

On the Application of Public Order Reservation in the Application of Law

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Abstract

The mainstream academic view in mainland China adopts the Effects Doctrine as the standard for applying the public order reservation. However, there has been little discussion on how to reasonably apply the Effects Doctrine in judicial practice. The separate application of the two primary modern western public order reservation theories — “Structured Public Order Theory” and “Doctrine of the Close Connection with Public Order” — each has its shortcomings. However, while adhering to the Effects Doctrine, drawing upon the distinction of structured concepts from Structured Public Order Theory and case-specific connection approach under the Doctrine of the Close Connection with Public Order can facilitate its reasonable application in judicial practice. Furthermore, when employing the public order reservation to exclude laws from Hong Kong, Macao, and Taiwan, mainland courts should also be guided by the principle of minimum harm.

Keywords: public order reservation, legal application, Effects Doctrine, Structured Public Order Theory, Doctrine of the Close Connection with Public Order

1. Introduction

Case 1: On April 1, 2020, the Dinghai District People's Court of Zhoushan City, Zhejiang Province, accepted China's first same-sex custody dispute case.¹ In this case, the parties were legally married in the United States and underwent embryo transfer procedures there, subsequently giving birth to a son and a daughter. Their relationship deteriorated in 2019, leading each to return to China. In 2020, they filed separate lawsuits in Chinese courts to contest custody of the two children. This case involves a custody dispute, but it presents a preliminary issue — the legal validity of international same-sex marriages. The legal validity of such marriages impacts the primary issue at hand — the “best interests of the child” in the custody dispute. Specifically, whether the marriage registration of the two “mothers” in the United States is recognized directly affects the interests of the two children.² Given that the recognition of foreign same-sex marriages in this case directly relates to custody disputes, this paper focuses on the legal validity of foreign same-sex marriages. Pursuant to Articles 21

¹ Beijing News. (2020, April 7). Zhejiang Dinghai Court Accepts Same-Sex Couple's Child Custody Case. <https://baijiahao.baidu.com/s?id=1663301429028654239&wfr=spider&for=pc>.

² See Guo, X. (2020, April 22). The shadow of non-recognition by law: A dispute over parental rights between lesbian partners. *Shanghai Review of Books*. https://www.thepaper.cn/newsDetail_forward_6998311

and 22 of the Law on the Application of Law to Foreign-Related Civil Relations¹, if the parties had their common habitual residence in the United States at the time of marriage, the conditions and procedures for marriage shall be governed by U.S. law. Under U.S. law, the marriage may be deemed valid. However, mainland China has historically refused to recognize the legal validity of same-sex marriages. In such cases, courts may invoke Article 5 of the Law on the Application of Law to Foreign-Related Civil Relations², which permits the exclusion of foreign law based on public order reservation. Specifically, they may rule that applying U.S. law would violate China's public order and good morals, thereby precluding its application. Ultimately, Chinese law would be applied to deny the legal validity of the foreign same-sex marriage involved in the case.

Case 2: "A defendant from mainland China entered into a loan agreement with a plaintiff from mainland China while vacationing in Macao, borrowing cash for gambling purposes. After the defendant failed to repay part of the cash by the due date, the plaintiff filed a lawsuit with a mainland Chinese court." ³In this case, the court selected Macao law as the governing law pursuant to Article 41 of the Law on the Application of Law to Foreign-Related Civil Relations⁴. Under Macao law, the loan agreement is valid. However, mainland Chinese law contains entirely different provisions regarding gambling debts. Recognizing this debt as lawful and providing it with protection would clearly violate mainland public order. The court ultimately excluded the application of Macao law based on the public order reservation provision under Article 5 of the Law on the Application of Law to Foreign-Related Civil Relations. It ruled the loan agreement invalid under mainland Chinese law. In this case, since both the plaintiff and defendant are mainland Chinese nationals and the incident occurred during a brief visit to Macao, the application of Macao law was excluded under the public order reservation. The invalidation of the loan agreement under China's Law is unquestionably correct. However, if the plaintiff were a Macao resident and the defendant a mainland Chinese citizen residing long-term in Macao, with the defendant later returning to the mainland where the plaintiff ultimately filed suit, mainland Chinese courts might still invoke the public order reservation to exclude Macao law's applicability. Consequently, mainland Chinese law would be applied to declare the contract invalid.

In the aforementioned Case 1, the legal validity of foreign same-sex marriages was merely a preliminary issue. If the application of foreign law — which would recognize the legality of foreign same-sex marriages — is consistently rejected on the grounds that it violates China's public order, does this constitute a reasonable application of the public order reservation? Is it beneficial for China to uniformly invoke the public order reservation without distinguishing the specific circumstances of recognizing same-sex marriages under Chinese law? In the second case, where the parties' status changed, would it be reasonable for the court to still apply the public order reservation to exclude the application of Macao law? Is it necessary to invoke the public order reservation? Furthermore, is there a distinction between applying the public order reservation to exclude foreign law versus excluding laws from Hong Kong, Macao, and Taiwan? This article explores these questions by examining the primary theories of modern public order reservation.

2. Application of the Public Order Reservation Doctrine and Its Shortcomings

Public order reservations are referred to by different names in various countries. Anglo-American scholars call it public policy, French and Japanese scholars refer to it as "public order and morality," while German scholars term it the "reservation clause" or "exclusion clause". In China, it is generally known as the "public order reservation" or "public order." This principle allows courts to exclude the application of a foreign substantive law that would otherwise be applicable under their conflict-of-laws rules to a foreign-related civil legal

¹ According to Article 21 of the *Law of the People's Republic of China on the Application of Law in Foreign-Related Civil Relations*, the conditions for marriage shall be governed by the law of the parties' common habitual residence. Where the parties do not share a common habitual residence, the law of their common nationality shall apply. Where the parties have neither a common habitual residence nor a common nationality, and the marriage is concluded in the habitual residence or the country of nationality of either party, the law of the place where the marriage is concluded shall apply. Article 22 of the same Law provides that the formalities of marriage shall be valid if they comply with the law of the place where the marriage is concluded, the law of the habitual residence of either party, or the law of the nationality of either party.

² Article 5 of the *Law of the People's Republic of China on the Application of Law in Foreign-Related Civil Relations* provides that where the application of foreign law would harm the social public interests of the People's Republic of China, the law of the People's Republic of China shall apply.

³ Hubei Provincial Xiaogan Intermediate People's Court. (2020). (2020) E 09 Min Zhong No. 242 Civil Judgment.

⁴ Article 41 of the same Law provides that the parties may, by agreement, choose the law applicable to a contract. Where the parties have not made such a choice, the law of the habitual residence of the party whose performance best reflects the characteristics of the contract, or another law that has the closest connection with the contract, shall apply.

relationship if such application would violate the public order of the forum state.¹ It also permits courts to refuse recognition or enforcement of a foreign court's final judgment or ruling when requested if such recognition or enforcement would contravene the public order of the forum state.² Public order reservations exist at both the application of law stage and the recognition and enforcement stage. The application of public order reservation differs between these two stages, such as the distinct phases at which domestic courts conduct public order reservation reviews and the varying degrees of scrutiny applied.³ Given the differing applications of public order reservation at the stages of law selection and recognition and enforcement, this paper focuses solely on public order reservation during the law selection stage. The primary modern theories of public order reservation include the "Effects Doctrine," the "Structured Public Order Theory," and the "Doctrine of the Close Connection with Public Order." The following discussion will continue to examine the application and limitations of these three theories in light of the aforementioned case.

2.1 Application and Limitations of the Effects Doctrine

The Effects Doctrine holds that "when invoking public order reservation, one must distinguish between foreign law provisions that violate the public order of the forum state and the consequences of applying such foreign law that violate the forum state's public order. If the violation is merely substantive, it does not necessarily preclude the application of the foreign law. Only when the consequences of applying the foreign law threaten the public order of the forum state may the public order reservation be invoked to exclude its application."⁴ The Effects Doctrine emphasizes the consequences of applying foreign law in a particular case rather than merely examining the content of that foreign law, thereby demonstrating greater objectivity. However, a limitation of this doctrine is that it addresses only the scenario where the application of foreign law threatens the public order of the forum, without considering the degree of connection between the specific case and the forum.

In Case 1 above, under the Effects Doctrine and guided by the Law on the Application of Law to Foreign-Related Civil Relations, U.S. law was applied as the governing law. The application of U.S. law necessitated recognizing the validity of foreign same-sex marriages. This clearly conflicts with China's historical and cultural tradition of not recognizing the legal validity of same-sex marriages. In such cases, the court would inevitably invoke the public order reservation clause to exclude the application of U.S. law on grounds of violating China's public order and good morals, thereby negating the legal effect of foreign same-sex marriages in China. However, in essence, recognizing the legal validity of foreign same-sex marriages in China in Case 1 serves only as a preliminary issue in a custody dispute. This differs markedly from recognizing the validity of foreign same-sex marriages as the primary issue of the case. This distinction arises because the degree of connection to the forum differs between treating the validity of foreign same-sex marriages as a preliminary issue versus as the primary issue. Compared to being the main issue, recognizing the validity of foreign same-sex marriages as a preliminary issue indicates a less direct connection to the court's jurisdiction. In Case 2, where both the plaintiff and defendant are from mainland China and entered into a loan agreement for gambling purposes during a brief visit to Macao, the court would naturally exclude the application of Macao law on the grounds that its outcome would violate China's public order. Ultimately, applying mainland Chinese law to invalidate the loan agreement is entirely reasonable. However, if the plaintiff were a Macao resident and the defendant a mainland Chinese citizen residing long-term in Macao, with the defendant later returning to the mainland where the plaintiff ultimately filed suit. According to the Effects Doctrine, the application of Macao law would similarly conflict with mainland China's public order. The court would similarly invoke the public order reservation clause to exclude the application of Macao law and apply mainland law to invalidate the loan agreement between the parties. However, if the factual circumstances of the case involve a transformation from both parties being mainland Chinese residents to one being a Macao resident and the other a mainland resident, coupled with the defendant's residency status changing from a temporary visit to Macao to long-term residence, this case scenario indicates a significantly diminished connection to mainland China. If mainland Chinese courts persist in solely focusing on the outcome — that the application of Macao law violates mainland China's public order — to exclude Macao law and invalidate the loan agreement, then with this precedent, mainland Chinese residents who have relocated to Macao for long-term residence may develop a speculative mindset that gambling-related loan agreements with local Macao residents are invalid. This could lead to a refusal to fulfill

¹ See Hu, Z., & Li, S. (1992). On the proper application of the public policy reservation doctrine in private international law: Evidence from several cases decided by Chinese courts. *Tribune of Political Science and Law*, (5).

² Hu, Z., & Li, S. (1992). On the proper application of the public policy reservation doctrine in private international law: Evidence from several cases decided by Chinese courts. *Tribune of Political Science and Law*, (5).

³ See Gao, X. (2008). *The application of public policy in private international law* (p. 134). Beijing: China Democracy and Legal System Publishing House.

⁴ See Xiao, Y. (2002). *Xiao Yongping on conflict of laws* (p. 91). Wuhan: Wuhan University Press.

such agreements, increasing loan contract disputes in Macao and undermining the maintenance of normal civil and commercial order in the region. Moreover, if the plaintiff files a lawsuit against the defendant in the Macao region and the defendant subsequently returns to the mainland of China, the judgment rendered by the Macao court would require recognition and enforcement by mainland Chinese courts. This would inevitably increase the judicial burden on mainland Chinese courts. In other words, whether the plaintiff sues the defendant in the Macao region or in mainland China, it offers no benefit to mainland China. Therefore, under the Effects Doctrine, focusing solely on whether the application of the law would jeopardize the public order of the forum without considering the importance of the connection between the specific case and the forum cannot properly guide courts in judicial practice to reasonably apply the public order reservation.

2.2 Application and Limitations of Structured Public Order Theory

Structured Public Order Theory represents European scholars' expansion and elaboration of the rough outline of Savigny's structured theory of public policy exceptions.¹ According to this doctrine, public order can be divided into three types: 1) Domestic public order. Domestic public order refers to "Ordre Public Interne," which are matters of domestic concern rather than international public order, and the rules of this type of public order have not entered the stage of legal application, but understanding this concept helps distinguish other types of public order and grasp the complete structure of public order.² 2) Ordre public international. "Ordre public international is a public policy doctrine that, despite its name, is essentially national in character. The term 'international' refers only to the effect of the forum's rules on the policy and law of other jurisdictions interested in the case."³ This essentially constitutes the public order that should be considered when applying foreign law under a nation's private international law conflict-of-laws rules to govern private international legal relationships. Public order in private international law does not take into account the public order of other countries. 3) Ordre public universel. It provides that "the principle of public policy will prevail if the application of a foreign legal rule conflicts with the peremptory rules of the law of nations, the international commitments of the home state, or the requirement of justice as generally recognized by the international legal community."⁴

Structured Public Order Theory provides judges with a structured analytical framework to distinguish between different sources and effects of public order, thereby preventing the abuse of the public order reservation system in judicial practice. However, this doctrine falls short by remaining confined to theoretical distinctions without accounting for the intricate complexity of real-world cases. Regarding the concept of "Ordre public universel" proposed by this doctrine, domestic scholars in China have suggested that "introducing a community-centered approach in private international law will inevitably incorporate numerous internationally recognized factors into the assessment of whether a violation of public policy occurs. This will gradually establish certain international standards that the international community must uniformly adhere to, thereby establishing a truly meaningful international public order."⁵ This paper argues that prioritizing the realization of Ordre public universel is merely a noble aspiration. On the one hand, from the perspective of logical relationships, "since it is 'universal' public order, it reflects the public order universally recognized by all nations and thus simultaneously reflects the public order of the home country. If a court of a given nation considers the so-called ordre public universel in judicial practice, it is not because that court is applying the standards of ordre public universel but rather because this ordre public universel is also part of its own domestic public order and is therefore taken into account."⁶ On the other hand, regarding international treaties, the exclusion of relevant rules in international conventions based on domestic public order has been adopted by the Hague Conventions and resolutions of the Institute of International Law. Many Hague Conventions employ the following standardized format to limit the application of international conventions: "The provisions of this Convention shall not be applied where compliance by a

¹ Burger, D. C. (1984). Transnational public policy as a factor in choice of law analysis. *New York Law School Journal of International & Comparative Law*, 5, 370.

² Burger, D. C. (1984). Transnational public policy as a factor in choice of law analysis. *New York Law School Journal of International & Comparative Law*, 5, 370.

³ Burger, D. C. (1984). Transnational public policy as a factor in choice of law analysis. *New York Law School Journal of International & Comparative Law*, 5, 370.

⁴ Burger, D. C. (1984). Transnational public policy as a factor in choice of law analysis. *New York Law School Journal of International & Comparative Law*, 5, 370.

⁵ See Li, S., & Xu, G. (1998). *The construction of a new international civil and commercial order* (pp. 257–261). Wuhan: Wuhan University Press.

⁶ See Gao, X. (2008). *The application of public policy in private international law* (pp. 39-40).

Contracting State would be manifestly contrary to its public order.”¹ For example, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters explicitly stipulates public order as an exclusionary condition. The public order referred to in this convention clearly pertains to the domestic public order of each state.² Moreover, as some scholars have pointed out, “public order in private international law today is closely tied to the society of the forum and cannot exist beyond the legal order of a specific society. Given the exceptional and passive nature of reservation clauses, it is more appropriate to understand them, in principle, as a domestic concept.”³ In summary, the so-called *Ordre Public Universel* is only realized when it coincides with the public order of the forum state. When the forum state’s own public order conflicts with *Ordre Public Universel*, the forum state’s own interests prevent *Ordre Public Universel* from taking precedence.

In the aforementioned Case 1, recognizing the legal validity of foreign same-sex marriages serves to protect the rights and interests of the two children involved in this case. As a signatory to the Convention on the Rights of the Child, China is obligated under Article 2(2) of the Convention to recognize the legal validity of international same-sex marriages. This recognition would facilitate China’s implementation of the principle of “the best interests of the child” enshrined in the Convention, safeguarding the rights of the two children in this case to a family environment free from discrimination. “The best interests of the child” constitute an *Ordre Public Universel* in this case. However, recognizing the legal validity of same-sex marriage clearly conflicts with China’s public order. Here, China’s public order under private international law—which denies the legitimacy of same-sex marriage—clashes with the *Ordre Public Universel* of “the best interests of the child.” In such a conflict, Chinese courts would prioritize the realization of “the best interests of the child” as the overriding *Ordre Public Universel*. Would they then recognize the legality of same-sex marriage? This paper believes the answer is no. China has its own interests in maintaining public order that denies the legality of same-sex marriage. Courts would not disregard China’s public order under private international law solely to achieve the *Ordre Public Universel* of “the best interests of the child.” Only if China had no inherent public order denying same-sex marriage would courts unhesitatingly implement the *Ordre Public Universel* of “the best interests of the child.”

2.3 Application and Limitations of the Doctrine of Close Connection with Public Order

The Doctrine of Close Connection with Public Order, proposed by American scholars, asserts that “the closer the tie between the forum and the facts of a given transaction, the more readily we may expect the forum to use its own law to judge the matter before it.”⁴ Professor Nussbaum has stated, “All depends on the circumstances, or, more precisely, on the importance of the ‘contacts’ of the case with the territory of the forum.”⁵ According to this doctrine, the degree of connection between the case and the forum’s jurisdiction is the key factor in determining whether to invoke the public order reservation. The closer the connection between the case and the forum, the greater the likelihood of invoking the public order reservation.

The merit of this doctrine lies in proposing a concrete analytical method for assessing the connection between a case and the forum, thereby assisting judges in determining whether to invoke the public order reservation during case adjudication. However, its drawback is the potential for a “forum-centered approach”, where courts may abuse their discretion in judging the degree of connection between a case and the forum, leading to misuse of the public order reservation. In Case 1 above, since both the plaintiff and defendant held Chinese nationality and returned to China to litigate the custody dispute, under the Doctrine of Close Connection with Public Order, the court would likely find a close connection to China due to their shared nationality. This could lead to the application of the public order reservation to exclude the application of U.S. law. Similarly, in Case 2, if the parties were transformed from mainland Chinese nationals to Macao residents and mainland Chinese nationals residing long-term in Macao, the mainland Chinese national’s involvement would raise issues of mainland China’s public order. Mainland Chinese courts would then likely invoke the public order reservation to exclude the application of Macao law, thereby declaring the loan agreement invalid. Therefore, the approach that focuses solely on the degree of connection to public order—considering only the case’s connection without emphasizing the objective outcome—risks leading to the abuse of the law of the forum and fails to achieve conflict justice in the case.

¹ Ye, D. (2012). *The application of the public policy reservation doctrine in China’s foreign-related civil and commercial judicial practice* (p. 57). Beijing: Law Press China.

² Convention on the recognition and enforcement of foreign judgments in civil or commercial matters. The Hague, 2 July 2019.

³ See Kita-waki, T. (1989). *Private international law: International relations law II* (M. Yao, Trans., p. 67). Beijing: Law Press China.

⁴ Paulsen, M. G., & Sovern, M. I. (1956). Public policy in the conflict of laws. *Columbia Law Review*, 56, 981.

⁵ Nussbaum. (1940). Public policy and the political crisis in the conflict of laws. *Yale Law Journal*, 49, 1027, 1031.

3. Applying the Public Order Reservation in Legal Application

Regarding the application of the public order reservation in legal practice, the Effects Doctrine should be upheld as the standard for applying the public order reservation. However, its application in specific judicial practice should be enriched. This requires drawing upon the Structured Public Order theory to distinguish structured concepts and employing the Doctrine of the Close Connection with Public Order to establish case-specific connections. This approach ensures the effects doctrine effectively guides the reasonable application of public order reservations in concrete judicial practice.

3.1 Drawing on the Distinction of Structured Concepts from Structured Public Order Theory

Although Structured Public Order Theory remains confined to academic distinctions, it offers a structured framework for differentiating between domestic public order and ordre public international, thereby facilitating the reasonable application of public order reservations in judicial practice. When applying public order reservations in legal application, one should adhere to the Effects Doctrine while drawing upon the structured conceptual distinctions of Structured Public Order Theory.

First, when applying the Effects Doctrine to determine whether the application of foreign law or laws of Hong Kong, Macao, and Taiwan violates mainland China's public order, one must distinguish whether the result violates Domestic Public Order or Ordre Public International. If it violates Domestic Public Order, the application of foreign law or laws of Hong Kong, Macao, and Taiwan should not be excluded. If it violates Ordre Public International, further consideration should be given to whether the public order reservation system should be invoked to exclude the application of foreign law or laws of Hong Kong, Macao, and Taiwan. This involves domestic public order and ordre public international. Domestic Public Order can be understood as "encompassing all mandatory norms within domestic law, as well as the fundamental principles of the constitution and various branches of law—such as the principle of good faith in civil law. Furthermore, although not explicitly stipulated in domestic law, the good morals that clearly form the foundation of normal domestic social life should also fall within the scope of public order as defined by domestic law."¹ However, not all such rules apply equally to foreigners entering domestic social life. Some apply only to nationals, or at most to foreigners under specific circumstances governed by conflict-of-laws rules—such as provisions concerning age and these mandatory rules under domestic law do not constitute public order in the sense of private international law.² The so-called Ordre Public International encompasses at least two components. The first comprises mandatory rules within a state's domestic law that are deemed of paramount importance, thereby possessing absolute territorial effect and enforceable against all persons within the state, including foreigners.³ The other part consists of mandatory rules specifically established by domestic laws and regulations governing international civil and commercial relations, such as China's legislation concerning international trade and international financial controls.⁴ In Case 1 above, recognizing the legal validity of foreign same-sex marriages in China goes beyond mere Domestic Public Order. It directly challenges mainland China's marriage system, which stipulates that "marriage is between a man and a woman". This gender-based marriage system constitutes an absolute, mandatory rule of territorial jurisdiction in China—a rule that applies to all persons within its jurisdiction. Therefore, the preliminary issue in Case 1 falls under Ordre Public International. In the aforementioned Case 2, the determination that the validity of a loan agreement violated China's fundamental legal principle prohibiting gambling also falls under Ordre Public International. Consequently, both cases necessitate further examination of whether the public order reservation should be invoked to exclude the application of foreign law or the laws of Hong Kong, Macao, and Taiwan.

Secondly, if the facts of the case have been determined to violate Ordre Public International, it is necessary to further distinguish between the strength of public order considerations. This is because the exclusion of foreign law on grounds of public order preservation is limited and cannot exceed the requirements of public interest, which imposes a constraint: the consequences arising from the application of an objectionable legal rule are not necessarily objectionable themselves.⁵ For example, while a marriage between a father-in-law and a daughter-in-law is prohibited in England as it violates public policy, such a marriage contracted in the parties' foreign domicile will presumably be deemed valid and their children presumably legitimate if the couple subsequently acquire a domicile in England.⁶ Whether the validity of the marriage between the father-in-law and

¹ Jin, Z. (2004). A comparative study of the public policy reservation doctrine in private international law. *Journal of Comparative Law*, (6).

² Jin, Z. (2004). A comparative study of the public policy reservation doctrine in private international law. *Journal of Comparative Law*, (6).

³ Li, H. (2000). *Public policy issues in private international law*. In *Selected works of Li Haobei* (p. 91). Beijing: Law Press China.

⁴ Li, H. (2000). *Public policy issues in private international law*. In *Selected works of Li Haobei* (p. 91). Beijing: Law Press China.

⁵ Wolff, M. (2009). *Private international law* (2nd ed., H. Li & Z. Tang, Trans., p. 208). Beijing: Peking University Press.

⁶ Wolff, M. (2009). *Private international law* (2nd ed., H. Li & Z. Tang, Trans., p. 208). Beijing: Peking University Press.

daughter-in-law in this case is treated as a preliminary issue or a principal issue yields different legal consequences, precisely reflecting the distinction between strong and weak public order. In Case One above, applying the distinction between strong and weak public order: since the right of this same-sex couple to marry had already been legally established in the United States, their marriage would be treated merely as a preliminary issue in the custody dispute. Consequently, the resulting legal effect—recognizing the validity of their marriage—would not necessarily violate *Ordre Public International* in China. In the second case, if the factual circumstances changed such that the plaintiff were a Macao resident and the defendant were a mainland Chinese national residing long-term in Macao, the intensity of public order would be less pronounced than if both parties were mainland Chinese nationals.

3.2 Applying the Case-Specific Connection Approach Under the Doctrine of Close Connection with Public Order

Although the Doctrine of Close Connection with Public Order may readily give rise to a “forum-centered approach,” incorporating its case-specific connection methodology while adhering to the Effects Doctrine can facilitate the reasonable application of the Effects Doctrine in specific cases. To distinguish between strong and weak public order concerns, the case-by-case approach under the Doctrine of Close Connection with Public Order must be employed. This involves assessing whether the case has sufficient connection to the forum state and evaluating the severity of the conflict between applying foreign law or the law of a foreign jurisdiction and *Ordre Public International*. In applying the public order reservation doctrine, German courts typically analyze both the severity of the violation of public order and the domestic connection of the case, permitting the exclusion of foreign law only when a substantial connection to the forum state exists and its application would lead to a serious violation of the domestic public order.¹ This approach by German courts offers valuable reference for China. Specifically, the public order reservation should only be invoked to exclude the application of foreign law or the laws of Hong Kong, Macao, and Taiwan when the consequences of applying such laws exhibit sufficiently substantial ties to China’s public order.

In the aforementioned Case 1, the application of U.S. law to recognize the legal effect of foreign same-sex marriages in China serves only as a preliminary issue in the case. Compared to the main issue, its status as a preliminary matter renders its connection to Chinese courts less significant. Therefore, applying U.S. law to recognize the legal effect of foreign same-sex marriages is not unacceptable. In other words, the result of applying U.S. law in this case—recognizing the legal effect of foreign same-sex marriages—does not have a sufficiently substantial connection to China’s public order. Therefore, invoking the public order reservation to exclude the application of U.S. law would not be reasonable in this context. Specifically, as analyzed above, applying U.S. law to recognize the validity of foreign same-sex marriages serves to protect the legitimate rights of the couple’s two children to a family environment free from discrimination. It also advances the implementation of the principle of “the best interests of the child” enshrined in the Convention on the Rights of the Child, which China has ratified. In Case 2, both the plaintiff and defendant are from mainland China. Moreover, the loan agreement for gambling purposes was signed during a brief visit to Macao, demonstrating a clear and sufficient connection to mainland China. Therefore, invoking the public order reservation to exclude the application of Macao law is unquestionably justified. However, if the facts were altered such that the plaintiff is a Macao resident and the defendant is a mainland Chinese national residing long-term in Macao, where the loan agreement was signed in Macao; the plaintiff is a Macao resident; and the defendant is a mainland Chinese national residing long-term in Macao, but the lawsuit is filed solely in mainland Chinese courts, these facts collectively indicate an insufficiently substantial connection to mainland China’s public order. Consequently, mainland Chinese courts would have no grounds to invoke the public order reservation to exclude the application of Macao law and thereby declare the loan agreement invalid.

3.3 Guided by the Principle of Minimum Harm

When deciding whether to exclude laws from Hong Kong, Macao, and Taiwan, judges in mainland Chinese courts should apply the public order reservation system guided by the principle of minimal harm to the laws of Hong Kong, Macao, and Taiwan. The scholar argues that “when public policy reservation serve as limitations on the application of foreign laws, courts should be guided by the principle of minimal harm to foreign laws. If alternative solutions that do not violate public order would not create gaps, foreign laws should continue to apply.”² This paper contends that the “principle of minimal harm” can serve as the guiding principle for applying the public order reservation to exclude laws from Hong Kong, Macao, and Taiwan.

First, this is dictated by the nature of these three jurisdictions. Hong Kong, Macao, and Taiwan remain regions

¹ Zhang, H. (2011). International human rights protection and the public policy reservation doctrine: A perspective from German private international law. *Journal of Guangzhou University*, (9).

² Luís de Lima Pinheiro. (2020). *Public policy and private international law*. Cheltenham, UK: Edward Elgar Publishing.

under China as a sovereign state, differing in nature from foreign countries. In advancing the interests of the mainland, efforts should be made to balance the interests of these three jurisdictions while minimizing inter-regional conflicts, thereby laying the groundwork for future unified inter-regional conflict-of-laws rules in China. This necessitates that when applying the public order reservation to exclude the application of Hong Kong, Macao, and Taiwan laws, consideration must be given to whether excluding the application of these laws in mainland China would cause harm to the legal systems of the Hong Kong, Macao, and Taiwan regions. Second, from the perspective of feasibility, when considering whether applying mainland Chinese law after excluding Hong Kong, Macao, and Taiwan laws would cause harm to the legal system of these regions, judges need to be familiar with the legal provisions of Hong Kong, Macao, and Taiwan. Compared to foreign national laws, judges in mainland Chinese courts find it easier to ascertain the laws of these three jurisdictions and can more readily and accurately understand their public order. This indicates that considering the minimal impact on the laws of these three jurisdictions when applying mainland Chinese law after excluding Hong Kong, Macao, and Taiwan laws is a more realistic and feasible approach. Moreover, China resolves inter-regional private law conflicts by reference to international private law conflict rules. When mainland Chinese courts exclude the application of Hong Kong, Macao, and Taiwan laws and uniformly apply mainland Chinese law, this result fails to reflect protection for the distinct interests of these regions as opposed to foreign countries. Therefore, guiding mainland Chinese courts' discretion on whether to exclude Hong Kong, Macao, and Taiwan laws by the principle of minimal harm can compensate for this legislative deficiency. Conversely, when excluding the application of foreign law, judges need only assess whether the application of foreign law would threaten the public order of the forum. They bear no obligation to consider whether excluding foreign law and applying domestic law would cause harm to the foreign law. This is because a nation's judges need only consider their own country's interests, not those of other nations. Moreover, if judges were to consider whether foreign law is harmed, they would need to assess the public policy of the foreign state. However, judges generally lack sufficient capacity to discern foreign public order, potentially leading to discrepancies between their understanding and the foreign state's own interpretation of its public order. Therefore, when exercising discretion to exclude foreign law or the laws of Hong Kong, Macao, and Taiwan through the public order reservation, a distinction should be made. The exclusion of the laws of Hong Kong, Macao, and Taiwan should be guided by the principle of minimum harm.

In the aforementioned Case 2, if the plaintiff were a Macao resident and the defendant were a mainland Chinese national residing long-term in Macao, and the parties entered into a loan agreement in Macao for gambling purposes, mainland Chinese judges deciding whether to apply the public policy exception to exclude Macao law should be guided by the principle of minimum harm. That is, judges should consider whether applying Macao law would cause harm to the legal system of the Macao Special Administrative Region. After applying the public order reservation to exclude the application of Macao law in this case, the final outcome was the application of Mainland China's Law to declare the loan agreement invalid. Given the stronger ties both parties had with Macao, the invalidation of the contract undoubtedly undermined the maintenance of normal civil and commercial order in the Macao Special Administrative Region. Furthermore, given that the parties' connection to mainland China was not particularly strong—they merely filed the lawsuit in a mainland court—the application of mainland Chinese law had limited relevance to mainland interests. Therefore, the mainland judge should have applied the principle of minimum harm, applied Macao law to uphold the contract's validity, and thereby achieved fairness and justice under both conflict of laws and substantive law principles.

4. Conclusion

Regarding the proper application of the Effects Doctrine in mainland China's judicial practice, the correct procedure is to draw upon the distinction of structured concepts from Structured Public Order Theory. First, differentiate whether the application of foreign law or Hong Kong, Macao, and Taiwan laws results in a violation of Domestic Public Order or *Ordre Public International*. Second, to differentiate the strength of public order, apply the case-specific connection approach under the Doctrine of Close Connection with Public Order. Additionally, distinctions should be made when employing the public order reservation system to exclude the application of foreign law or Hong Kong, Macao, and Taiwan laws. When excluding laws from Hong Kong, Macao, and Taiwan, mainland courts should be guided by the principle of minimum harm in addition to applying the aforementioned steps.

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