sciendo
Vietnamese Journal of Legal Sciences, Vol. 04, No. 01, 2021, pp. 46-64 DOI: 10.2478/vjls-2021-0008

JURISDICTION LIMITATION OF NATIONAL COURTS WITH RESPECT TO CIVIL CASES OR MATTERS INVOLVING FOREIGN ELEMENTS IN ACCORDANCE WITH UNITED STATES LAWS AND VIETNAMESE LAW

NGUYEN LE HOAI
Hochiminh city University of Law
Email: nlhoai@hcmulaw.edu.vn
PHUNG HONG THANH
Hochiminh city University of Law
Email: phthanh@hcmulaw.edu.vn

Abstract

Determination of limitation of jurisdiction of national courts with respect to civil cases or matters involving foreign elements has become an important aspect of judicial practice around the world as with the growing cross-border cooperation. The study on the subject matter helps to promote the efficiency in the civil procedure. On the one hand, it provides legal ground for national courts to determine their jurisdiction over the related civil cases or matters, and helps the plaintiff to initiate the legal action in the national court with competent to accept the case on the other. This article will analyse the U.S. laws as well as judicial experience in U.S. national courts on limitation of their jurisdiction in civil cases or matters involving foreign elements. It will focus on the cases in which the jurisdiction of the court is granted by mutual agreements of the relevant parties, frauds, force, immunities, forum non conveniens, *limits imposed by the forum or the laws of the states where the transactions have been conducted. It will be followed by the critical assessments on the status of relevant laws and regulations of Vietnam and some recommendations for future development.*

Keywords: *limitation of courts' jurisdiction, private international law, forum non conveniens*

Determination of national courts' jurisdiction plays an important role in resolving civil cases or matters involving foreign elements. It has been proven in practice that civil cases or matters involving foreign elements, if being resolved by courts in different countries, may result in different legal consequences.

Laws of all nations establish the grounds to determine their courts' jurisdiction for civil cases or matters involving foreign elements, including the grounds to determine common and exclusive (absolute) jurisdiction. Normally, the establishment of grounds for determination of jurisdiction of national courts are based on the principles such as residence (*lex domicilii*), location of the related properties (*lex situs*), place where the transaction arises, place where the transaction is conducted, place with the closest connection (*lex loci actus*). However, judicial experience in the United States shows many cases that even though U.S. courts have ground to determine their jurisdiction for a civil affair involving foreign elements, they are not entitled to accept and resolve the case due to some certain reasons, for example, because parties in that case agree to choose another dispute resolution body or the acceptance and resolution of the case is not convenient to the national courts.

In Vietnam, the 2015 Civil Procedure Code (hereinafter referred to as the "2015 CPC"), effective on July 1, 2016, provides for some cases of limitation of Vietnamese courts in Article 472, for example, in case a defendant is entitled to sovereign immunity or relevant parties agree to choose a foreign court… However, some provisions in Article 472 of the 2015 CPC are still not detailed and clear enough and it is necessary to issue guidance for competent bodies to apply them in reality, such as guidance on invalid choice of competent forum or on impractical choice of forum. It is believed that experience of the United States, the world's leading legal system, in dealing with the subject matter would be very helpful for Vietnamese legislator in studying and improving the state of the 2015 CPC in the future.

1. Determination of court's jurisdiction on civil cases or matters involving foreign elements under the United States legal system

In U.S. legal system, there are three major bases in determining the national courts' jurisdiction in civil cases or matters involving foreign elements. *Firstly*, the competent court must have a certain connection with relevant parties in the civil affair (in case of jurisdiction *in personam*)[1] or with assets (in case of *jurisdiction in rem*).[2] *Secondly*, in order to conduct a hearing, a court is required to be able to serve notice. This ability of serving notice means that the way of giving notice to a party not participating in the hearing ensures end justice to all relevant parties of the case. *Thirdly*, the court's jurisdiction is determined according to the object of the dispute.

1 Jurisdiction in personam is the jurisdiction of a court to resolve affairs in order to judge the behaviour of a person or some people, and the verdict in these cases will bind the defendant to fulfil its obligation to the plaintiff. Retrieved from https://www.law.cornell.edu/wex/in_personam [accessed on 30 July, 2021].

2 Jurisdiction in rem is the jurisdiction of a court to resolve affairs relating to certain assets. The verdict in these cases will impact on interests of all parties relating to the assets. Retrieved from https://www.law.cornell.edu/wex/in_rem [accessed on 30 July, 2021].

1.1. Limitation of jurisdiction due to agreement by relevant parties

In the United States, a state court has power to open a hearing against a defendant if this defendant is present in that state or that person already agrees with that state court's jurisdiction. Except for some states rejecting agreement on choice of forum in all cases (such as states of Idaho and Montana), others will consider this agreement and only impose limitations to certain types of contracts. United States laws also provide conditions on which national courts determine their jurisdiction when relevant parties of a case sign an agreement on choice of a state court.[3] However, if the plaintiff initiates a legal action to another court, but the defendant wants to enforce the agreement on choice of state court, then the question is whether a court is restricted in determining its jurisdiction in a civil affair that it has jurisdiction or not. United States courts used to not consider the agreement on choice of forum on the ground that the relevant parties by their own agreement cannot "revoke" the jurisdiction of the court that has statutory jurisdiction. However, recent verdicts often acknowledge the validity of the agreement on choice of forum, unless that agreement is "unfair or unreasonable" .

In consideration of a court's selection to resolve a dispute, relevant parties have to take into account the following factors: (i) geographical convenience of the court and relevant parties is an important matter; (ii) relevant parties often choose the court well-known for dispute resolution as well as with many lawyers in that area. This is so-called home advantage, when relevant parties' lawyers all understand well both the laws and proceedings in that chosen court. This will help relevant parties to estimate the legal consequences which are advantageous or disadvantageous to them if the chosen court exercises its jurisdiction; and (iii) relevant parties also consider if state court or federal court will bring better result for a case and check out if that case falls within exclusive jurisdiction of another court or not.

Regarding the provision of choice of forum, United States laws recognize two types which are exclusive and non-exclusive.[4] *Provision of choice of exclusive court* (or statutory provision) is the provision requiring all disputes relating to the agreement of choice of forum to be resolved in an appointed court. On the contrary, *provision of choice*

3 Section 2 of Model Choice of Forum Act 1968.

4 Choice of Law and Forum Selection Provisions. (n.d.). Retrieved from http://www.leaselawyer.com/cases-and-articles/choice-of-law-and-forum-selection-provisions/ [accessed on 30 July, 2021].

of non-exclusive court (or optional provision) is far more flexible than the provision of choice of exclusive court and is more favourable to relevant parties who are customers in civil transactions. This type of provision is suitable for the subjects who are difficult to predict the settlement venue more benefit for them.

Regarding validity of the agreement on choice of forum, on general view, provisions on choice of forum are permitted, but when constructing, executing or objecting a provision on choice of forum, it is noteworthy as below:

Firstly, the party to execute the provision of choice of forum needs to be "informed" about this contractual provision. Though this requirement has been eased remarkably for many years, it is shown very clearly in reality when the provisions on choice of dispute settlement body are capitalized or in different font in order to make it noticeable in the contract.[5]

Secondly, the provision of choice of forum may be invalid due to inconsistency or being opposite to a nation's public interests. A contractual provision of choice of dispute settlement body is considered inconsistent, for example, if it is stated in a template agreement attached to a computer being purchased via email or phone. This is the case of *Brower v. Gateway*, 1998, N.Y. App. Div. Lexus 8872.[6] The example of a contractual provision on choice of forum likely causing harm to public policies is when a state has a special policy to protect

5 Dyson S. and Johnson K. D. (2011), 'Enforcement of Forum-Selection Clauses in Employment Agreements', *The Federal Lawyer*, p. 20.

6 *Brower v. Gateway*. In this case, appellants are among the many consumers who purchased computers and software products from defendant Gateway 2000. Those consumers receive the materials along with a copy of its "Standard Terms and Conditions Agreement of Gateway 2000". This copy mentions terms and conditions as binding agreements between parties if the purchasers keep Gateway products within 30 days. In 30 days, the purchasers are entitled to return goods for any reasons. The plaintiffs then request New York court to resolve the dispute because of Gateway's deceptive sales practices. The plaintiffs also request the court to void the arbitration clause of choice of dispute settlement body (namely to be arbitrated via International Chamber of Commerce) because this content is stated in "Standard Terms and Conditions Agreement of Gateway 2000". After considering all relating matters, the court then concludes to void arbitration clause of choice of dispute settlement body because it considers this as "unconscionable" in according to UCC 2-302 (Uniform Commercial Code). According to ICC, a claim of less than $50,000 required advance fees of $4,000, of which the $2000 registration fee was nonrefundable even if the consumer prevailed at the arbitration. Because those amounts are more than the cost of most Gateway products, the court says that this arbitration clause is unacceptable. The court states that this arbitration clause is to bar consumers from exercising their right to claim because unaffordable amounts, then, the court does not permit the contractual provision of choice of dispute settlement body.

a certain industry or a certain group of people.[7]

Thirdly, the U.S. Constitution establishes scope of federal court's jurisdiction in accordance with subject matters. Therefore, relevant parties cannot use their agreement to request a court to resolve cases not falling in this scope.

Besides, according to other provisions of U.S. laws,[8] if a case is brought to a court of a state whereas relevant parties' written agreement saying firmly that it can only be resolved by a court of another state, then that court will, on a case-by-case basis, suspend or postpone to open hearing for that case, unless:

(i) According to laws, that court has to open a hearing for that case;

(ii) Plaintiff cannot be assured an effective remedy in another state due to some reasons except for the reason of delay in opening a hearing;

(iii) The court chosen by relevant parties may be remarkably less convenient than the court considering the case;

(iv) Agreement on choice of forum is established due to untruthful representation, coercion, economic power abusing or other improper manners; or

(v) Agreement of choice of forum is unjust or unfair due to some other reasons.[9]

1.2. Limitation of jurisdiction due to deception, coercion, or immunity[10]

In Terlizzi v. Brodie, Supreme Court, Appellate Division, Second Department, 1972. 38 A.D.2d 762, 329 N.Y.S.2d 589[11]. The presence

---

7 See *High Life Sales v. Brown-Forman Corp.*, 823 S.W. 2d 493 (Mo. 1992). (Court states that the contractual provision on choice of dispute settlement body for a wine distributor causes harm to Missouri law on protecting franchising wine product).

8 Section 3 of Model Choice of Forum Act 1968.

9 Hay P. (2009), *Cases and Materials – Conflict of Law (Thirteenth Edition),* Foundation Press, pp. 179-180.

10 Restatement (second), *Conflict of Law*, pp. 82-83.

11 *Terlizzi v. Brodie*. In May or June 1968, defendants who were New Jersey residents had a car collision and caused injury to plaintiffs who resided in New York. On February 1971, the defendants called home to tell that they had been chosen to receive tickets to a show as part of a promotion to get their opinion on a questionnaire regarding the new 7:30 pm show time. After the performance and while still in the theatre, defendants were served with a summons in this action by a man who had been sitting behind them. No questionnaire had been given them. Plaintiffs have presented no facts concerning the service to refute defendants' claim and have not submitted an affidavit of the investigator retained to effect service. It has long been held that where a defendant has been lured into this jurisdiction by fraud or deceit in order that he may be served, the service so effected is invalid. (In *Terlizzi v. Brodie, Supreme Court, Appellate Division, Second Department*, 1972. 38 A.D.2d 762, 329 N.Y.S.2d 589). Retrieved from https://casetext.com/case/terlizzi-v-brodie [accessed on 30 July, 2021].

of the plaintiff in a state due to extradition proceedings with signs of deceit is grounds to declare that the service is invalid for the purpose of hindering the defendant. However, if the plaintiff is a non-resident and is arrested for criminal execution, he will not be immune from being served with summons in an illegal way in a civil affair.

If a defendant is kidnapped and forced to a state and then is served with a summons for a civil affair, is that state competent to adjudicate the defendant? U.S. Uniform Criminal Extradition Act[12] provides that when a person is brought to a state according to extradition procedures or after that person gives up his right not to be extradited (for a criminal procedure), that person will not be obliged to the service for a civil affair arising from the criminal procedures… until that person is declared guilty according to criminal procedures, or if that person is acquitted, then until that person has a reasonable chance to come back to the state from where that person was extradited.

Regarding sovereign immunity, a foreign government is generally entitled to immunity from a trial, but there are some exceptions. For example, in case the foreign government carries out commercial transactions (non-governmental). Foreign diplomats are entitled to the absolute sovereign immunity from criminal, civil, and administrative jurisdiction.[13] However, the nations delegating those diplomats may give up their sovereign immunity.

According to common practice, a state can grant immunity against serving court summons to people who are non-residents when their presence is necessary for proper judicial proceedings. The immunity is usually granted to witnesses and lawyers, and in some states, it can be granted to relevant parties of a case. The immunity finishes when the necessity of protection finishes. For example, the immunity is gone when a person does not leave the state in a reasonable period and his presence in that state is not necessary anymore.[14]

1.3. Limitation on jurisdiction due to inconvenience of court (forum non conveniens)

The doctrine *forum non conveniens* is considered as an optional jurisdiction which allows courts to remove a case to another court, or another dispute settlement body, is more convenient in adjudication.

---

12 The Uniform Criminal Extradition Act (1932), *Columbia Law Review,* 32(8), pp. 1411-1424.

13 Articles 31, 32 of Vienna Convention 1961 on Diplomatic Relation.

14 Second Restatement, *Conflict of Laws*, p. 83, Comment b (1971).

This suspension does not stop a plaintiff from taking legal action in a more convenient dispute settlement body. This doctrine can be cited by a defendant. The court will not impose suspension if the judiciary system of the alternate dispute settlement body is inadequate. For example, a U.S. court will not suspend a case due to inconvenience if the alternate dispute settlement body is located in Cuba.[15]

The doctrine *forum non conveniens*, introduced for the first time in Scotland in 1866, is nowadays widely accepted by the common law systems around the world. The U.S. Supreme Court accepted to apply this doctrine in 1947 in *Gulf Oil Corp. V. Gilbert*.[16] However, at the federal level, the U.S. Supreme Court limits the application of this doctrine in cases where the substitute is not a federal district court. In case relevant parties agree to choose a federal district court, then federal statutes (28 U.S.C.A. § 1404(a)), if applicable, will bring out a suitable resolution.

Many states have met misuse of venue by investigating courts with discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice. The federal law contains no such express criteria to guide the district court in exercising its power.

This doctrine grants the court where the plaintiff takes legal action the discretion to hear the cases or not. It is not difficult to determine factors that the court may weigh to make a decision on acceptance or dismissal of its jurisdiction. However, what are the factors in each case and how weigh they do individually are difficult to estimate and determine, and they are benefits of litigants. A benefit being considered, or the material factor being considered, is the personal benefit of the applicant. Important factors includes the ease of access to sources of proof; availability of compulsory process for unwilling attendance, and expense for attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. Capacity of the execution of the judgement is considered as well. The court will weigh advantages and disadvantages to have a fair trial. Normally, plaintiffs will not choose an inconvenient dispute settlement body to cause trouble or pressure to the defendant and

15 Carlson M. D. (2017, June 30), 'Forum non Conveniens'. Retrieved from https://www.law.cornell.edu/wex/forum_non_conveniens [accessed on 30 July, 2021].

16 Edward L., Barrett Jr.(1947), 'The Doctrine of Forum Non Conveniens', *35 Calif. L. Rev.*, p. 380.

make it suffer unnecessary expenditure and problems when it exercises its right of remedy. But unless the disadvantage is far more serious to the defendant, the plaintiff's choice of dispute settlement body is hardly changed.

Factors of public interest are considered when applying this doctrine. The administrative difficulties occur when disputes are centralized instead of being resolved at home. It is unfair to burden citizens in an unrelated form with jury duty. In case many people get involved in the case, it should be at the place that they can join instead of in faraway then they can only be updated with the case through reports.

However, in reality, there are cases that the application of the doctrine *forum non conveniens* is refused. The U.S. legal framework always requires courts to resolve legal issues in the most efficient way so that relevant parties enjoy the maximum justice. Therefore, in certain cases, the doctrine *forum non conveniens* is refused by court because there is no suitable alternative forum to resolve the dispute, or the alternative forum cannot bring to the plaintiff an adequate legal result he is seeking for (for example, compensation for damages) even when this person wins. Another case of dismissal of the doctrine *forum non conveniens* is when the alternative court cannot resolve the dispute in an effective way, for example that court is located in a nation the legal framework thereof nearly collapses.

1.4. Limitation of jurisdiction as being set by a dispute settlement body

For judicial enforcement and forum convenience, courts may ask an applicant to take legal action in another state. However, courts are often very conservative in the issuance of such requests, mainly because (1) they do not want to interfere improperly with the administration of another state and (2) it is difficult to request the defendant to participate in proceedings in a jurisdiction out of their control. Hence, the defendant is usually not requested to take an action violating another state's laws, except for very few exceptions.

In *United States v. First National City Bank*, the United States Court of Appeal[17] supports the investigation of the jury on certain alleged violations of the antitrust laws, a subpoena was sent to First National City Bank (Citibank) requiring Citibank to produce all documents of a foreign branch of the bank in Frankfurt, Germany relating to some

[17] *United States v. First National City Bank*, 379 U.S. 378 (1965). (n.d.). Retrieved from https://supreme.justia.com/cases/federal/us/379/378/ [accessed on 30 July, 2021].

customers of Citibank. This bank refused to comply with this on the ground that the production of documents would subject it to civil liability under laws of Germany. District court requested Citibank to take responsibility for non-compliance and this bank appealed.

Generally, in some cases, the U.S. courts will require a person to provide testimonies or documents overseas though the compliance with this request would cause violation against that nation's laws. However, in some other cases, the court would refuse to give an order that may cause violation against other nation laws.[18]

The problem in *United States v. First National Citibank* occurs more and more and in recent years, some nations approve "rule on prevention" to prohibit the provision of information in these nations in order to comply with an order or a request of a foreign court, for example, Act of Business Protection of UK 1980 and Act of Foreign Proceedings of Australia in 1984.

In conclusion, the U.S. courts have jurisdiction for a case, but it is restricted to make certain requests to relevant parties, usually in case of requesting the defendant to provide information under secrecy laws of another country. This is considered a limitation of court jurisdiction as explained by U.S. judges.

1.5. Limitation of jurisdiction as being set by laws of the country where a transaction is conducted

In *Tennessee Coal, Iron & Railroad Co. v. George*, Supreme Court of the United States, 1914. 233 U.S. 354, 34 S.Ct. 587, 58 L.Ed. 997, Wiley George (defendant), was an engineer employed by the Tennessee Coal, Iron & Railroad Company at its steel plant in Jefferson County, Alabama. While George was under a locomotive repairing the brakes, a defective throttle allowed steam to leak into the cylinder, causing the engine to move forward automatically, in consequence of which he was seriously injured. He brought suit by attachment, in the City Court of Atlanta, Georgia, founding his action on § 3910 of the

[18] Restatement (Third) of Foreign Relations Law of the United States (1986), § 442(2): "If the divulgence of information outside of the U.S. is prohibited by laws, regulation or order of the court or state organization of the nation that the information or potential witness is situated or of the nation that the potential witness hold nationality, [and if that person cannot ask for permission from that foreign nation to produce information], …(b) Court… would not impose sanctions for not respecting the court, for destruction of information or violation as usual, except for intentional concealment or destruction of the information…; (c) Court… may, in suitable cases, deliver disadvantageous conclusion to the party not providing information, though that party tries…"

Alabama Code 1907, which makes the master liable to the employee when the injury is *"caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer."*

The defendant filed a plea in abatement in which it was set out that § 6115 of that Alabama Code 1907 also provided that *"all actions under § 3910 must be brought in a court of competent jurisdiction within the State of Alabama, and not elsewhere." The defendant thereupon prayed that the action be abated because to continue said case of said statutory cause of action given by the statutes of Alabama, and restricted by said statutes to the courts of Alabama, would be a denial, so far as the rights of this defendant are concerned, of full faith and credit to said public acts of the State of Alabama in the State of Georgia, contrary to the provisions of Art. 4, § 1 of the Constitution of the United States."*

A demurrer to the plea in abatement was sustained, and the judgment for the plaintiff thereafter entered was affirmed by the Court of Appeals. The case was then brought to this Court.

Through this case, it is noted further a limitation of jurisdiction when laws of the place where a transaction is conducted provide that the case must be adjudicated in a competent court in such a place, then others have to refuse to accept that case.

2. Suggestions to improve Vietnamese law

The 2015 CPC provides for the grounds to determine the jurisdiction of Vietnamese courts over civil cases or matters involving foreign elements. Accordingly, the common jurisdiction of Vietnamese courts with respect to civil cases or matters involving foreign elements were provided under Article 469 of the 2015 CPC and the exclusive jurisdiction of Vietnamese courts were provided under Article 470 of the 2015 CPC. Besides, Article 472 of the 2015 CPC also provides for the cases where Vietnamese courts' jurisdiction is restricted.[19]

[19] Article 472 of the 2015 CPC provides that Vietnamese courts shall return lawsuit petitions or applications or terminate the settlement of civil cases or matters involving foreign elements if such civil cases or matters both fall in common jurisdiction of Vietnamese Courts and any of the following cases:

(1) Involved parties are entitled to choose dispute settlement methods according to law provisions applicable to civil relationships involving foreign elements and such involved parties have chosen foreign Arbitrators or Courts to settle such cases/matters.

In case where the agreements to choose foreign Arbitrators or Courts are replaced by agreements on choosing Vietnamese Courts, or the agreements to choose foreign Arbitrators or Courts are annulled or cannot be executed, or where the foreign Arbitrators or Courts refuse to accept the petitions, thus Vietnamese Courts shall have the jurisdiction to settle;

In general, Article 472 of the 2015 CPC introduces a lot of new provisions on the cases when Vietnamese Courts have to return lawsuit petitions or applications or terminate the settlement of civil cases or matters involving foreign elements as compared to that of Article 413 of the 2004 CPC (as amended in 2011). Those are the cases where the parties have agreed to choose foreign arbitrators or foreign courts, the cases or matters fall in the exclusive jurisdiction of foreign courts, or the cases or matters accepted for settlement by foreign arbitrators or foreign courts. However, in comparison with the United States law, such new provisions under Article of the 2015 CPC remain with significant restraints and require further amendments for the convenience of practical application.

2.1. Limitation of court jurisdiction when the parties have agreed to choose foreign courts

It is provided under point a, clause 1 of Article 472 of the 2015 CPC that Vietnamese Courts shall return lawsuit petitions or applications or terminate the settlement of civil cases or matters involving foreign elements if: (1) such cases or matters fall in the common jurisdiction of Vietnamese Courts; or (2) the involved parties have agreed to choose foreign Arbitrators or foreign Courts for settlement of such cases or matters.

However, there are exceptions to the above provision. Accordingly, Vietnamese Courts shall have the jurisdiction to settle the civil cases or matters if the agreements to choose foreign Arbitrators or Courts are annulled or incapable of being performed or the parties' agreements to choose foreign Arbitrators or Courts are replaced by agreements on choosing Vietnamese Courts or where the foreign Arbitrators or Courts refuse to accept the petitions.

Similarly to the United States law, Vietnamese law recognises the cases where Vietnamese courts may not have jurisdiction to

---

(2) The civil cases or matters do not fall within the exclusive jurisdiction of Vietnamese Courts specified in Article 470 of this Code and fall in the exclusive jurisdiction of relevant foreign Courts;

(3) The civil cases or matters do not fall within the exclusive jurisdiction of Vietnamese Courts specified in Article 470 of this Code and have been accepted for settlement by foreign Arbitrators or Courts;

(4) The civil cases or matters have already been settled by judgments/decisions of the foreign Courts or by foreign Arbitrators awards.

If such judgments/decisions or awards thereof are not recognized by Vietnamese Courts, Vietnamese Courts shall have jurisdiction to settle such cases or matters;

(5) The defendants are eligible for sovereign immunity.

settle civil cases or matters if the parties have agreed on selection of dispute resolution institution. This is a relatively new provision of the 2015 CPC. For the first time, the 2015 CPC mentions the jurisdiction of Vietnamese courts when the parties have agreed on selection of Vietnamese courts for dispute resolution under point c, clause 1 of Article 470 and in case Vietnamese courts have to return lawsuit petitions or applications or terminate the settlement of civil cases or matters involving foreign elements if the parties have agreed on selection of a foreign court under point a, clause 1 of Article 472. However, as compared to the United States law, Vietnamese law recognises the parties' right to agree on selection of the court of jurisdiction without providing for more precisely on the validity of the same such as form of agreement on selection of the court of jurisdiction, scope of the validity thereof, or the time of agreement on selection of the court of jurisdiction, etc.

In addition, it is provided under point a, clause 1, Article 472 of the 2015 CPC that Vietnamese courts shall still have the right to settle the civil cases or matters even when the parties have agreed on selection of foreign courts if the *"agreement on selection of the foreign court is null and void"* or "*is incapable to be performed"*. Nevertheless, Article 472 as well as other by-law documents under the 2015 CPC do not provide for explanation of cases where an agreement on selection of court of jurisdiction is considered as null and void or is incapable to be performed.

Meanwhile, in the United States, the parties' right to agree on selection of the court of jurisdiction is not only recognised under applicable laws but the United States law also specifically provides for the validity of an agreement on selection of the court of jurisdiction as well as the cases where an agreement on selection of the court of jurisdiction is considered as null and void. For example, in order for an agreement on selection of the court of jurisdiction to be valid, the party subject to the implementation of the term for selection of the court of jurisdiction must be "notified" that such term has been incorporated in the relevant contract between or among the parties; the term for selection of the court of jurisdiction may become null and void for the reason of being inappropriate or in contrary to the national public policies or the parties cannot use their contract to request the Court to settle cases which do not fall in such scope. The Second Restatement (volume no. 2 on private international law) also mentions another case that may result in invalidation of the term for the parties' selection of the court of jurisdiction. Specifically, when a party is able to prove that it will suffer an extremely material adversity as a result of such agreement that at the time of agreement, it could not foresee. However, in order to apply this case, the party who objects to agreement on selection of the court of jurisdiction must provide clear, express, persuasive demonstration and the obligation that it is subject to is really a cumbersome and material obligation[20].

Thus, basing on the limitation of Vietnamese law as analysed above as well as under the viewpoint of comparison with United States law, Vietnamese law should supplement additional provisions with respect to agreement on selection of the court of jurisdiction such as conditions for the validity of the agreement on selection of the court of jurisdiction, the extent allowed for selection of the court of jurisdiction, and the form of such agreement.

2.2. The case of limitation of jurisdiction where the defendant is eligible for sovereign immunity

Under the Vietnamese law perspective, one of the events that the Vietnamese courts must return lawsuit petitions or applications or terminate the settlement of civil cases or matters involving foreign elements is the case when defendants are eligible for sovereign immunity (Article 472.1.dd, the 2015 CPC). Accordingly, the subjects entitled for sovereign immunity shall include foreign organisations, entities, and individuals that fall under the category that enjoys diplomatic privileges and immunities or consular privileges and immunities and foreign countries.

With respect to foreign organisations, entities, and individuals that fall in the category that enjoys diplomatic privileges and immunities or consular privileges and immunities under Vietnamese laws and international treaties to which the Socialist Republic of Vietnam is a signatory, Article 2.4 of the 2015 CPC expressly provides that the civil cases or matters related to such individuals, agencies and/or organizations shall be settled through the diplomatic channel. Moreover, Article 43 of the Vienna Convention on Consular Relations in 1963, Article 12 and Article 28 of the Ordinance on Privileges and immunities for foreign diplomatic missions and consular offices and representative offices of international organizations in Vietnam also

[20] See Section 2.1. of The Second Restatement (volume No. 2 on private international law)

provides exceptions that a diplomatic agent and a consular officer shall not be entitled to prosecution immunity such as: the civil lawsuit arising out of a contract entered into by such consular officer not under the name of the country that he/she represents, a dispute relating to a real property owned by such diplomatic agent not on behalf of his/her country.

Article 4.2 of the 2015 CPC does not provide the resolution by way of diplomatic channels with respect to civil cases or matters involving foreign countries as litigants of the same. Deriving from the principle of national sovereignty, states are special subjects of international private law, subjects which have sovereignty. National sovereignty is an element that cannot be infringed and must be protected. Hence, when participating in civil cases or matters with foreign elements, states must also enjoy the immunity.

However, the question is whether foreign states should enjoy the immunity rights in all events. This is not expressly provided under the law of Vietnam.

Under Article 100 of the 2015 Civil Code, it is provided that when participating in civil relations with the Socialist Republic of Vietnam, central and local state agencies, or legal entities or individuals of Vietnam, foreign states shall also be subject to civil obligations incurred as the results of their participation in such civil relations in the event that international treaties that they are signatory parties provide for the waivers of immunity or the parties under such civil relations agree to waive the immunity, or such states declare to waive the immunity.

Hence, the law of Vietnam does not provide specific cases where foreign states are not entitled for sovereign immunity. The provisions under Article 100 of the 2015 Civil Code may be construed that foreign states will always be entitled for sovereign immunity unless such states declare to waive the immunity in accordance with international treaties or in accordance with their agreements or declarations as provided under the laws of such states. Such provisions in fact will create adverse impact on Vietnamese citizens and legal entities when they participate in civil transactions with foreign states.

Under a comparative perspective, the United States law also recognises that a foreign state may be eligible for sovereign immunity before the federal court or the state courts of the United States.

However, the United States law[21] provides for a number of cases where a foreign states shall not be immune from the jurisdiction of courts of the United States or of the States, including the followings: (i) the foreign state has waived its immunity either explicitly or by implication,[22] (ii) the action is based upon a commercial activity carried on in the United States by the foreign state or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States, (iii) rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state- or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States, (iv) rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue, or (v) money damages caused by the fault of the foreign State.[23] It can be seen that, when participating in the above civil relations, foreign states shall be automatically not entitled for sovereign immunity without having to declare their waivers thereof. Such provision represents the content of the relative sovereign immunity doctrine which has been now recognised by many countries in the world. This provision is aimed to create the balance on legal standing between foreign states and other subjects being individuals and legal entities, thus, ensuring the implementation of the common principle of the civil laws which is equality.

Under the practical perspective, currently the 2004 United Nations Convention on Jurisdictional immunities of states and their property as well as the majority of states are in favour of the doctrine of relative sovereign immunity. Accordingly, the Convention and the laws of such states provide for a number of cases where foreign states shall not be entitled for sovereign immunity. As such, in practice of certain civil relations with foreign elements with the participation of the Government of Vietnam and lawsuits against it are initiated in foreign countries, the Government of Vietnam is not

[21] The Foreign Sovereign Immunities Act 1976.
[22] Article1605 of the Foreign Sovereign Immunities Act 1976.
[23] Article 1605 of the Foreign Sovereign Immunities Act 1976.

entitled to sovereign immunity in accordance with applicable laws of such foreign countries where the courts settling such lawsuits are located. A typical example is a civil case related to Can Gio Vessel. In 1999, Mohamed Enterprises with Tanzanian nationality entered a rice purchase contract with the state-owned company namely Thanh Hoa Company in Tien Giang Province. Later, Thanh Hoa Company hired a vessel to transport the rice for delivery to the buyer and such vessel disappeared. Mohamed Enterprises initiated a lawsuit without having been appropriately settled. Four years later, Can Gio Vessel of Sea Company berthed at a port in Tanzania and was arrested to put pressure on the Government of Vietnam with respect to the payment of the outstanding amount of the contract. During the trial at the court of Tanzania, the court considered the Government of Vietnam as the 12th defendant in the lawsuit because according to the court, the doctrine of the foreign states' sovereign immunity is relative, and the Government of Vietnam actively participated in the transportation phases of the goods. The Government of Vietnam was later prosecuted with an amount of fine at approximately USD 2 million.[24]

Thus, when foreign states opine that the sovereign immunity is relative, the Government of Vietnam is still subject to lawsuits before foreign courts of jurisdiction.

However, in Vietnam, the provisions under Article 100 of the 2015 Civil Code contribute to creating favourable conditions for foreign states when they participate in civil transactions with Vietnamese citizens and/or legal entities. For instance, the sales and purchase contract entered into between a foreign state and a Vietnamese legal entity. The foreign state is a defaulting party under such a contract and the Vietnamese legal entity initiates a lawsuit at a Vietnamese court. However, pursuant to Article 100 of the 2015 Civil Code, the foreign state shall always have sovereign immunity unless it waives such right provided under an international treaty that it is a signatory party or provided under the applicable national laws or under a mutual agreement between the concerned parties. As such, adverse positions will be all on the Vietnamese legal entity.

From the above reasons, it is recommended that Vietnamese law must contain more specific provisions on sovereign immunity.

[24] Dai D. V., Quy M. H. (2010), *The International Private Law of Vietnam*, The National Political Publishing House of Hanoi, p. 150.

Specifically, it must define the cases where foreign States are not immune for the purpose of practical application of the provisions under the 2015 CPC as well as creating equality, convenience for Vietnamese individuals and enterprises when participating in civil transactions with a foreign State.[25]

2.3. The case of forum non conveniens

As analysed above, the doctrine *forum non conveniens* may be understood as the case when a Court of a country refuses its jurisdiction over a civil case or matter involving foreign elements that it should have been provided with complete jurisdiction under the relevant national laws. Such refusal by the Court in this case derives from the reason that there is an existing foreign Court which is more convenient in settling such civil cases or matters. Nowadays, the doctrine of *forum non conveniens* is widely accepted in the common law system.

In contrary to the United States law, the doctrine of *forum non conveniens* is not accepted for adoption in Vietnam. However, in our opinion, a number of provisions on determining the jurisdiction of Vietnamese courts with respect to civil cases or matters involving foreign elements under the 2015 CPC when applied in practice will result in difficulty for Vietnamese courts in settlement of such cases or matters, as well as result in difficulty in issuing judgements, decisions of Vietnamese courts. For example: Points đ, e of paragraph 1, Article 469 of the 2015 CPC are provisions that extend the common jurisdiction of Vietnamese courts. Specifically, point đ provides for Vietnamese courts to have jurisdiction over civil cases or matters related to civil relations which are established, changed or terminated in Vietnam, objects of which are properties in Vietnam or acts performed in Vietnam. Point e provides for Vietnamese courts to have jurisdiction over civil cases or matter civil cases or matters related to civil relations which are established, changed or terminated outside Vietnam but involve rights and obligations of Vietnamese agencies, organizations and individuals or agencies, organizations and individuals that are headquartered or reside in Vietnam. However, in many situations, the linkage with Vietnam is very vague. For a civil case or matter which does not have much linkage with Vietnam that a Vietnamese court determines itself to have common jurisdiction over such case or matter and accepts to settle or resolve, it will face significant challenges as well as difficulty

[25] Giang L. T. N. (2016), *International Private Law,* The Ho Chi Minh City National University Publishing House, p. 253.

in enforcement of the judgement or decision issued by the Vietnamese court. For example, a Vietnamese passenger transport company takes tourists to Cambodia for a tour. However, on the way, the bus had an accident resulting in deaths and injuries to tourists with Cambodian nationality. These passengers submitted statements of claims to a Vietnamese court for compensation of damages. Pursuant to point e, clause 1, Article 469 of the 2015 CPC, Vietnamese courts shall have jurisdiction over the cases. However, in this case, all facts occurred in Cambodia, damages incurred in Cambodia, and the injured parties were Cambodian citizens residing in Cambodia. Thus, the question is whether it is reasonable or convenient for Vietnamese courts to settle the case?

It is provided under point c, clause 1, Article 469 of the 2015 CPC that Vietnamese courts shall have common jurisdiction if the defendants have assets in Vietnam. This provision is aimed at providing convenience for the enforcement of judgements, decisions in Vietnam because when the defendants have assets in Vietnam, the enforcement of judgements or decisions will be easier. However, if the defendants have assets in Vietnam, however, the value of such assets are too low as comparing to the value of the assets in dispute, and it is insufficient for enforcement of the related civil case or matter, then the acceptance for settlement by Vietnamese courts will not bring about significant effectiveness and meet the demand of the parties.[26]

Thus, although the doctrine of *forum non conveniens* is yet accepted in Vietnam, if Vietnamese courts apply the contents of the doctrine of *forum non conveniens* in practice, it will be more convenient for Vietnamese court in settling civil cases or matters involving foreign elements, ensuring that such cases or matters to be settled before the most suitable court, hence, increasing the enforceability of the Judgement and satisfying the interests of the parties.

Conclusion

The United States law has not only recognized the grounds to determine the national courts of jurisdiction with respect to civil cases or matters involving foreign elements but also provided the cases where the United States courts do not have jurisdiction including cases where such jurisdiction is limited due to the parties' agreement

[26] Nam P. H. (2017), 'The doctrine of forum non conveniens in the United States private international law–Some experience for Vietnam', *Vietnamese Journal of Legal Sciences*, Ho Chi Minh City University of Law, 06(109), p. 59.

incorporated in the related contract, deceiving, coercion or the subject eligible for immunity, *forum non conveniens* or the case of limitation of jurisdiction provided by the national law of the country of institution with jurisdiction to settle such civil cases or matters or provided by the national law of the country where the related contract is implemented. By way of comparing provisions of Vietnamese law and the United States law, the authors also provide a number of recommendations to complete the provisions of Vietnamese law on the limitation of the jurisdiction of the national courts with respect to civil cases or matters involving foreign elements, i.e., recommendations on supplementing the provision on agreement on selecting of the court of jurisdiction, the immunity of a foreign State or the consideration to apply the doctrine of *forum non conveniens* in practice with respect to determining the jurisdiction of Vietnamese courts over civil cases or matters involving foreign elements. ●

References

Cases

[1] *High Life Sales v. Brown-Forman Corp.*, 823 S.W. 2d 493 (Mo. 1992)

[2] *Terlizzi v. Brodie, Supreme Court, Appellate Division, Second Department*, 1972. 38 A.D.2d 762, 329 N.Y.S.2d 589). Retrieved from https://casetext.com/case/terlizzi-v-brodie [accessed on 30 July, 2021]

[3] *United States v. First National City Bank*, 379 U.S. 378 (1965). (n.d.). Retrieved from https://supreme.justia.com/cases/federal/us/379/378/ [accessed on 30 July, 2021]

Books and Journal

[4] Carlson M. D. (2017, June 30), 'Forum non Conveniens'. Retrieved from https://www.law.cornell.edu/wex/forum_non_conveniens [accessed on 30 July, 2021]

[5] Dai D. V., Quy M. H. (2010), *The International Private Law of Vietnam*, The National Political Publishing House of Hanoi

[6] Dyson S. and Johnson K. D. (2011), 'Enforcement of Forum-Selection Clauses in Employment Agreements', *The Federal Lawyer*

[7] Edward L., Barrett Jr.(1947), 'The Doctrine of Forum Non Conveniens', *35 Calif. L. Rev.*

[8] Giang L. T. N. (2016), *International Private Law,* The Ho Chi Minh City National University Publishing House

[9] Hay P. (2009), *Cases and Materials – Conflict of Law (Thirteenth Edition),* Foundation Press

[10] Nam P. H. (2017), 'The doctrine of forum non conveniens in the United States private international law–Some experience for Vietnam', *Vietnamese Journal of Legal Sciences*, Ho Chi Minh City University of Law, 06(109)

[11] The Uniform Criminal Extradition Act (1932), *Columbia Law Review,* 32(8)