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RESEARCH ARTICLE

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Evasion in the Conflict of Laws and Its Possible Solution in China

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Abstract Evasion in private international law differs from fraud of law in domestic law, which has been generally agreed upon in academic and judicial circles. However, in China's private international law, the theories on "evasion," are very confusing and quite a few Chinese academicians appear more declined to accept it as natural phenomenon in conflict of laws. Similarly, both Chinese judges and legislators take a conservative approach towards it. By comparative and historical methods, the definition of evasion is to be clarified in this paper. Also, it is to argue that evasion differs from fraud of law in the context of domestic law and it is necessary to elucidate it.

Keywords evasion, doctrine of evasion, fraud of law

1 Introduction

In China's private international law, evasion is a confusing term. In theory, it is mostly viewed as a means to treat foreign law as public policy. That academic view is reflected in China's judicial practice, however, such a view appears to be altered to some extent in China's *Civil Code* (Draft). Part IX of the *Civil Code* (Draft), titled as *Choice of Law in Foreign Civil Matters*, consists of general and special conflict rules. Nonetheless, there is no general rule that guides Chinese courts on how evasion shall be dealt with. Instead, we find a special rule on marriage evasion, i.e., Article 61(2). It reads that, "The marriage that is lawfully celebrated outside of the People's Republic of China shall be recognized unless the parties purposely evade China's mandatory or overriding rules in pursuit of that marriage." Possibly, those lawmakers try to judge evasion conclusively by

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that rigid rule. But a rule like that, especially in the domain of private international law, is seldom found in other jurisdictions.[1]

The concern is that Chinese lawmakers may be too courageous and too decisive. On the contrary, due to a bundle of theoretical problems arising out of evasion and how most jurisdictions deal with it in conflict of laws, Chinese would-be solution to evasion shown in Part IX is naturally questioned about its reason. First, generally speaking, evasion has been almost accepted as a lawful conduct both in theory and in practice.[2] In particular, it is worth noticing that most countries, including major civil law countries such as Germany and Switzerland, leave it open, for it is not so easy to establish evasion intent and decide whether there is evasion, let alone to judge it. Second, the doctrine of evasion, in essence, is about choice of law, to be more exact, the effect of conflict rules at the bottom, which means that it should have been put into the "*General Rules*" of Part IX as it is in *The Model Law of Private International Law* of *the People's Republic of China*.[3] Instead, what has been found therein is that a rule for the special evasion occurring in foreign marriage appears, rather than a rule for evasion in general. It might be inferred that Chinese lawmakers don't think evasion ought to be controlled except that it occurs in foreign marriage. They seem to believe that marriage evasion is necessarily more harmful than any other type of evasion (e.g., tax evasion, contract evasion) so that it has to be expressly ruled. If so, they probably take it for granted. If not, they fail to follow the logic of private international law. Third, either from the perspective of its substance or that of its purpose, we cannot help but question Article 61 about its real use and function. It is partly because China's marriage law is not so stringent as those in many other countries and partly because marriage evasion may be a public policy consideration, ruled by public policy clauses. A good legal rule always comes from a better understanding of what the concepts concerned (theory) and of what real life is like (practice). There is no exception for the rule on evasion. However regrettably, something in that *Civil Code* (Draft) and, even in Chinese popular textbooks of private international law shows that neither evasion nor the doctrine of evasion is well understood. In this article, three questions on evasion are to be referred: (1) What is evasion? (2) Ought it to be null? (3) If so, is the doctrine of evasion a public policy or ought it to be so? Upon the answers to those questions, a suggestion will be proposed about how Article 61 would possibly be amended.

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[1] See Depei Han, 国际私法 (Private International Law), Higher Education Press (Beijing) & Peking University Press (Beijing), at 134 (2000).

[2] Yoshio Tomeike, *Teaching Material for Private International Law*, 3rd ed., Yukikaku Publishing Co. Ltd (Tokyo), at 203 (2005).

[3] Art. 13 of the Model Code of Private International Law of the People's Republic of China "Where the parties purposely shop for the applicable law only to evade China's mandatory or overriding rules, that law they shopped shall not be applied."

2 The Definition of Evasion

In the context of private international law, especially in that of China's private international law, the term evasion[4] is often confusing and sometimes the term is misrepresented. It sometimes refers to an individual's conduct of evading law while at times it refers to the doctrine of evasion, a judicial practice. Despite both are termed "evasion" and are mixed with each other from time to time, the conduct of evading law and the doctrine of evasion are actually such distinct concepts that they ought to be differentiated. Evasion is a legal conduct through which individuals evade the law that could or should have been applied but instead make another law (often more advantageous to them), to be applied or applicable. The doctrine of evasion is a principle which treats evasion null.[5] It may be entertained as a tool to exclude the law the parties choose through evasion, declaring that evasion null.

2.1 Origin

In Chinese academia, there exists an opinion that evasion originated from private international law,[6] which is totally misunderstanding. The term "evasion" in private international law was borrowed from French domestic law, *fraude* à *la loi* (evasion of law).[7] It is originally a legal concept in civil law jurisdictions dealing with individuals' misuse of their rights, usually described as a conduct committed by lawful means but for unlawful purposes.[8] In Spanish, it is termed as *fraude de*

[4] In this article, unless expressed otherwise, evasion only refers to its definition in the context of private international law or conflict of laws.

[5] Some Chinese academics say the term "evasion" sometimes means a system of how to judge the conduct of evasion. See Jian Sun, *Evasion of Law in Private International Law*, 21(2) 河北法学 (Hebei Law Science) 84 (2003). But in the domain of private international law, actually the vast majority of jurisdictions throughout the world have left evasion open, so there exists no so-called system.

[6] Baofeng Zhang, 落叶归根畏秋风——在传统视域外对"法律规避"的关注 ("Evasion of Law" from a New Perspective), (1) 社科纵横 (Social Sciences Review) 70–72 (2009).

[7] In Latin, "fraus" contains the meaning of "evasion." The same case is true with French so in French "evasion of law" is usually termed as "fraud of law." It so happens not only because French inherits a great deal of Roman law but also because French itself came from Latin. See Alexander Muranov, "*Evasion (law)*" *Problem in Private International Law and Its Possible Solution in Russia*, (1) Russian Commercial Law 33 (1994).

[8] David Walker, *Oxford Law Dictionary*, Guangming Daily Press (Beijing), at 539 (1988). For example, art. 877 (Civil Code of the Macao Special Administrative Region) expressly forbids a father to sell his property to one of his children without other children's consent. Thus, where the father sells his property to a third party who resells it to one of his children, the sale of the father is regarded as the evasion of law. See Jin Huang and Huacheng Guo, *Evasion in Macao's Private International Law*, (2) 法学研究 (Chinese Journal of Law) 125 (1997).

ley; in Italian, *violazione di norme di legge*; in German, *Rechtswidrige Umgehung eines Gesetzes*. Most civil law jurisdictions treat it as an indirectly unlawful, fraudulent, null and void, resulted from an old Latin proverb *fraus omnia vitiate* (fraud vitiates everything), which is a common legal principal in most civil law jurisdictions. Consequently, those who intend to obtain ill interest by evading law possibly would fail to obtain what they expect and the worse is that they would be punished for that evasion. It reflects the need for governments to prevent citizens from intentionally and improperly manipulating their behavior to prevent mandatory provisions in the law from applying to them. Similar rules are also found in *China's General Civil Rules* and *Contract Code*.[9] However, in common law countries, e.g., England and the US, the case is different. In the latest Black's Law Dictionary (2009), we find that evasion only refers to tax evasion, "the willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability." "Tax evasion is punishable by both civil and criminal penalties."[10] Obviously, it does not apply to evasion in private international law.

It was in 1878 that the *Cour de Cassation* (a court's name) while handling the Princess Bauffremont Affairs[11] for the first time transplanted *fraude* à *la loi* from its domestic law into its private international law. In that case, the court refused to recognize Princess Bauffremont's divorce decided by a German court under German law—*lex patriae* (law of nationality) and declared her remarriage null as *fraude* à *la loi*. It was then that *fraude* à *la loi* entered into private international law and became an academic issue in the choice of law. However, in private international law, it was re-termed as evasion, a more popular English term. What we ought to keep in mind is that evasion in private international law (foreign evasion) is not necessarily the same as that in domestic law (domestic evasion) although it derived from the latter. That may explain why *fraude* à *la loi* (domestic evasion) and its doctrine are generally accepted in most jurisdictions while foreign evasion is mostly left open. Moreover, there are a few Chinese jurisprudential scholars who appear inclined to use the term evasion to express the phenomenon of *fraude* à *la loi*. The change in that legal label is more subtle than superficial, implying a substantial change in value judgment toward the conduct committed by lawful means but for unlawful purposes. No wonder

[9] Art. 58 (g), *The General Civil Rules of the People's Republic of China* and art. 52 (c), the *Contract Code of the People's Republic of China*.

[10] Bryan A. Garner, *Black's Law Dictionary*, 9th ed., West Publishing Company (New York), at 634, 1555 (2009).

[11] Princess Baufremont obtained her citizenship in Germany, got a divorce judgment there and then remarried. She returned to France where she attempted to re-establish herself but her divorce was refused to be recognized and thus her remarriage was declared null [Civ. 18 mars 1878, S.78.1.193 (note Labbé)].

"domestic evasion" was mistaken as being borrowed from private international law.

2.2 Definition

Fraude à *la loi* was once translated into evasion rather than fraud of law which may be closer to it literally. Translation possibly embodies how the translator perceived the conduct of evading law. For English lawyers usually take a positive attitude toward it and even from it did trust actually came into being. Moreover, particularly in the context of private international law, the term of "evasion" is even considered as genuine and original while its predecessor "*fraude* à *la loi*" or "fraud of law" degraded as its substitute.

However, what is the accurate definition of evasion? In China, for example, there are at least five different opinions which may represent what most Chinese academicians think about evasion:

(1) (In the context of private international law) evasion is a conduct purposely committed by parties of foreign civil and commercial relations through which new connecting factors are made, the law which should have been applied is evaded but another law more advantageous to them is applied.[12]

(2) (In the context of private international law) evasion means a conduct purposely committed by the parties through which new connecting factors are made, the law which should have been applied but works against them is evaded while another more advantageous law is applied.[13]

(3) The parties purposely make new connecting factors, according to a given conflict rule, so as to evade the law that should have been applied but let another more advantageous law be applied in reality.[14]

(4) Evasion refers to a conduct through which the parties consciously make the use of a given conflict rule and create some conditions in order to evade the law that should have been applied.[15]

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[12] Depei Han, 国际私法新论 (Private International Law: A New Perspective), Wuhan University Press (Wuhan), at 194 (1997); Shuangyuan Li, 国际私法 (冲突法篇) [Private International Law (Conflict of Laws)], Wuhan University Press (Wuhan), at 288 (2001); Guomin Lü, Xia Dai and Yuanmin Zheng, 国际私法 (冲突法与实体法篇) [Private International Law (Conflict of Laws and Substantial Law)], China Citic Press (Beijing), at 186–87 (2002).

[13] Yongping Xiao, 肖永平论冲突法 (Yongping Xiao on Conflict of Laws), Wuhan University Press (Wuhan), at 112 (2002).

[14] Xiangshu Liu, 国际私法基本问题研究 (Primary Issues of Private International Law), Law Press (Beijing), at 165 (2001); Xiaojian Zhang, 国际私法学 (Private International Law), Peking University Press (Beijing), at 200 (2000).

[15] Chengdi Yuan, Principles of Private International Law, Law Press (Beijing), at 130 (2003).

(5) (Fraud against the national law) refers to the system under which where the parties let a foreign law govern their civil relation instead of their national law which should have governed it, and obtain any right or interest that is forbidden by the national law, that right or interest shall never be recognized within the territory of their countries.[16]

As to the five definitions above, the first four definitions are similar but the fifth differs. Only in the fifth definition, the term of "evasion" is taken as the doctrine of evasion while in the other four definitions, the term of "evasion" means the conduct of evading law (evasion). In the first four definitions, both the intention to evade law and the conduct of making new connecting factors[17] are indispensable elements of evasion. But what is worth pointing out is that only the fourth describes evasion as an individual's conduct. The other three all mix it with a judicial act (choice of law by court), making it confusing and ill-defined. Still, all five definitions seem to imply that most Chinese academicians are inclined to deny evasion justice, at least to nullify the conduct of evading Chinese (mandatory) law.

It should be emphasized again that evasion is not the same as *fraude* à *la loi* and it never ought to be so. As a means, even the most significant and primary one, to rule the human society, private law has a natural inclination to be

[16] See Friedrich Meili, *International Civil and Commercial Law as Founded upon Theory, Legislation and Practice*, translated and supplemented with additions of American and English Law by Arthur K. Kuhn, Macmillan Company (New York) (1905); in Jun Lu, 国际私法之理论与实际 (Theory and Practice of Private International Law), China University of Political Science and Law Press (Beijing), at 86–88 (1992) (the original term is written "flaud," which is probably a mistake).

[17] Some Chinese academics emphasize that it is "to change" rather than "to make" "the factor that constitutes the connecting factor" instead of connecting factors themselves. See Xiaojian Zhang, Private International Law, Peking University Pres (Beijing), at 201–02 (2000); Jiang Zhou, 国际私法中法律规避问题的再思考 (Review of the Evasion of Law in the Private International Law), 25(4) 法律科学 (Science of Law) 153 (2007). In my view, firstly, "to change" the fact or to establish a new fact actually is to make a new connecting factor, namely, the parties cut off their relation to the law that could have been applied by making their novel relation to another. Secondly, "a connecting factor" does not essentially differ from the "factor that constitutes a connecting factor." A connecting factor is an element of a conflict rule which connects its category (the type of a foreign civil and commercial relation) and attribution (the proper law) of a given conflict rule. In a conflict rule, such factor is often abstract like nationality, domicile, habitual residence, etc., whereas sometimes it may be concrete, for example in case of a unilateral conflict rules, like the Mainland of China, England, New York State, etc. While in practice, a connecting factor is concrete, referring to a particular place. To change or make a connecting factor means to change or make a concrete factor, not the abstract one in a given conflict rule. In that sense, it is meaningless to differentiate "the factor that constitutes a connecting factor" and "a connecting factor," especially in case of practice of law (the living law). In spite of a minor difference in wording and perspective from which a connecting factor is observed, they essentially mean the same and the wording of "a connecting factor" is obviously more concise and thus better than the other.

diversified. Although the world is more economically globalized, the conflict of laws still exists. Hence, it is not undoubtedly reasonable to deny an individual right to choose law (procedural justice). Even though it is true in case of municipal or domestic law (fraud of law), the same case is not necessarily true with private international law because there is no such an occasion in which fraud of law possibly happens in private international law as that in domestic law (especially domestic administrative law, e.g., tax evasion). In the domain of municipal law, during the operation of law, uniformity of that law is usually valued most. To some extent, the doctrine of fraud of law benefits to prevent misuse of rights and maintain uniformity of law. However, private international law is such a unique division that it is established on bilateralism (sometimes even on multilateralism or internationalism) and treats domestic private law and its foreign counterparts equally. It means that in the domain of private international law, there is no uniform law but various laws coexist. The so-called "uniformity of law" may not be valued in private international law so much as it is in domestic law. In consequence, evasion is not necessarily unlawful or null and void as much as *fraude* à *la loi*.

I would like to take evasion as a simple phenomenon in obeying law rather than a problem of choice of law. Perhaps we had better let it be as it is. But if we have to define what it is (in the context of private international law), I deem that evasion is nothing more than an individual's conduct. Notwithstanding that evasion is usually taken advantage by the parties, in my view, it is essentially active rather than passive a conduct of obeying law. In that sense, the intent to evade law is sufficient enough to differentiate it from any other conduct, no matter what the expectation out of that intent exactly is.

3 Evasion Judgment: A Game between the State's Legal Uniformity and Individual Intelligence

In the domain of domestic law, fraud of law is taken as an indirect unlawful conduct and shall be null in most jurisdictions. But the same case is not necessarily true with evasion in private international law. It may be void, voidable or valid depending upon the circumstances. As a matter of fact, with the exception of very few jurisdictions, most jurisdictions leave the door open on how to judge evasion. The doctrine of evasion is actually applied with additional discretion. Simply speaking, the doctrine of evasion adopts a negative attitude toward evasion, being entertained to exclude the law that the parties indirectly choose through evasion but to apply another law as no evasion occurs. For the part of China, the doctrine of evasion is not written into its current law but in practice, where the parties purposely make new connecting factors and intend to evade China's mandatory rules, such evasion will be judged null and void and

would ultimately fail to bring the parties what they expect.[18]

There are two French cases that have to be mentioned whenever we speak of how to judge evasion, namely the "Princess Bauffremont's Affairs" (1878) and the Frrais' case (1922),[19] the most typical as well as best-known in the history of private international law. Those two cases were very similar but were judged in a totally different way. In the earlier case, Princess Bauffremont's remarriage was declared null as *fraude à la loi* because "*Fraus omnia vitiate*." But ironically, also in a French court, the Frrais' evasion was judged valid and thus they got divorced as they wished. As the fact showed us fraud itself did not vitiates everything.

In popular Chinese textbooks of private international law, the "Princess Baufremont's Affairs" has always been taken as a most authoritative case on evasion that no one ever questioned it. As all Chinese textbooks of international private law teach us, it is evasion itself that is to be judged. Thus, the so-called "validity of evasion" is always a popular topic in China's academia of private international law. However, what we have found in the "Princess Buafremont's Affairs" and the Frrais' case is that it was not at all evasion that counted in the end. For the part of the "Princess Baufremont's Affairs," divorce was forbidden in the late 19th century in France. Therefore if Princess Baufremont's evasion had been accepted, her divorce as well as her remarriage would have become valid but that would have violated the French public policy. In contrast, such problem was not there in the Frrais case for divorce was no longer forbidden in France then. In other words, there were no barriers or consequences that kept the court from accepting what the Frrais' evasion incurred.

In the end, there was something else other than evasion itself that determined whether the law which the parties indirectly chose through evasion ought to be applied. In the case of evasion, the real question is whether the law chosen by the parties through evasion ought to be applied as the given conflict rule provides.[20] In that sense, the so-called question whether evasion is or ought to be void or voidable is completely a false question because it is never evasion itself whose validity is denied. Evasion is valid, so it was in the Frrais' case, even the same case was with the "Princess Baufremont's Affairs." It was valid even though it failed to bring Princess Baufremont what she expected from it.

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[18] Rule 194, *Rules on Implementation of China's General Civil Rules*, promulgated by the Supreme Court of China (January 26, 1988).

[19] The Ferrai were Italian. Because divorce was forbidden then in Italy, they were naturalized into French and did obtain a divorce judgment there. In that case, the couple's conduct of evasion (law) was not judged fraudulent but lawful and effective.

[20] See Alexander Muranov, "*Evasion of Law*" *in Private International Law and Its Possible Solution in Russia*, (3) Russian Commercial Law 27 (1994).

In the "Princess Baufremont's Affairs," "Fraud vitiates everything" was not a sufficient proof to declare her evasion null and void. For Princess Baufremont's part, firstly, no evidence showed that she was unable to change her citizenship. She did exercise her right and lawfully acquired her German citizenship under German law. Secondly, she instituted a divorce lawsuit in a German court and obtained her divorce judgment after which she remarried there. Everything was perfectly lawful. Nonetheless, her remarriage was rejected in France. Did it mean her evasion was null? It is against my belief. For the part of German law (including its conflict of laws and domestic law), Princess Baufremont's evasion was valid. She succeeded in making Germany a new connecting factor and obtaining her divorce judgment under German law. For the part of French law, it was the divorce as well as remarriage instead of evasion itself that was declared null because it violated the French public policy.

Not only is evasion valid but it also ought to be so. The French court could have easily applied public policy and rightly refused Princess Baufremont's divorce. The Baufremont's Affairs could have been a good model case on how to use public policy but it finally turned out to be an ill one on how to judge evasion. It was the first case in which the proverb *fraus omnia vitiate* was applied to evasion (in private international law) and the doctrine of evasion was framed then which was more of a hindrance than of a help for facilitating international communication. The negative influence it may have upon international private relation is threefold. Firstly, for the part of the parties, the doctrine of evasion increased costs involved in foreign relations. Secondly, for the part of the court that applies it, it will make that court unpopular, discouraging parties to have their disputes solved in it. Thirdly, in the sense of development of law, it impairs good competition of (private) laws, against the requirement of law modernization. Thus, in terms of the economy, to deny evasion validity is not efficient, while in terms of development, it is not a sign of progress. Common law countries generally accept evasion. For example, in England and US, foreign laws ought not to be excluded unless it violates the local public policy, the same case is true with Germany. It was early in the 19th century that a German scholar, Wachter publicly criticized the doctrine of evasion, arguing that to make new connecting factors and choose the proper law was just.[21] Actually, I assume that how to judge evasion is something like a game in which the state's legal authority (rules) and an individual's intelligence (countermeasure) compete with each other. It is a game between power and rights. The text of law is usually inflexible and imperfect while an individual's countermeasure is always flexible and variable. Individuals are always driven to maximize their interest. That is humanity,

[21] Id.

natural and understandable. Perhaps the doctrine of evasion was established to prevent parties misusing their rights. In my opinion, nothing should be done to prevent the misuse of rights. However, I do believe what should have been controlled and restrained more ought to be the abuse of judicial power (fairness and justice). Taking conflict rules as an example, in case the lawmakers deem it extremely necessary to make rigid conflict rules and individuals obey their local law besides foreign law, they may make rigid conflict rules and adopt dual or combined connecting factors for that purpose. A good conflict rule ought to let individuals know what law may govern their affairs instead of to put their reasonable expectation under judges' unpredictable discretion, which necessarily results in higher risks and costs of obeying the law. The real risk therein is not a possible misuse of individuals' rights but the potential abuse of justice power. Where right conflicts with power, no matter under which circumstances, it is right rather than power that ought to prevail. That is ultimately governed by modern democracy and law. Also, in the context of modernization of law, evasion may somewhat be viewed as "an innovated system," another type of compliance with the law, conductive and creative. In that sense, evasion may play a positive role in the modernization of law (substantial justice). Perhaps we had better let individuals bring their intelligence into full play (e.g., evasion) rather than keep them rigidly adhering to written rules. In Japan, evasion was once a problem in choice of law, but nowadays it is valid.[22]

4 Doctrine of Evasion vs. Public Policy

The doctrine of evasion is a principle that is entertained to declare evasion null and void. It is typically employed to exclude foreign laws but in theory it may be entertained to exclude the law of court, too. Strictly speaking, except for very few jurisdictions that treat evasion absolutely null and void, in most jurisdictions there is no doctrine of evasion at all. For the part of most common law countries like the England and most states of the US, there is no any other tool than public policy that may be entertained to exclude foreign laws; evasion is valid and ought to be so. Even for the part of those countries that conditionally apply the doctrine of evasion, the so-called doctrine of evasion does not exist in practice. In such practice, evasion is often by discretion divided into reasonable evasion and unreasonable evasion. But in the absence of an express rule, by what criteria or criterion can a court tell a reasonable evasion from an unreasonable one? Are there any other criteria than the local public policy which may be entertained to

[22] See *Horei*, *Act on the Application of Laws*, no. 10, 1898.

refuse to apply the law chosen through evasion? Simply but essentially speaking, it is public policy that decides whether the law chosen by means of evasion would or ought to be applied. It precisely means that evasion itself is valid. That is why quite a few foreign scholars believe that the doctrine of evasion is a public policy consideration for it is the public policy that ultimately decides whether the law chosen through evasion would or ought to be applied. Even the same case is with those countries that declare evasion absolutely null and void as fraud of law, because no fraud is part of their public policy, the doctrine is also a public policy consideration. But most Chinese academicians generally insist that evasion is a distinct problem instead of a public policy consideration, and the doctrine of evasion is a distinct principle of the choice of law. According to a most popular Chinese textbook of private international law, evasion or the doctrine of evasion differs from public policy in five respects below:

(1) Different causes. Evasion results from making or changing connecting factors while public policy from the unsolvable conflict between the applicable foreign law and the local law.

(2) Different objects to guarantee. (The doctrine of) evasion keeps either a local law or foreign law (most of which is mandatory) from being evaded or violated while public policy maintains the fundamental principle of domestic law rather than overriding rules.

(3) Different natures. Evasion is an individual's conduct while public policy is a judicial act.

(4) Different outcomes. In case of evasion, not only the law purposely chosen by evasion may be excluded but the parties themselves might be liable for that evasion while in case of public policy, no one would be punished.

(5) Different status quos in legislation. Public policy is universally accepted and thus written into conflict rules of every jurisdiction while (the doctrine of) evasion is not.[23]

At first sight, those differences listed above might appear to stand to reasoning. But actually, none of them is reasonable. That comparison is totally wrong from the very beginning. Its biggest problem is that it confuses evasion and the doctrine of evasion. As an individual's conduct, evasion can never be compared with public policy. Only the doctrine of evasion may be able to be compared with public policy. Next, the fact that the doctrines of evasion are different from public policy will be argued.

Firstly, for what reasons are the doctrine of evasion and public policy system entertained? In most jurisdictions, evasion is not expressly forbidden and whether the law chosen through evasion would be applied actually depends upon the public

[23] Id.

policy of the forum court. Even though to the countries that absolutely deny its validity, there is no exception because "no fraud" may be taken as part of their public policy. In view of that, both are entertained due to the same rather than different causes, namely the law chosen through evasion could have been applied unless it violates the fundamental local interest or principles of the forum court.

Secondly, for what purposes are the doctrine of evasion and public policy employed? Legislations in the majority of countries show that "…the doctrine of evasion is either an academic theory or judicial practice which is not written into law."[24] It means that, according to the practice in many countries, the aim of the doctrine of evasion is not certain. It may be so extensive that it not only includes domestic law but also foreign laws, while at the same time it may be so narrow that it is only concerned with domestic mandatory law. The majority of Chinese academics assert that public policy refers to the local fundamental domestic systems, policies and principles but not necessarily mandatory rules whereas the doctrine of evasion may either generally applies to evading every country's law (e.g., Argentina's Civil Code) or specially to evading domestic mandatory law (e.g., Yugoslavia's Conflict Rules).[25] It puts more significance upon both the universal values of the human society and the public order of where the forum court sits, compares those values and interests which may conflict with each other and decides whether the law chosen through evasion ought to be applied rather than judge that it is evasive in general. Chinese academicians generally agree that evading Chinese domestic law shall be null and void.[26] It is further proposed to differentiate the evasion of foreign law, namely, where such evasion is reasonable if it ought to be valid; and if not reasonable, it is void but with no criteria being framed. So how ought the act of evading a foreign law to be judged? Apart from China's local public policy, is there any other tool that can help to make a seemingly correct decision? Ought such evasion to be justified and valid as long as it does not violate China's local public policy? It is worth noticing that in most cases, the doctrine of evasion only keeps the domestic law or domestic mandatory law and overriding rules from being violated. In that sense, the object for which the doctrine of evasion was set up does essentially belong to that of public policy. It is worth pointing out that the forum court has no duty to enforce a foreign law or to keep that law integrated and the reason it does so is ultimately rooted in its own interests, namely, maintaining its own public order. As to the modest view about evasion, the same case is true with England and most states of

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[24] See Depei Han, 国际私法 (Private International Law), Higher Education Press (Beijing) & Peking University Press (Beijing), at 133–34 (2000).

[25] Id.

[26] Chinese Academic Society of Private International Law, art. XIII of *The Model Law for China's Private International Law*, Law Press (Beijing), at 6 (2000).

the US.[27] It is safe to say that no matter how evasion is judged, effective or ineffective,[28] it in fact results from the practice of public policy. Public policy is such a flexible concept, abstract and inclusive enough to embrace the doctrine of evasion. In fact, to those jurisdictions that apply the doctrine of evasion discreetly, evasion is valid rather than voidable. As argued before, the real question therein is not the validity of evasion but its effect, namely, whether the law chosen through evasion would be or ought to be applied. If that law conflicts with the local public policy, it ought to be excluded while if not, it ought to be applied.

Thirdly, evasion is an individual's conduct but the doctrine of evasion is often a judicial act. It is the latter which can be compared with public policy instead of evasion itself. From the perspective of elements of evasion, new connecting factors are made by the parties but whether such connecting factors would in fact decide the law to be applied is actually in the judges' hands rather than in those of the parties. As we said before, the issue of evasion is essentially the issue of its effect in which the theory of evasion ends. In simple words, evasion itself is not the proof to exclude foreign laws. Unless it is expressly declared null and void in the written law, evasion ought to be valid. Nonetheless, not all valid evasions are effective, some of them fail to make the law chosen through evasion be applied. That is because local public policy works. At bottom, the so called doctrine of evasion is nothing more than a public policy consideration, a judicial act, too.

Fourthly, would the parties that commit evasion be liable for it? Whether evasion necessarily results in the parties' liability is an issue of positive law. Since most jurisdictions throughout the world leave evasion open, I believe that talking about parties' liability for evasion in such circumstances is of least significance. In the context of domestic law, where an individual commits fraud of law, he or she probably will be liable for it but no evidence shows the same case with evasion in private international law.

Finally but not least importantly, how are the doctrine of evasion and public policy considerations expressed in the man-made law that deals with conflict of laws? Public policy is universally written into every country's legislation but not the doctrine of evasion. It shows exactly from another perspective that the use and function of the doctrine of evasion may overlap with that of public policy. Further, the reason why most jurisdictions choose public policy rather than the

[27] It is obviously shown in judging the conduct of evading foreign law. The opinion that "a conduct of evading domestic mandatory law ought to be void," is still essentially a public policy consideration. To define what is domestic mandatory law is essentially to indirectly legislate what is public policy.

[28] As argued before, I deem evasion itself is valid and ought to be so. It is not evasion but the consequence it would incur that is judged. Evasion is certainly valid but whether it is effective, namely whether it would bring the parties as expected is a question. So herein I entertain "effective" and "ineffective" instead of "valid" and "void."

doctrine of evasion is nothing more than that the former is inclusive enough to cover the latter.

Regrettably, evasion described in popular Chinese textbooks of private international law is most confusing. It is unnecessarily complicated. To some extent, evasion is more a relic than a dynamic topic in private international law. I would rather believe that it intruded into private international law by chance. More and more evidence shows that evasion is a very natural phenomenon in conflict of laws and never should it have been made as a problem of choice of law. It is worth mentioning that Japan (a civil law country in general) has modified its *Act on Application of Laws* and deleted its evasion clause. Of course, if Chinese lawmakers persist in writing the doctrine of evasion or evasion clause into law, they may. However, what they did in Article 61(2) of the *Civil Code* (Draft) is problematic.

5 Different Opinions about Article 61(2) of China's Civil Code (Draft)

5.1 Structure[29]

In private international law, evasion is usually viewed as a general problem of choice of law and the doctrine of evasion as a principle or practice to deal with it, so that both evasion and the doctrine of evasion ought to belong to the general conflict of laws as shown in Chinese textbook of private international law. In the same manner, reflected in that *Civil Code* (Draft), in case that those legislators would like to codify the doctrine of evasion as a means to exclude foreign laws, they should have put it under the general rules (of choice of law) next to public policy,[30] as Chinese academicians suggest in the China's *Model Law of Private International Law*.[31] But in Part IX of that *Civil Code* (Draft), we find that the doctrine of evasion appears in Chapter VI *Domestic Relations* [Article 61(2)] instead of Chapter I *General Rules*, applicable only to marriage evasion. It fails to follow the logic of private international law and is displaced. Furthermore, since Chinese judges are strictly forbidden to make law, that rule implies no evasion may be null and void except for marriage evasion. Do those legislators believe marriage evasion is so much more harmful than any other type of evasion? This explanation is hardly unconvincing.

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[29] Strictly speaking, Part IX of *China's Civil Code* (Draft) betrays the logic of private international law.

[30] See art. 11, the Civil Code of the Macao Special Administrative Region; art. 5, the Conflict Rules of Yugoslavia; art. 31, the Civil Code of Republic of Gabon.

[31] See art. 13–14, Chinese Society of Private International Law, in *The Model Law of Private International Law of the People's Republic of China*, Law Press (Beijing), 2000.

5.2 Substance

In substance, since Chinese judges are strictly forbidden to make law, Article 61(2), to a large extent, implies that evasion is valid in general except for marriage evasion in which the law purposely to be evaded is Chinese mandatory rules for marriage. However, evasion may occur in many other areas of social life other than in foreign-related marriage, like marital property rights, parents and children, divorce, will, contract (especially employment contract), property and so on and the negative consequences it incurs in every other area than foreign marriage is not necessarily less serious. Take transnational business as an example, (foreign) tax evasion may happen and that obviously does more harm to national interests and public policy. Since those Chinese legislators take evasion very seriously, why not make it applicable to all types of evasion but instead turn a blind eye to them? Of course, quite a few problems may be dealt with in particular in special civil or administrative rules or regulations. However, since they would like to codify evasion, making it normalized and regulated, why not choose a simple but flexible general rule rather than a bundle of would-be scattered special rules? In fact, nowadays as evasion happens more frequently and in more places, Article 61(2) is destined to fail to show what the legislators intend to do by or expect from it, causing dissatisfaction in both theory and practice.

Additionally, even though in the context of foreign marriage, the effect of Article 61(2) fails to be satisfactory. On one side, Chinese marriage law, compared with those of major countries ruled by law, is fairly loose so that the use and function of that rule is questionable. On the other side, due to the diversification of (private) law, the parties are supposed to have the right to the choice of law so that it is not so justified or just as it seems.

In China's current marriage law, the requirements for essential validity of a marriage are found in Articles V-VIII and X, China's *Marriage Law*. According Article X, in case of whichever below, the marriage concerned shall be null and void: (a) bigamy; (b) kinship relation between the parties which keeps them from marrying each other; (c) a disease contracted before the marriage but uncured after it; (d) shortage of marriage age (too young to marry).

We find that except for the marriage age, other requirements for a valid marriage, namely, monogamy, no marriage between those who have kinship relation, no marriage to mentally or physically deficient individuals are universally accepted in most jurisdictions. Any marriage that fails to satisfy whichever of them would be null and void according to international public policy. As to the marriage age, it may be taken as part of domestic public policy.

In private international law, attribution of foreign marriage includes *lex loci celebrationis* (law of the place where the marriage is celebrated), *lex partriae*, *lex*

domicilli and the law of the parties' habitual residence or residence. Consequently, the parties may choose the law that governs their marriage by deciding where to marry or changing their nationalities, domiciles, habitual residences or residences. Thereinafter, I will take evasion of Chinese marriage law as an example to explain those cases below.

Firstly, marry abroad and evade Chinese marriage law. In such cases, the conflict rule made use of by the parties is usually expressed as "marriage shall be governed by *lex loci celebrationis* (law where the marriage is celebrated)." The parties may sometimes choose to marry abroad instead of home (e.g., their domicile, habitual residence or motherlands). It often happens in the US. The majority of American states provide that marriage shall be wholly governed both in form and essence by the law where the marriage is celebrated, which results in a great number of marriage evasions. The US Uniform Law Commission once tried to draft a law bill, *Uniform Marriage Evasion Law*, expecting to prevent it. However, though passed in very few states, it failed in the vast majority of the states. In 1943, the US Uniform Law Commission decided to take it back.[32] At present, 46 states of the US still insist the traditional practice, making marriage solely governed by *lex loci celebrationis*. The fact that the *Uniform Marriage Evasion Law* was aborted shows to some extent that it is not feasible to prevent evasion. On one side, diversification of law makes evasion possible. On the other side, it is extraordinarily difficult to establish the intent (especially an ill intent) of evasion and even though such intent could be established, it might not be worthwhile to do so. There is always conflict between various values, say, individuals' right and states' power. Most of the US state laws show that the former ranks higher than the latter. Nevertheless, other countries including China are prone to value the latter more than the former. According to China's current conflict rules, the essential validity of marriage shall be governed by *lex patriae*, *lex domicilli*, or the law of the parties' habitual residence instead of *lex loci celebrationis*, strengthening the state's control over its citizens' status. In that way, to marry abroad cannot help to evade Chinese mandatory marriage rules.

Secondly, change citizenship and evade Chinese marriage law. Article 61(2) reads that: "The People's Republic of China recognizes a foreign marriage that is lawfully celebrated abroad. But where the parties purposely evade China's mandatory rules and marry outside of China, that marriage shall not be recognized."

In that wording, the scope of subjects of that rule, namely to whom it applies is not clear enough. The wording of "purposely evade" may imply that it is applicable only to those who are Chinese and who have domicile or residence in

[32] See Willis L. M. Reese, *Casebook of Conflict of Laws*, Seattle University Press (Seattle), at 687 (1989).

China. However, the legislators still neglect a question, namely, why Chinese mandatory rules ought to be applied. To put it in another way, ought those rules to be applied as part of national law, law of domicile, or that of habitual residence? Article 61(4) continues: "A foreign couple who marry in China, no matter whether they have the same nationalities, may marry under Chinese law or the international conventions that China takes part in, or before their consuls according to their national law(s) based upon the reciprocity principle."

It may be inferred that Articles 61(1) and 61(2) applies only to Chinese citizens. If so, *lex personalis* (law of person) would be law of citizenship. As we all know, citizenship differs from domicile, habitual residence or residence. It is purely a legal status in the context of public law, manifesting the relationship between an individual and a state. China denies dual citizenships so once a Chinese lawfully obtains a foreign citizenship he or she will automatically be deprived of his or her Chinese citizenship at the same time. It means that where a Chinese changes his or her nationality, Article 61(2) will not be applicable to him or her any longer. Additionally, with respect of consular marriage, let's say there is such a Chinese. He changes his nationality, then marries before his new consular in China and keeps living in China thereafter, so what about his marriage, valid, voidable or void? It would be a problem beyond private law.

Thirdly, change domicile or habitual residence and evade Chinese law. According to China's *General Civil Rules*, the domicile is the place where the citizen's household is registered. Where the habitual residence is different than the domicile, the habitual residence ought to be taken as the domicile. Thus, the domicile in Chinese law is more like the habitual residence in general private inter national law, despite the intent to settle.

Habitual residence is the place where individuals habitually live, work or study. Almost every country rules that an individual will not obtain his or her domicile or habitual residence in the absence of at least one year continual residence there. Under such circumstance, unless the parties return back to China soon after they marry abroad and keep living in China for at least one year so as to restore their domicile in China, "purposely evade Chinese mandatory rules" may be doubted. Even though the parties actually intend to evade Chinese law, change their habitual residence or domiciles and evade Chinese law as intended finally, it is only the prima facie of evasion. If they do not return back to China after their marriage but keep living there at least a year, ought their marriage to be denied due to evasion? For example, say a Chinese boy and a Chinese girl both of whom are adults but not old enough to marry fly to a foreign country, marry there, live there a couple of years and immigrate to another foreign country. Years later, the husband or the wife institutes a divorce lawsuit. Then a problem rises. If according to the law of their residence, his or her divorce shall be decided by a Chinese court because they are Chinese, what shall the Chinese court do, to make

a divorce judgment or dismiss it because there is no marriage due to their evasion?

Incidentally, for the part of foreigners living within the territory of China, their marriage may be governed by Article 61(4) but from the perspective of its substance, it is only a permissive rule, conditionally recognizing consular marriage. It by no means implies that foreigners habitually residing in China are free from Chinese law. Those foreigners' marriages are governed by their *lex personalis*, subject to Chinese public policy.

Fourthly, in case that *lex personalis* includes the law of citizenship, the law of domicile and that of habitual and all the three laws equally govern the parties' status at the same time, wherever they go, all Chinese citizens and foreigners who have residence in China, shall be governed by Chinese law (at least its mandatory law). It is too much for them. It is not only ugly but betrays the spirits of private international law.

6 Conclusion

As to evasion in private international law, I deem:

(1) As a legal conduct, it is valid and ought to be so;

(2) As a problem of choice of law, unless it is written into legislation, the doctrine of evasion is a false proposition. All the questions about evasion are nothing more than whether the law chosen through evasion will or ought to be applied, but that question never does depend upon evasion itself but public policy. In that sense, the doctrine of evasion is part of public policy consideration.

As to Article 61, Part IX of the Draft Code, It is suggested:

(1) to delete Article 61(2);

(2) for the purpose to prevent marriage evasion, to make reference to the *Hague Convention on Celebration and Recognition of the Validity of Marriages of 1978* ("*Hague Convention 1978*").

(3) to keep Article 2(3) to deal with the conflict of laws in marriage formality;[33]

(4) to make substantive requirements for marriage governed by: (a) *lex loci celebrationis* (where one of the future spouses has nationality or habitual residence there); or (b) the proper law decided by the conflict rules of the place where the marriage takes place.[34]

In choice of marriage law, the *Hague Convention 1978*, like the *Civil Code* (Draft), goes with the tide of minimalism. With respect to how to decide the proper law that governs the essential validity of marriage, they both take the

[33] The *Hague Convention on Celebration and Recognition of the Validity of Marriages* (1978), art. 2.

[34] Id. art. 3.

place where the marriage takes place as the primary connecting factor. But the *Civil Code* (Draft) takes it as the only connecting factor while the *Hague Convention 1978* combines it with others. Combined connecting factors not only help to prevent evasion but to lessen limp marriages. Article 3(2) of the *Hague Convention 1978* provides: "A marriage shall be celebrated where each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration." That rule concurs with the principle of *Locus legit action*. On one side, it sufficiently respects the judicial power of the country where the marriage takes place. On the other side, because the proper law ought to be decided by the conflict of rules of the place where the marriage takes place, it raises difficulty and cost to shop for the law which to some extent may help to discourage evasion.[35]

Finally, Article 11 (public policy), Part IX of the *Civil Code* (Draft) is necessarily applicable to choice of law in foreign marriage.

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[35] Generally speaking, whether a marriage is essentially valid ought to determined by *lex patriae* (law of nationality), *lex domicilli* (law of domicile) or the law of habitual residence. The same case is with sect. 2, art. 3, the *Hague Convention on Celebration and Recognition of the Validity of Marriages* (1978). Thus, marriage evasion is not easy in terms of technique.