

Law on settlement of civil disputes involving foreign elements at the Courts in Vietnam

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Abstract:

The settlement of civil disputes involving foreign elements is a relatively complicated issue due to conflicts of laws and conflicts of jurisdictions in private international law. This article analyses Vietnamese laws on identification of jurisdictions of the Courts and identification of applicable laws to settle civil disputes involving foreign elements. On those grounds, this article points out certain shortcomings of the laws and provides an orientation for the completion of Vietnamese laws.

Keywords: applicable laws, civil disputes, courts, foreign elements, jurisdiction.

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Introduction

Under Vietnamese laws, foreign elements in a civil dispute are identified in accordance with clause 2, Article 464 of Civil Procedure Code 2015. Accordingly, civil cases involving foreign elements are civil cases that belong to one of the following cases: i) at least one party is a foreign individual, agency, or organization; ii) all parties are Vietnamese citizens, agencies, or organizations but the relationship is established, changed, developed, or terminated in a foreign country; iii) all parties are Vietnamese citizens, agencies, or organizations but the object of the relationship is placed overseas.

In principle, when there is a civil dispute involving foreign elements, the first legal issue is to identify which countries have jurisdiction of the case. Due to the nature of having foreign elements in a civil case, the case could be under jurisdiction of different judicial bodies of different countries. This issue, that is, where a civil case involving foreign elements could fall under jurisdictions of judicial bodies of different countries, is called conflict of jurisdictions.

For a civil case involving foreign elements, the Court needs to settle two issues: i) whether that case is under jurisdiction of the country of the Court or under jurisdiction of the Court of another country and, if the case is under jurisdiction of the country of the Court, then which specific Court has jurisdiction. This issue raises two levels of identification of jurisdictions of the Court: international level (identifying the country of which the Courts have jurisdiction by application of legal norms in conflict of laws and international conventions) and national level (identifying a specific Court according to national laws that has been selected to directly settle the case). The second issue is ii) to identify applicable laws to settle civil disputes involving foreign elements.

Overview of Vietnamese Courts to settle civil disputes involving foreign elements

Jurisdiction of the Courts to settle civil disputes involving foreign elements

For civil disputes involving foreign elements, each country has its own regulations to identify jurisdiction of national courts. However, in general, jurisdiction to settle civil disputes involving foreign

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elements of the courts of many countries can be divided into common jurisdiction and exclusive jurisdiction.

Common jurisdiction is jurisdiction to cases that the courts of that country have competence, but courts of the other countries can also settle (depending on whether international private law provisions of the other country stipulate that its courts have jurisdiction or not). When courts of more than one country have jurisdiction of a civil case involving foreign elements, then determining which court has jurisdiction depends on the filing of the parties.

Exclusive jurisdiction is the case when one country states that only courts of that country have jurisdiction to certain cases. In the case where courts of other countries settle cases that belong to the exclusive jurisdiction of that country, then the judgments and decisions of the courts of other countries shall not be recognized or enforced in that country.

First, on common jurisdiction of Vietnamese Courts, according to regulations of Civil Procedure Code 2015, common jurisdiction of the courts is stipulated in Article 469 and exclusive jurisdiction is stipulated in Article 470. Regulations on common jurisdiction and exclusive jurisdiction of Vietnamese courts in Civil Procedure Code 2015 have new points compared to regulations of Civil Procedure Code 2004. Indeed, Article 469 of Civil Procedure Code 2015 amends many provisions compared to regulations of Article 410 of Civil Procedure Code 2004 such as the provision: "The defendant is an agency or organization which is headquartered in Vietnam or the defendant is an agency or organization has a branch or a representative office in Vietnam, applicable to cases related to the operation of the branch or representative office in Vietnam of such agency/organization".

Whereas, according to Article 410 of Civil Procedure Code 2004, the defendant only needs to have "headquarters in Vietnam or have a management unit, branch, or representative office in Vietnam" then Vietnamese courts have

jurisdiction. Article 469 of Civil Procedure Code 2015 also removes the following regulations at point e), clause 2, Article 410 of Civil Procedure Code 2004: "disputes arising from a contract which is wholly or partly implemented in the territory of Vietnam", because such regulation is no longer suitable with practice and is controversial. Also, Article 469 of Civil Procedure Code 2015 is re-structured by transferring clause 1 Article 410 of Civil Procedure Code 2004 to clause 2 Article 469 of Civil Procedure Code 2015, as well as transferring clause 2 Article 410 of Civil Procedure Code 2004 to clause 1 Article 469 of Civil Procedure Code 2015 and clearly identifying at clause 2 Article 469 of Civil Procedure Code 2015 that, following the identification of the jurisdiction of Vietnamese courts, then courts can identify jurisdiction of a specific court to settle civil cases involving foreign elements based on Chapter 3 of the Code.

Second, the exclusive jurisdiction of Vietnamese Courts to civil cases involving foreign elements is stipulated in Article 470 of the Code. This Article is also divided into two clauses as regulated in Article 411 of Civil Procedure Code 2004, but with new points and an amendment on the choice of court agreement of the parties stipulated at point c) clause 1 of Article 470; adding the case stipulated at point a) clause 2 Article 470 "claims without dispute arising from civil legal relationships specified in clause 1 of Article 470" to the list of civil cases involving foreign elements under exclusive jurisdiction of Vietnamese courts; and remove regulation at point b) clause 1 Article 410 of Civil Procedure Code 2004 "disputes arising from transport contracts where the courier has headquarter or branch in Vietnam".

Therefore, prior to Civil Procedure code, legal instruments governing jurisdiction to settle civil cases with foreign elements regulated in different documents were incomplete and unsystematic. Since 2004, by promulgating Civil Procedure Code 2004, regulations on identification of jurisdiction have step by step completed with clear advancement. To 2015 by replacing Civil Procedure Code 2004 with Civil Procedure Code 2015, the identification of jurisdiction to settle civil cases with foreign elements has advancement

compared to Civil Procedure Code 2004. Civil Procedure Code 2015 has been reinforced and significantly completed in regard to jurisdiction to settle civil cases with foreign elements.

The law on jurisdiction of Vietnamese courts to settle civil cases involving foreign elements prior to Civil Procedure Code 2015 is listing, mutually inclusive, and does not meet the need of international integration in the new era. Since Civil Procedure Code 2015, the codification of the law has been enhanced to be suitable with the current situation and the above-mentioned shortcomings are significantly overcome in both formality and substance. First of all, on formality, the legalization of regulations on jurisdiction of the courts to civil cases involving foreign elements contributes to the stability of procedural legal norms and enhances the unification of the legal system for greater completeness. Second, on substance, the issue of identification of jurisdiction of Vietnamese courts to settle civil cases involving foreign elements is regulated more clearly, specifically, and has become gradually suitable for the current practice of Vietnam and also gradually compatible with foreign laws and international conventions that Vietnam is a member.

Laws applicable to civil cases involving foreign elements

Civil Code 2015 regulates on the scope of application of the law, conditions for application, etc., in part 5 on applicable law to civil relations involving foreign elements.

First, on the scope of application:

Clause 1 Article 663 of Civil Code 2015 stipulates that: *“If any regulation of law providing for applied law to civil relations involving foreign elements complies with Article 664 through Article 671 of this Code, it shall prevail; if it does not comply with those Articles, Part 5 of this Code shall prevail”*. Therefore, Civil Code 2015 stipulates that if regulations on applicable law to civil relations involving foreign elements are not contrary to regulations of the Code, then such regulations can be applied. This regulation adheres

to the principle of freedom, voluntary commitment, and the agreement in civil relations in the context of international integration.

Second, on the principle to identify applicable law to civil relations involving foreign elements:

Article 664 of Civil Code 2015 stipulates on principle to identify applicable law to civil relations involving foreign elements.

The principle to identify applicable law to civil relations involving foreign elements according to Civil Code 2015 is as follows: first, the parties apply international conventions of which Vietnam is a member or Vietnamese laws. In the case that international conventions in which Vietnam is a member, or Vietnamese laws stipulate that parties have the right to choice of law, then the applicable law to civil relations involving foreign elements is identified as chosen by the parties or the parties can choose to apply international customs if the consequence of the application is not contrary to basic principles of Vietnamese laws. In case of failure to identify applicable laws in the above situations, the law applied is the law with the closest links.

Therefore, the principle to identify applicable law to civil relations involving foreign elements according to Civil Code 2015 is the priority of selected applicable law, especially Civil Code 2015, which only allows the parties to a choice of applicable law in cases where international conventions that Vietnam is a member or Vietnamese laws stipulate. Besides, Civil Code 2015 also adds the principle to apply law with the closest links with Civil relations involving foreign elements.

A supplementary principle to apply law with the closest links to identify applicable law in cases where failing to identify applicable law helps competent authorities, especially adjudicating bodies in the process of settling civil disputes involving foreign elements. In essence, the referred laws in conflict of laws provisions are the laws which have the closest links to that civil relation involving foreign elements and are

usually pointed out, for example, nationality laws, residence, etc., depending on each specific civil relation involving foreign elements. However, due to the diversity of civil relations involving foreign elements, in many cases, the laws do not cover all of the related applicable laws. This way of regulation shall ensure the necessary flexibility for the adjudicating bodies to handle cases, and avoid the direct application of Vietnamese laws without base while also expressing the integration of laws governing civil relations involving foreign elements.

Third, on the application of referred laws:

Civil Code 2015 has separated Article 668 to have clearer regulation on application of referred laws.

Therefore, Article 668 of Civil Code 2015 identifies the scope of the referred laws. Accordingly, in case parties in civil relations involving foreign elements have an agreement on the choice of applicable law, then the applicable law is regulations on rights, obligations of parties of the contract, and exclusive of regulations on identification of applicable law, which means that the referred law is substance related only and not a conflict of law provisions. In case there is no agreement on choice of applicable law, the referred laws include regulations on identification of applicable law and regulations on rights and obligations of the parties (including conflict of laws provisions). This provision also allows reverse referral and clause 3 of Article 668 also allows referral to law of a third country, however, in case of referral to the law of a third country, laws of that country on rights and obligations shall be applied.

Fourth, agreement on choice of law, international customs:

Civil Code 2015 stipulates that in civil relations involving foreign elements, parties have the right to an agreement on choice of international customs for application if the consequence of such application is not contrary to fundamental principles of Vietnamese laws (Article 666 of Civil Code 2015).

From general regulations on applicable laws, Civil Code 2015 has specific regulations on applicable laws to civil relations involving foreign elements. Accordingly, parties in civil disputes involving foreign elements can only choose laws applicable to ownership right and other rights related to movable properties in transit (Article 678 clause 2); contract (Article 683); performance of acts without authorization (Article 686); and compensation for non-contractual damage (Article 687).

Fifth, cases that cannot apply foreign laws:

Relating to the issue of non-application of foreign laws when referred to, Article 670 of Civil Code 2015 stipulates that *foreign laws, which are referred to cannot be applied in case: i) the consequences of the application of foreign law is contrary to fundamental principles of Vietnamese laws; or ii) the substances of foreign laws cannot be identified even though already apply necessary measures in accordance with procedural laws.*

Therefore, Civil Code 2015 stipulates “the consequence of the application”, that is, the application of foreign laws that are contrary to fundamental principles of Vietnamese laws shall not be applied.

Besides, in the case of not applying foreign laws when the substances of foreign laws cannot be identified even though necessary measures are already applied in accordance with procedural laws, competent authorities of Vietnam can only cite this provision for not applying foreign laws in case necessary measures have already been carried out in accordance with procedural laws but still cannot identify foreign laws governing such civil relations.

Shortcomings of Vietnamese laws on settlement of civil disputes involving foreign elements by litigation

Jurisdiction of Vietnamese Courts to settle civil dispute involving foreign elements

The jurisdiction to settle civil cases involving foreign elements are divided by Civil Procedure Code 2015 into common jurisdiction and exclusive jurisdiction.

Through research of legal norms, shortcomings still exist on the matter of jurisdiction of Vietnamese Courts to settle civil disputes involving foreign elements which need amendment and supplement.

First, point a), clause 1 of Article 469 of Civil Procedure Code 2015 stipulates that “civil cases that the respondent is an individual who resides, works, or lives for long-term in Vietnam”. The use of criteria “resides, works or lives for long-term” under Vietnamese law makes this article hard to interpret and complicated because these terms are not yet clarified in any regulations under Vietnamese law.

For example, what is “resides”? According to clause 1, Article 11 of the Law on Residence 2020, “resides” can be understood as an individual’s residence that is either temporary or permanent. Then, clause 8 and 9, Article 2 of the Law on Residence 2020 stipulates that: a place of permanent residence means a place where a citizen resides stably, for a long-term, and has registered his/her residency.

A place of temporary residence means a place where a citizen resides in a certain period other than permanent residence and already registers his/her temporary residence. In another example, what is “works, lives for long-term”? Currently there are no regulations that clearly interpret what “works, lives” mean or for how long could be deemed as “long-term”. This causes many difficulties for the courts in the process of identifying jurisdiction to settle civil cases involving foreign elements. Therefore, the criteria “works, lives” is unnecessary as criteria to identify jurisdiction of Vietnamese Courts.

Therefore, point a), clause 1, Article 469 of Civil Procedure Code 2015 needs to be amended in the direction that Vietnamese Courts have jurisdiction to civil cases involving foreign elements in cases where the respondent is an individual having residence in Vietnam. Or the term “works, lives” can be deleted and the criterion “long-term” can remain [1]. The respondent who is an individual residing in Vietnam for the long-term. Regarding “long-term”, first the Supreme People’s Court needs

to issue judicial interpretation to clearly explain this definition, as well as to identify a specific period of time to identify whether a respondent is deemed a long-term resident of Vietnam.

Second, the respondent has properties in the territory of Vietnam (Item c, clause 1, Article 469 of Civil Procedure Code 2015).

The criterion “the respondent has properties in the territory of Vietnam” is used to identify a civil case involving foreign elements that falls into common jurisdiction of Vietnamese Courts without any other criterion attached to identify the connection of the case with the territory of the Courts (Vietnam) is still not justified. Only the fact that “the respondent has properties in the territory of Vietnam”, then Vietnamese Courts shall have the jurisdiction, without any appraisal of the value of the properties. The hypothesis raised here is that, in this case the values of the properties are too small compared to the value of the dispute, but the respondent resides in or has headquarters in another country and the claimant initiates the suit in Vietnamese Court. So, in this case, according to regulation at point c), clause 1, Article 469 of Civil Procedure Code 2015, Vietnamese Courts shall have jurisdiction. Therefore, in this case, the interests of both claimant and respondent are not ensured when participating in the legal proceedings at Vietnamese Court [1].

Therefore, the author think that point c), clause 1, Article 469 of Civil Procedure Code 2015 should be amended with the direction that Vietnamese Courts shall have jurisdiction to settle civil cases involving foreign elements when “the respondent has properties in the territory of Vietnam and the value of the properties is equal (or equivalent) to the value of the dispute” or when Civil Procedure Code 2015 is amended, the criterion on the place of properties of the respondent should not be used to identify jurisdiction of Vietnamese Courts but using another specific criterion instead with the direction: Vietnamese Courts have jurisdiction to settle civil cases involving foreign elements when the case has a connection with the territory of Vietnam (and take the criteria about properties

of the respondent, place of performance of the contract, place of conclusion of the contract, etc., as the criteria to identify the jurisdiction).

Third, divorce cases between a Vietnamese citizen and a foreign citizen or a stateless person if both spouses reside, work, or live permanently in Vietnam.

According to point b), clause 1, Article 470 of Civil Procedure Code 2015, a divorce case between a Vietnamese citizen and a foreign citizen or a stateless person if both spouses reside, work, or live permanently in Vietnam shall belong to exclusive jurisdiction of Vietnamese Courts. However, this regulation is still not fully justified. According to the Law on Marriage and Family 2014, at clause 3, Article 5: "Getting married means a man and a woman's establishment of the husband-and-wife relation according to the provisions of this Law on marriage conditions and registration" and clause 14, Article 3 stipulates "Divorce means termination of the husband-and-wife relation under a court's legally effective judgment or decision".

According to clause 2, Article 7 of the Law on Civil Status 2014, the authority to register marriage involving foreign elements belongs to the District-level People's Committee. In the case of a marriage between a Vietnamese citizen residing in the border area and a citizen of a neighbouring country residing in the border area with Vietnam, according to clause 1 Article 7 of the Law on Civil Status, the authority belongs to Commune People's Committee of the place of residence of the Vietnamese citizen.

The Commune People's Committee of the place of residence of the Vietnamese citizen registers marriage between Vietnamese citizen and foreigner; between Vietnamese citizen residing in Vietnam and Vietnamese citizen residing in a foreign country; between Vietnamese citizens residing in a foreign country; and between Vietnamese citizen having nationality of a foreign country and Vietnamese citizen or foreigner. In the case where a foreigner residing in Vietnam requests to register marriage in Vietnam, the District-level People's Committee where one of the two parties

resides shall register marriage.

Overseas representative offices of Vietnam like the embassy or consulate have the authority to register marriage between Vietnamese citizens in a foreign country or between a Vietnamese citizen and foreigner. Therefore, according to Vietnamese law, authorities having competence to register marriage involving foreign elements are District-level People's Committee (Commune People's Committee in case of border area) and representative offices of Vietnam overseas. These government authorities exercise their power in accordance with the laws and obviously these activities have the nature of the State's power.

If the marriage relationship is established based on registration at competent government authorities of Vietnam, then the termination of these marital relationships shall also be under jurisdiction of Vietnam. According to the principle of sovereignty equality among nations, other nations cannot suspend the effectiveness of a marital registration certificate issued by Vietnamese competent authorities, and also cannot terminate a marital relationship that has been registered by Vietnamese competent authorities. On the contrary, Vietnam also cannot terminate a marital relationship (even when one party is Vietnamese citizen) that has been established in accordance with the laws of a foreign country on marriage conditions and registration at competent authorities of foreign country. There is an exception when Vietnam and the related country have concluded international convention in which there is regulation that competent authorities (the Courts) of the signatories have jurisdiction to terminate a marital relationship that has been established in accordance with the laws and regulations on marriage conditions and registration of the other signatory.

In our opinion, point b), clause 1, Article 470 of the Civil Procedure Code 2015 needs to be supplemented as follows: "Divorce between a Vietnamese citizen and citizen of a foreign country or a stateless person, in case the marriage is registered at competent authorities of Vietnam and both spouses reside, work, live in Vietnam,"

or “Divorce between a Vietnamese citizen and citizen of a foreign country or stateless person, in case both spouses reside, work, live in Vietnam and have no property dispute in a foreign country”.

Fourth, cases where the parties can choose Vietnamese Courts.

Other civil cases where the parties select Vietnamese Courts to settle in accordance with Vietnamese laws or international conventions that the Socialist Republic of Vietnam is a signatory, and the parties agree to select Vietnamese Courts.

According to this article, only when the parties select Vietnamese Courts then Vietnamese Courts shall have exclusive jurisdiction. This regulation of Civil Procedure Code 2015 is suitable with international practices and ensures the unification with other specialized legal normative documents of Vietnam when regulating jurisdiction of Vietnamese Courts as well as the right to select the Court of the parties.

Article 14 of the Law on Investment 2020 on dispute settlement in investment activities stipulates that disputes relating to investment activities in Vietnam are settled through negotiation and/or mediation. In case of unsuccessful negotiation and/or mediation, the dispute shall be settled at Arbitration or Court.

Disputes between domestic investors, economic organizations having foreign invested capital, or between domestic investors, economic organizations having foreign invested capital with competent State authorities relating to investment activities in the territory of Vietnam shall be settled by Vietnamese Arbitration or Vietnamese Courts except disputes between investors in which at least one party is a foreign investor or economic organization, then the dispute can only be settled by one of the following bodies or institutions: Vietnamese Court; Vietnamese Arbitration; Foreign Arbitration; International Arbitration; or Arbitration selected by the parties.

Disputes between foreign investors and competent State authorities relating to investment activities in the territory of Vietnam are settled

by Vietnamese Arbitration or Vietnamese Court, except when there is another agreement in the contract or international conventions that the Socialist Republic of Vietnam as a signatory provide otherwise. As can be seen from the above regulations, the right to select the court to settle their disputes falls into the scope of these specialized legal normative documents. For disputes about investment, Vietnamese laws do not allow the parties to select the court of a foreign country to settle the dispute.

Therefore, the unification between regulations of Civil Procedure Code 2015 and other legal normative documents such as Article 14 of the Law on Investment 2020, the criterion to identify jurisdiction of the Court to settle disputes between foreign investors and competent State authorities relating to investment or business in the territory of Vietnam, even though the article is not clear but exclusive jurisdiction of Vietnamese Courts can be identified. However, in this case it is not regulated in clause 1, Article 470 of Civil Procedure Code 2015 causing difficulties in dispute settlement.

The Article 470 should supplement the case with: “Civil cases relating to foreign investors and competent State authorities related to investment activities, business in the territory of Vietnam” because of its necessity, unification between legal normative documents, and creation of favourable conditions in application of the laws to settle disputes involving foreign elements.

The Hague Conference developed a convention on the choice of Court (Vietnam is not a signatory member of this convention yet) in which there is specific regulation on jurisdiction of the Court based on choice of the parties. Point c, clause 1 of the Civil Procedure Code of Vietnam 2015 is stipulated based on reference to Article 3 and Article 5 of the Hague Convention 2005 on the Choice of Court Agreements. The essence of this regulation is that in case the parties selected Vietnamese court to settle the dispute but later one party requests a foreign Court, Vietnamese Arbitration, or foreign Arbitration to settle the dispute, then the foreign Court or Arbitration must refuse admission of the party's request.

Clause 7, Article 3 of Civil Procedure Code of Japan stipulates that parties have the right to have an agreement on choice of Court of any country to settle their dispute. Choice of Court agreements must be made in writing (in case data message is unrecognizable, then such message is not deemed in writing and shall be invalid). However, Civil Procedure Code of Japan also stipulates on agreement of jurisdiction for dispute settlement (choice of Court agreement), which has more stringent conditions for validity in case of consumer contracts and labour contracts.

Agreement on the choice of jurisdiction to settle consumer contract disputes according to sub-point i), point 5, clause 7, Article 3 of Civil Procedure Code of Japan, even when a trader already signed an agreement with the consumer on the exclusive jurisdiction of the Court in which the case can only be submitted to a Court of the country where the headquarter of the trader located, this agreement also has certain requirement to become valid. Specifically, this agreement is only valid when the selected Court is the Court of the country where the consumer resides at the time of conclusion of the consumer contract and this agreement is not exclusive. According to this regulation, in a case where a consumer submits a case to a Court of a foreign country other than the Court which has been selected in the consumer contract, the trader cannot argue that this Court has no jurisdiction for adjudication on the grounds that this is not the selected Court by the parties [2].

While an employer can, when terminating labour contracts, engage in an agreement with an employee to restrict adjudication jurisdiction to the employee at the end of the term of employment, the employee still has the right to sue the employer at another Court and obviously, in this case, the employer also cannot argue that the parties already had a choice of Court agreement in the contract to object jurisdiction of the other Court. In this case, the validity of agreement on choice of Court is restricted, except the case when the employee cites choice of Court agreement, or the employee initiated the suit at the selected Court in the labour contract.

In our opinion, there are no criteria to identify jurisdiction of the Courts in Civil Procedure Code 2015 regarding consumer and employee cases to protect legitimate rights and interests of the parties that are deemed “weaker” in cases of consumer contracts and labour contract cases.

Singapore issued the Choice of Court Agreements Act 2016, which came into effect on 01 October 2016, which was amended and came into effect on 30 November 2017 [3]. This Act has specific regulation on choice of Court agreements. For example, Article 3.2 Section 1 stipulates that a choice of court agreement between two or more parties which satisfies the following requirements is deemed to be an exclusive choice of court agreement, unless the parties to the agreement expressly provide otherwise.

The agreement is concluded or documented in writing or by any other means of communication that renders the information communicated accessible so as to be usable for subsequent reference [3].

The Choice of Court Agreements Act of Singapore also excludes certain issues outside of the scope of application such as choice of court agreement relating to consumers, employees, and collective bargaining agreements, etc. [3]. Besides, in the Civil Procedure Code of Japan 2011, Japanese Courts have exclusive jurisdiction in cases relating to existence or value of intellectual property rights from registration in compliance with Japanese laws. Accordingly, issues relating intellectual property right registration in Japan shall be under exclusive jurisdiction of Japanese Courts [4].

However, regulation at point c) clause 1 Article 470 of Civil Procedure Code 2015 just provides direction for parties to select Vietnamese Courts. Vietnamese laws do not regulate in the direction that parties can have agreement on choice of foreign Courts to settle cases and the choice of foreign Court jurisdiction is exclusive as regulated in Hague Convention 2005 or laws of other countries such as Singapore and Japan. Besides, this article does not regulate on the formality of the choice of court agreements and restriction of validity in

case of choice of Court agreements in consumer contracts and labour contracts. Accordingly, in case of choice of Court, specific requirements on formality of choice of court agreement of the parties should be regulated. In our opinion, the choice of court agreements to settle civil disputes involving foreign elements should be made in writing or other forms which have equivalent validity. The validity of choice of court agreements in labour contracts and consumer contracts should also be restricted in the direction that employees, consumers still can bring the case against employers, traders to the Court of the country other than selected Court in the contracts, except the case that consumer, employee cites the agreement or initiates the case at the selected Court in the contract.

Civil Procedure Code 2015 is silent on regulation on exclusive jurisdiction of Vietnamese Courts in the area of intellectual property. Clause 4 Article 10 of Law on Intellectual Property 2005 regulates the State management on intellectual property, in which the registration and implementation of other procedures relating to the issuance of copyright registration certificate, related rights registration certificate, industrial property registration certificate (including patent registration certificate, utility solution registration certificate, industrial design registration certificate, semiconductor integrated circuit layout design registration certificate, trademark registration certificate, geographical indication registration certificate), plant variety protection certificate. According to Article 53, Article 93 and Article 169 of this Law, these certificates are effective on the entire territory of Vietnam. However, cases involving foreign elements relating to intellectual property which must be registered in Vietnam, Civil Procedure Code has no regulation on the exclusive jurisdiction of Vietnamese Courts.

Therefore, clause 1 Article 470 of Civil Procedure Code 2015 needs to be supplemented a new point, that is: "...d. Disputes relating intellectual property rights must be registered in Vietnam such as patent registration certificate, trademark registration certificate etc." shall be under exclusive jurisdiction of Vietnamese Courts.

Shortcomings of Vietnamese laws on applicable laws to civil disputes involving foreign elements

First, on the agreement on choice of applicable laws:

Civil Code 2015 has extended regulations on agreement on choice of applicable laws to civil relationships involving foreign elements compared to regulations of Civil Code 2005. Specifically, ownership rights and other rights related to moveable property in transit regulated in clause 2 Article 678; for contracts in Article 683; for performance of acts without authorization in Article 686 and compensation for non-contractual damage in Article 687.

Agreement on choice of applicable laws for civil relationships involving foreign elements in Civil Code 2015 is regulated as follows:

One, ownership rights and other rights related to moveable property in transit.

Clause 2 Article 678 stipulates: *"Ownership rights with respect to moveable property in transit shall be determined in accordance with the law of the country of destination, unless otherwise agreed"*.

Civil Code 2005 only stipulates ownership rights to property, however, Civil Code 2015, Article 676 stipulates further with other rights related to property because apart from ownership right, there are other rights to property such as rights to adjacent real estate, surface right, usufruct right. For moveable property in transit, Vietnamese law allows parties to agree on choice of applicable laws, and other rights to property in this case is usufruct right only because in essence, property in transit is moveable [5].

For property in transit, Article 38 of Private international law of China stipulates that: Parties can agree on choice of applicable laws for the change of rights to moveable property in transit. If the parties have no agreement, the law of the country of the destination of the property shall be applied.

As can be seen, Vietnamese law and Chinese law both regulate that parties are allowed to have agreement on choice of applicable laws to moveable property in transit. However, regulation of Vietnamese law is more advanced because agreement on choice of applicable laws is applied not only to ownership of moveable property in transit but also applied to other rights.

Regarding ownership right to moveable property in transit, both Civil Code 2005 and Civil Code 2015 regulate that parties are allowed to have agreements on choice of applicable laws in case of moveable property in transit. What should be noticed is the formality and the timing of the agreement. In our opinion, in order to ensure unification of the laws, this regulation should be regulated like agreement on choice of applicable law for contracts, it means that parties are allowed to choose formality and timing of the agreement on choice of applicable law to identify ownership right of moveable property in transit. Similarly, parties can have agreement on choice of applicable laws anytime and can alter this agreement without infringing interests of the third person.

Two, civil contract involving foreign elements.

Article 683 of Civil Code 2015 stipulates: Parties in a contract may agree to select applicable laws to the contract, except cases regulated in clause 4, 5, and 6 of this Article. In case the parties have no agreement on choice of applicable law, the law of the country with which such contract closely associates shall apply.

Civil Code 2015 stipulates “parties in a contract may choose applicable law to the contract”. This regulation covers all matters of the contract but not just only within the scope of rights and obligations of the parties.

Article 683 also stipulates that parties cannot have agreement on choice of applicable law to the contract in the following cases:

- If the object of a contract is an immovable property, the law applied to transfer of its ownership rights and/or other property-related rights, lease of immovable property or using the immovable

property as the guarantee for performance of obligations shall be the law of the country where the immovable property is located.

- If the applied law selected by contracting parties in a labour contract or a consumer contract affects adversely minimum interests of employees or consumers as prescribed in the law of Vietnam, the law of Vietnam shall prevail.

Article 41 of Private international law of China also stipulates: parties may agree on the choice of applicable law to the contract, and in case there is no such agreement, the law of the country where the party who demands for performance of the major activities of the contract resides, or any other law that the contract closely associates shall be applied. Civil Code 2015 has clear and specific regulation in case parties cannot select applicable laws.

However, some aspects of applicable law are not clearly regulated in cases where parties have an agreement on dispute settlement in general and civil contract involving foreign elements in particular. Whether the applicable law selected by disputing parties can be applied to separate parts of the contract or not remains unregulated. Clause 1, Article 683 of Civil Code 2015 does not clearly identify whether the scope of application of the selected law to the contract is for the whole contract or part of the contract. This content is almost not mentioned in Civil Code 2015 and other related specialized laws.

Civil Code 2015 remains silent or, put it another way, lacks regulations on the formality, timing, and validity of the agreement on choice of applicable law for civil contract involving foreign elements.

Regarding formality, the agreement must be in writing, or could be formed by behaviour, or even “implied”. There is an opinion that “Agreement on choice of applicable law must be in writing or a clause in the contract. In case the agreement on choice of applicable law fails to satisfy formality requirement, it shall be deemed invalid” [6].

In our opinion, this requirement is unjustified and too rigid. In the current trend of expanding

the freedom to choose law, one should not restrict this freedom by a regulation on formality. Important international conventions on applicable law to contractual obligations, as well as laws of other countries around the world, all express the freedom in formality of the agreement on choice of applicable law. Both Rome Convention on the law applicable to contractual obligation 1980 and Rome I Regulation accept expressed and implied agreement [7].

Private international law of China also lacks regulation on formality of agreement on choice of applicable law between parties, and Chinese Courts had judgments that applied the law selected by the parties. Chinese Courts accept an agreement in writing, by behaviour, and even “implied” between parties [8]. Therefore, there is a current trend in private international law around the world to accept the freedom in formality of agreement on choice of applicable law to contracts [8]. On the other hand, in our opinion, if we have strict regulations on this type of agreement, and do not accept “implied” agreement, it will be against common practices of Vietnamese Courts and current Arbitration [9].

From the analysis above, it can be seen that recognizing the freedom of agreement on choice of applicable law to contracts, even “implied” agreements, are suitable with international practices as well as practices in Vietnam. From both theoretical and practical analyses, we think that there should be regulation on the formality of agreement on choice of applicable law to contracts with foreign elements that Vietnamese laws regulates that parties may have agreement on choice of applicable law with the freedom of expression of parties, even if it is “implied”.

Besides, the timing of agreement on choice of applicable law is not clearly stipulated in Civil Code 2015. Noticeably, on this matter, both clause 2, Article 3 of the Rome Convention and clause 2, Article 3 of Rome I Regulation recognize that: “The parties may at any time agree to subject the contract to a law other than that which previously governed it. Any change in the law to be applied

that is made after the conclusion of the contract shall not prejudice its formal validity or adversely affect the rights of third parties”. Scholars in Vietnam all agree on the opinion that regulation on this matter should follow the same direction as in the Rome Convention and Rome I Regulation mentioned above. It means that parties can have an agreement on choice of applicable law at any time and can change this agreement without affecting the validity on formality of the contract or adversely affect the rights of third parties [10, 11]. In our opinion, apart from two factors, which are the legality of the contract and adversely affect the rights of third parties, it seems that we should notice another issue in which the change of the choice of applicable law of parties can not affect the validity of the contract.

Therefore, it should be regulated that parties may have agreement on choice of applicable law to the contract at any time and can change this agreement without prejudice to the legality or validity of the contract or adversely affect rights of third parties. Noticeably, the formality of the change of agreement on choice of applicable law should be regulated with the freedom of formality. This is suitable with practices of Vietnamese Courts and Arbitrations; that is, when the Courts or Arbitrations apply law other than which has been selected by the parties, but the parties raise no objection, then it could be deemed change of agreement on choice of applicable law in an implied manner.

Three, compensation for non-contractual damage.

Civil Code 2015 also allows parties to select applicable law for non-contractual damage relationship. Article 687 of Civil Code 2015 stipulates that: *“Contracting parties may agree to select the law applied to the compensation for non-contractual damage, except for the case prescribed in clause 2 of this Article. In case there is no such agreement, the law of the country where the consequences of such acts arise shall prevail”*.

Therefore, Article 687 of Civil Code 2015 allows parties to have agreement on choice of applicable

law for compensation for non-contractual damage but “in case the party causing damage and the aggrieved party, being for natural persons having residence, or for juridical person having place of establishment, are in the same country, the law of such country shall prevail”. Thus, parties cannot have agreement on choice of applicable law in this case.

Article 44 of Private International Law of China stipulates that compensation for non-contractual damage is governed by the law of the country where the behaviour which causes the damage occurs. In case parties reside in the same country, the law of the country of common residence shall prevail. After the occurrence of the behaviour causing damage, parties have agreement on choice of applicable law then the law applied is the law of the country selected by the parties.

Regulation in Article 687 of Civil Code 2015 bears some similar characteristics with regulation of Chinese law. However, while Chinese law stipulates clearly when parties can have agreement on choice of applicable law for compensation for non-contractual damage which is after the occurrence of the behaviour causing damage, Vietnamese law is silent on this matter.

However, Civil Code 2015 has no regulation on formality and timing of agreements on choice of applicable law. About the formality of the agreement, due to the nature of the relationship of compensation for non-contractual damage, there has been no prior agreement between the parties, therefore, it would be justified and unified if there is freedom in formality of agreement on choice of applicable law in this case. For the timing of the agreement, Article 101 of Private International Law of Belgium stipulates that *“parties can select, following the occurrence of dispute, applicable law for obligation arising from the behaviour which causes damage”*. Similarly, Article 44 of Private International Law of China stipulates that *“in case parties selected applicable law, following the occurrence of illegal acts, the agreement shall be applied”*. Regulation (Règlement) 864/2007

in 2007 of European Union stipulates in clause 1 Article 14 that parties can select applicable law to obligation arising from non-contractual relationship with an agreement, following the occurrence of the damage [12]. Therefore, there is a trend in legislation of many countries around the world that only agreement on choice of applicable law following the occurrence of the damage is accepted. Vietnamese scholars also support this opinion [6]. Besides, we think that parties can change their agreement on choice of applicable law at any time, even during the litigation process, and this change also allows freedom in formality.

Four, for performance of acts without authorization.

Article 686 of Civil Code 2015 stipulates: “Contracting parties may agree to select the law applied to the compensation for non-contractual damage. In case there is no such agreement, the law of the country where the acts without authorization are performed shall prevail”. This is a new regulation that shows the advance of private international law in Vietnam by recognizing freedom of will of parties in civil relationship involving foreign elements and not bearing its imposing nature [6].

Article 47 of Private International Law of China stipulates that obligation arising from illegal gain therefrom, and performance of acts without authorization are governed by law selected by the parties. In case there is no such agreement, the law of the country of common residence shall prevail; in case there is no common residence, the applicable law is the law of the country where the illegal gain therefrom and performance of acts without authorization occur.

However, we could not find any regulation of Civil Code 2015 stipulating formality and timing of agreements on choice of applicable law. Like compensation for non-contractual damage, for this relationship, we think that agreement on choice of law following the performance of the acts should be allowed with freedom of formality.

Second, in case there is no agreement on choice of applicable law:

In case the parties of civil disputes involving foreign elements are not allowed to select applicable law or in case there is no agreement of choice of applicable law of parties, the applicable law is the law that conflict of law provisions refer to.

For contractual relationship, Article 683 of Civil Code 2015 stipulates that the law applied is the law of the country has the closest association with the contract. Accordingly, clause 2, Article 683 lists the law of country that has the closest association, however, such regulation technique is non-exhaustive and, like other listing technique, it would be difficult for parties when their situation does not fall into any listed categories that the law foresees. This means for un-listed contracts, the law of the country which has the closest association is the law of which country, it is difficult to identify, especially for mixed-type contracts [13].

For other civil relationships, the law referred to could be international conventions, law of another country, international customary, etc. Vietnamese law also has specific regulations relating to the scope of reference in Article 558 of Civil Code 2015.

Besides, in case a law of another country is applied based on agreement of the parties or referred to by conflict of laws, Article 670 of Civil Code 2015 stipulates that law of another country shall only be applied if satisfying a condition that the consequence of application of the law of that country is not contrary with fundamental principles of Vietnamese law. This is an important condition to protect fundamental principles of the nation of the court without being influenced by the law of other country. However, this regulation still conflicts with regulations in other legal normative documents of Vietnam. Specifically, clause 2, Article 5 of the Commercial Law 2005 stipulates: "Parties to commercial transactions involving foreign elements may agree to apply foreign laws or international commercial practices if such foreign laws or international commercial practices

are not contrary to the fundamental principles of the Vietnamese law"; or clause 3, Article 5 of the Maritime Code 2015 stipulates: "foreign law can be applied in Vietnam to contractual relationship relating to maritime activities, if such law is not contrary to fundamental principles of Vietnamese law". The articles cited above show that the conditions to apply foreign laws can be regulated under different forms and in different legal normative documents. In Civil Code 2015, the condition that is recognized is the consequence of application of foreign laws is not to contrary with fundamental principles of Vietnamese law, but in other specialized legal normative documents regulate that foreign law can only be applied in case the contents of foreign law are not contrary to fundamental principles of Vietnamese law. The current inconsistency shall cause different interpretations and applications in practice in case the Courts apply foreign laws. Therefore, this is a shortcoming in legislation technique on this matter.

Besides, the definition of "fundamental principles of Vietnamese law" is not recognized in previous regulations. Currently, there are no legal normative documents that officially interpret what are the fundamental principles of Vietnamese law. Therefore, there should be guidance to explain this definition so that the Courts can systematically apply them in practice and avoid any discretion when settling the cases.

Therefore, the regulations of specialized legal normative documents in cases of not applying foreign law in accordance with Civil Code 2015 should be amended "foreign law shall not be applied in case the consequences of the application of foreign laws are contrary to fundamental principles of Vietnamese law".

Conclusions

It can be seen that the laws on the mechanism for settlement of civil cases involving foreign elements at Vietnamese Courts have gone through a long development process and have obtained significant progress in solving conflict of jurisdiction of national Courts and applicable laws. With the rapid development of civil relationships

involving foreign elements and to ensure national interests, public interests, legitimate rights, and interests of the citizens, as well as to create a safe, stable, and effective legal framework, the laws need to be completed to settle civil cases involving foreign elements, to develop a good mechanism for settling disputes, and to meet the demands of the integration process.

Therefore, Vietnamese laws on the settlement of civil disputes involving foreign elements need to be amended and supplemented in order to:

First, amend regulations on jurisdiction of the courts in Civil Procedure Code 2015:

One, amend point a), clause 1, Article 469 in the direction that Vietnamese courts have jurisdiction to civil cases involving foreign elements in cases: The defendant is individual who has residence in Vietnam or the defendant is an individual who has a long-term residence in Vietnam.

Two, amend the regulation at point c), clause 1, Article 469 in the direction that Vietnamese courts shall have jurisdiction to settle civil cases involving foreign elements when “the defendant has properties in the territory of Vietnam and the value of the properties are equal (or equivalent to) the value of the dispute” or Vietnamese courts shall have jurisdiction to settle civil cases involving foreign elements when the case has territorial connection with Vietnam (and take the criteria on defendant’s properties, place of execution of the contract, place of conclusion of the contract, etc., as criteria to identify jurisdiction).

Three, supplement the regulation at point b), clause 1, Article 470 of Civil Procedure Code 2015 as: “Divorce case between Vietnamese citizen and foreign citizen or person with no nationality, if the marriage is registered at Vietnamese competent authority and both spouses reside, work, live in Vietnam and have no dispute on property abroad”.

Four, in the case of choosing the Court, there needs to be specific regulation on the formality of choice of court agreement between the parties. In our opinion, the agreement on choice of court to settle civil disputes involving foreign elements

must be made in writing or by other formality having equivalent legal validity. There needs to be restrictions on the effectiveness of agreement on choice of court in employment contracts and consumer contracts in the direction that employees and consumers can initiate cases against employers and traders to the court of the country other than the court selected in the contract except for the case that the consumers or employees cite the agreement or imitate the case at the court selected in the contract.

Five, clause 1, Article 470 on exclusive jurisdiction of Vietnamese court also needs to have new point, which is “...d. Disputes relating to intellectual property rights which are registered in Vietnam such as patent, certificate of trademark registration, etc”.

“Civil cases between foreign investor and competent authority relating to investment activities, business in the territory of Vietnam” is necessary, unified among legal normative instruments, creating favourable conditions in application of laws to settle disputes involving foreign elements.

Second, on applicable laws to settle civil disputes involving foreign elements

One, in the trend of extending the freedom to choose the law currently, we should not restrict the freedom of agreement by certain regulation on formality. Therefore, an agreement on choice of law for civil relations involving foreign elements needs to be allowed in Article 678, Article 683, Article 686, and Article 687 of Civil Code 2015 in the direction that, except when the parties have agreement, and in case of not having agreement, other formality of the agreement on choice of law should be accepted even if there is an “implicit” agreement.

On the timing of an agreement on choice of law, it should be in the direction that parties can have an agreement on choice of law to govern their contractual relationship at any time and can change this agreement, but this does not affect the validity or effectiveness of the contract or have

adverse impacts on rights of the third party.

Two, we recommend to amend regulations of specialized legal instruments in the case of not applying foreign laws such as clause 3, Article 5 of the Marine Code 2015 and clause 2, Article 5 of Commercial Law 2005, etc., in the direction that they are unified with Civil Code 2015: “shall not apply foreign laws if consequences of the application of foreign laws are contrary to fundamental principles of Vietnamese laws”.

COMPETING INTERESTS

The authors declare that there is no conflict of interest regarding the publication of this article.

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