoid some stringent laws or the relevant taxes of the country with higher tax rates. 4. Changes in religious belief: in modern western religious regulations is widely used for direct means to adjust the relations of civil society of religious country under the rule of law, the parties in order to effectively circumvent the code in the specification relevant personnel of a certain concrete behavior law of the full range of prohibitions, active request to change its original foreign religious beliefs or their subordinate.

### 4. Effectiveness and application of circumvention of law

#### 4.1 Effect of circumvention of laws

Countries often have different attitudes towards whether legal evasion can have practical effect in daily law implementation and political affairs.

Evasion of domestic laws. In order to ensure the stability of the international legal order applied in their country, most countries and governments do not recognize its legal effect. In common law countries, it is widely recognized that legal evasion is essentially legal fraud. Although some relevant legislative practices and jurisprudence theories in common law countries generally do not recognize legal evasion, they still tend to exclude the application of relevant foreign laws by means of interpretation and exclusion of conflict norms in specific practice procedures. Circumvention of domestic law is not the focus of this paper, so it is only briefly described here.

The focus is on circumventing foreign law. The current related to evade or apply foreign law effectiveness of specific issues research conference, each region related country representatives are put forward for avoiding effect problem, hold various from different research Angle of view, the main ideas include the following three main theories, effective, and said, is invalid and the specific case analysis for specific problems. Specific content is as follows: 1. The effective said: as long as the parties to the actual of relevant foreign law provisions of substantive dodge, if the country is not to evade the law of the country directly to sign the related provisions of international treaties related laws, shall be deemed to be agree with its substantial circumvent the related provisions of foreign law effectiveness. 2. Invalid said: as long as the parties for their own has been enacted in accordance with the relevant law of the country should be preferred to its mandatory legal provisions shall be applicable or other prohibited provisions and the evasion of law is the legal act is invalid, regardless of its behavior by aversion is domestic or foreign law have decided that it is not effect in the process of law. 3. Aiming at specific problems of specific case analysis, said: current situation analysis for the specific case questions say still is not really a method widely used by domestic scholars theory, its

content requirement is a pointer to the parties ever wrote the behavior of the foreign law, should be taken respectively for the specific case of respectively corresponding to different processing ways[2]. First of all, it should be clearly identified that this behavior is absolutely illegal and invalid. On the contrary, if the law that the party is trying to circumvent is an unjust law that violates the international public order, such as the implementation of apartheid, then the legality of the act should be determined regardless of whether the relevant provisions exist in the domestic or foreign law. However, in the specific judicial practice and application activities, this theoretical view has a universal problem, involving or even affecting the judicial sovereignty of our country. However, due to the lack of a unified and effective and perfect judgment system and the great differences in the national conditions of various countries in the world, it is also difficult to solve the problem of the consistency of this basic system in the operation of China's legal practice. Whether it is effective or specific analysis for specific problems, it almost ignores the point of ensuring the effective implementation of the national legal system, which is the fundamental purpose of establishing and applying this legal system.

## **4.2 The application of law evasion**

In the field of international civil and judicial communication: in the field of international civil and judicial communication, the main application field of legal avoidance is to realize or facilitate the conclusion of written legal contracts with others, inheritance of gift property, marriage and other purposes through the use of artificial legal connection points created by the parties.

In the field of international commercial communication: in the field of international commercial communication, the majority of the scope of application of legal avoidance refers to the economic behavior of the parties in order to avoid certain stringent business conditions for the establishment of joint ventures and tax avoidance in the operation. For example, some transnational corporations evade the relevant domestic current tax law norms by transferring domestic prices and other means, which belongs to the typical behavior of avoiding the law.

## **5. The relationship between legal evasion and the preservation of public order**

### **5.1 The concept of the preservation of public order**

Courts of one state in handle foreign-related civil and commercial cases, according to some rules about the domestic conflict rules concerning foreign affairs, should be allowed to refer to foreign law, violated the law source of public order, therefore, in the court has ruled out the use or foreign law clearly forbids the use of which, it is a system of public order [3]. In addition, Chinese law also makes relevant provisions on the public order reservation system. For example, when the public order reservation system is stipulated in accordance with the latest Civil Code of China, and relevant foreign laws are quoted in accordance with the norms of conflict of laws, the application of the foreign law shall not harm any public interests in the People's Republic of China.

### **5.2 The difference between law evasion and public order reservation**

Evasion of law and public order reserve, even though they share some common similar place, but is fundamental in essence is both is different, this paper argues that, evasion of law and the reservation of public order, mainly embody the following five fundamental difference: first, the cause of evasion of law and reservation of public order is not the same. In the debate of international civil and commercial cases, both parties choose to change the legal connection point in the conflict in order to avoid the existing law that they do not want to be applied, which causes the dispute is usually called legal evasion. And the public order reservation refers to those who, according to the norms of the conflict of laws, should continue to apply the original foreign laws but have obviously damaged the public interest of the court country. Second, reservation of public order and the evasion of law usually specially protected concrete object is also different, evasion of law is usually in the interest of the parties in order to fully protect themselves, domestic law and foreign law generally belongs to the

key protection object of evasion of law, many foreign laws and regulations also often have some prohibitions are protected. Although the principle of public order preservation also protects many important prohibitive clauses, in fact, its most concerned protection goal is still the basic interests of the court itself, to maintain the healthy operation of the entire legal order. Thirdly, the nature of the principle of avoidance of law and the principle of preservation of public order are not the same. The so-called evasion in law mainly refers to the parties choosing the most favorable law for themselves by relying on their personal consciousness in order to achieve some of their own goals, which is an individual behavior. In the legal avoidance mechanism, if the parties fail to achieve their own goals, in addition to the goal cannot be achieved, their interests are also more likely to be damaged. However, public order reservation only protects the national public interests without deliberately protecting the interests of the parties. On the contrary, changing the applicable law may even damage the interests of the parties. Fifth, the principle of public order preservation and the principle of law avoidance also have great differences in legal status and national legislation.

## **6. The situation of legal evasion in China**

### **6.1 Legal evasion in the context of Chinese legal thinking**

Chinese legal thinking holds that the phenomenon of law evasion is an act that does not respect the legal authority of the state, and advocates giving a negative evaluation of law evasion. In fact, most countries in the world think so, but there is no law prohibiting law evasion in China. Confucianism, legalism and Taoism have all expressed their views on the phenomenon of law evasion. Confucianism holds that the common people will not circumvent the law only if they truly agree with the law. According to the legalists, laws must be made in accordance with human nature and should not interfere with people's nature to seek advantages and avoid disadvantages. The Daoists summarized the propositions of the two schools, believing that if there is no correct way to govern the country, the country will be in chaos, and the increase of laws and people's pursuit of profits result in the avoidance of laws [4]. To this end, the Daoists proposed a solution -- Dao Fa Natural. Professor Chen Longxiu believes that this kind of thinking is consistent with the ancient principle of good faith to restrict the policy [5]. This can answer the question of legal evasion, but mainly from the rule of judgment. And the most important thing is that the law should be made naturally, so that people can't feel the effect of the law, and then obey the law unconsciously, rather than thinking of avoiding the law, which is the original intention of Taoism.

### **6.2 China's judicial practice in the face of legal evasion**

Legal circumvention is not complete in China's legal system. However, legal evasion is quite complex and changeable in the specific links of law enforcement, including the court's judgment on the behavior mode and subjective consciousness of the parties. For judicial work, it needs to consume a lot of manpower, time and financial resources. Therefore, we should make more perfect and effective laws and regulations in the future on the one hand, on the other hand, we should pay attention to how to improve the legal literacy of judicial personnel. All kinds of connection points in the field of private international law are systematically classified and softened, so that the connection points can be determined in the face of different international legal relations. If the number of connection points is really large, they should be limited accordingly; Conversely, if the number of join points is small, consider refining more join points [6]. In judicial practice, judicial staff should effectively improve their legal literacy, through the interpretation and analysis of the current law, and then find and fill the loopholes of the law, to safeguard the dignity and interests of the country. Legislative workers should constantly enrich and improve Chinese laws and regulations, establish a more perfect and reasonable legal system, and promote China to become a great modern socialist country with Chinese characteristics.

### 6.3 Suggestions on the avoidance of laws in China

At present our country only in the judicial interpretation to circumvent the mandatory or prohibitive legal norms are regarded as invalid, shows the evasion of law on the legislation of our country how to define and solve not form a system, even if the above expressed people's identity is the most important law in his own heart, but evasion of law still need certain laws to regulate [7]. In view of this problem, our country needs to start from two aspects. First, strengthen the legislation of relevant aspects of the state law as soon as possible, perfect our legal system, so that the problem of legal avoidance can be basically implemented in China. Only in this way can judicial staff deal with and solve cases involving evasion of the law, otherwise they are likely to be at a loss when the parties take advantage of some loopholes in the law to challenge the authority of the law. Second, international unified substantive law should be formulated. If the substantive law of various countries is relatively unified, even if the parties circumvent the law, they can only get similar legal results, and then they will not choose to circumvent the law.

Third, we should establish a general international law evasion system. As mentioned above, not all countries can give the same treatment to parties' evasion of foreign law and evasion of domestic law, and not all countries adopt the invalid theory of legal evasion. In this paper, we believe that a general international law evasion system should be established. No matter which country's law is evaded, the law evasion act should be regarded as invalid, and countries can communicate and cooperate in the judicial practice of law evasion. In order to ensure the normal operation of our legal system and prevent the avoidance of law, China needs to work together with other countries to develop the international system of general avoidance of law by signing international treaties and other ways [8].

## 7. Conclusion

Evasion of the law in private international law is a difficult problem to deal with not only abroad but also at home. In the face of legal evasion, not only domestic laws should be regulated and people should agree with the current laws, but also the international law should be able to form a relatively unified system of legal evasion. Domestic first establish a complete legal system, internationally, countries and countries to cooperate with each other, whether the parties to avoid domestic law or foreign law, all adopt the same attitude, are determined that legal evasion is invalid. In this way, the dilemma faced by domestic law evasion can be solved to a certain extent.

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