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# INTERNATIONAL TORT LAW IN VIETNAM – TAKING STOCK AND THE CASE FOR REFORM

**Abstract:** *This article proposes that the current Vietnamese conflict of law rules for tort actions, which presently use the place of damages rule to determine the applicable law (meaning applying the law of the jurisdiction where the damage occurred), should be supplemented with additional conflicts of law rules in order to address the problems presented by specific tort actions such as environmental pollution, product liability, intellectual property rights, and violations of competition rules. It is proposed that for these specific torts, the place of damages rule needs to be either replaced by other connecting factors, such as the place of acting or the rule of closest connection, or it has to be made more concrete. In other types of torts, the rule has to be rebuttable by the foreseeability defense or has to give way to a ubiquity rule granting the plaintiff the choice between the laws of the place of damage and the laws of the place of acting.*

**Keywords:** applicable law, conflict of law, place of damage, tort, Vietnam

## INTRODUCTION

In the past 15 years, the Vietnamese courts have been adjudicating on an increasing number of civil cases with foreign elements. The Ministry of Justice's Explanatory Report of The Civil Code 2015 Project[1] provided data from the Supreme Court that between 2003 and March 2013, the courts at all levels had settled 12,473 civil cases with foreign elements, accounting for 2.42% of all civil cases. Another report by the

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[1] Ministry of Justice (Vietnam), Explanatory Report of the Civil Code 2015 Project, September 2014, available at: https://tinyurl.com/r35kdax (accessed 30 May 2021), at 83.

Supreme Court in 2019[2] showed that in each year between 2014 and 2018 the courts handled between 80 and 151 business and commercial cases with foreign elements, which were mainly concentrated in the provincial courts of Ho Chi Minh City, Hanoi, and Binh Duong.[3]

International tort cases are also increasing, although they usually account for smaller numbers[4] compared to family and commercial cases. In the years 2012-2014, when we wrote the very first book in the English language on contracts and torts in private international law in Vietnam,[5] numerous problems were found related to cross-border discharge and waste transport, imported Chinese products containing toxic chemicals, traffic accidents, and the fraudulent treatment of foreign medical doctors. However, when court judgments were examined, only a few judgments were found.[6]

After five years, more crossborder damage cases in traffic accidents were found,[7] and the spread of environmental pollution appears to be growing and severe.[8] Liability actions against Vietnamese products exported to other countries are also expected to increase.[9] Emerging competition infringements and violations of foreign intellectual

[2] Report by the Vietnamese Supreme Court at a conference for exchanging experiences between Vietnamese and international judges on resolving international commercial disputes and the recognition and enforcement of foreign arbitral awards, held on 22 October 2019. The conference was co-organized by the Vietnamese Supreme Court, UK Government, Cour de Cassation (France) and UNDP.

[3] Ho Chi Minh City is the largest city in Vietnam in terms of its economy. Hanoi is the capital city and the second largest city in terms of its economy, and Binh Duong is a dynamic city and a leading city in attracting foreign investment and the location of many industrial zones.

[4] Data on the number of international tort cases handled by the Vietnamese courts is not available. The judgments of Vietnamese courts have recently been published on the website of the Supreme and local courts, but the published cases are categorized, based on the branches of law, into criminal, civil, commercial, family, etc. International cases have not been counted and reported separately; therefore, they are spread though these categories. Researchers have had to self-screen, and journals, reports and comments specifically concerning private international law cases have not been available.

[5] T. Nguyen, *Private International Law in Vietnam*, Mohr Siebeck, Tübingen: 2016.

[6] *Ibidem*. As I have explained at 154 "this is mainly because Vietnamese community has not been aware of the potential to take actions of this sort."

[7] Traffic accidents involving foreigners increased in the first 8 months of 2019. Information given by the Head of Traffic Safety, Department of Ministry of Traffic and Transport, posted on "Báo Văn hóa điện tử," available at: https://tinyurl.com/tt6odxp (accessed 30 May 2021).

[8] The ten companies causing the most severe pollution in Vietnam were named as Formosa Ha Tinh, Thermal Power Vinh Tan 2, Vedan Vietnam, Mei Sheng Textiles Vietnam, tannery Hao Duong, Sonadezi Long Thanh, ship building Hyundai-Vinashin, weaving and dyeing Pangrim Neotex, Miwon and the sugar company Hoa Binh, according to the investment forum bizlive.vn. Many of these companies are shell companies of Taiwanese and Korean enterprises.

[9] In a presentation in 2015 to AIG (American International Group Inc.), a leading international insurance organization pointed out that recalls of Vietnamese-manufactured goods had been increasing and claimed that trends in the US Consumer Product Safety Commission had switched from China to Vietnam, available at: https://tinyurl.com/ua6wktf (accessed 30 May 2021).

property rights are also expanding.[10] More Vietnamese court judgments resulting from these kinds of tort actions are being published. Based on our observations, the most significant increase has been in cases involving the infringement of intellectual property rights, where the plaintiffs are foreign company rights holders.

Theoretically, when dealing with an international tort case, after assuming international jurisdiction the court will ascertain the applicable law. This step has to be taken before it can handle any substantive law problems. The tool used to find the applicable law is the conflict of law rules in torts. In this article, the current Vietnamese conflict of law rules on torts will be examined to propose a solution to the problems the courts have to cope with when applying these rules to complex torts and specific cases. The article will then prescribe preliminary steps for more modern and appropriate special conflict of law rules for four particular types of torts; namely environmental damage, product liability, intellectual property rights, and competition. It is proposed that for these specific torts, the place of damages rule needs to be either replaced by other connecting factors, such as the place of acting or the rule of closest connection, or it has to be made more concrete. In other types of torts, the rule has to be rebuttable by the foreseeability defense or it has to give way to a ubiquity rule granting the plaintiff the choice between the laws of the place of damage and the laws of the place of acting.

## 1. VIETNAMESE CONFLICTS OF LAW RULES FOR TORTS

The quality of the Vietnamese conflicts of law rules is of key importance in order for them to work in practice, and they should be suitable to the situation in Vietnam, economically, legally, etc. The first conflict of law rules for torts appeared in Vietnamese law in the Civil Code 1995,[11] and they remained unchanged in the Civil Code 2005,[12] where they provided for the application of the laws of the country where the act causing such damage took place or where the actual consequences arose. The rules also included an exception to the *lex loci delicti* principle in its ubiquity, which provided that where the act causing the damage occurred outside the territory of Vietnam, but where the person who caused the damage and the victim were both Vietnamese citizens/legal persons, in such situations Vietnamese law applied.

The current Civil Code 2015 has made significant changes to the conflict of law rules for torts. Art. 687 reads, with regard to *compensation for non-contractual damages:*

1. Parties may agree to choose the law applicable to the compensation for non-contractual damages, except in the case provided in clause 2 of this article. Where there is no

[10] Increasing numbers of cases of cross-border competition infringements and violations of intellectual property rights handled by Vietnamese courts have been reported by Vietnamese law firms on the website Managing IP (https://www.managingip.com).

[11] *See* Art. 835.

[12] *See* Art. 773.

agreement, the law of the country in which the consequences of the event causing loss and damage arise, shall apply.

2. Where a party having caused loss and damage and an aggrieved party have the places of residence in the case of individuals or the places of establishment in the case of legal entities in the same country, the law of that country shall apply.

This article gives the parties the right to choose the applicable law for compensation for non-contractual damages. However, this right is eliminated in the case where the party having caused loss and damage and the aggrieved party both have their place of residence, in the case of individuals, or their place of establishment, in the case of legal entities, in the same country. In such a situation, the law of that country shall apply.

Where there is no agreement, the article provides for the law of the country in which the consequences of the event causing loss and damage arose. Therefore, the general Vietnamese conflict of law rules for torts opts for the place of damage and not the place of acting or the ubiquity rule. The legislators provided two rationales for this choice.[13] Firstly, when the place of acting and the place of injury were in different countries, it was not clear whether the court or the plaintiff was to choose between the two possible applicable laws. Where the law gave no priority between the two places, they were afraid that different courts may not apply them consistently. Secondly, the place of damage would better protect the victims. However, the Ministry of Justice did not explain anything further with respect to the second rationale. It is supposed that when the Ministry said that choosing the place of damage would better protect the victims, it was referring to conflict of laws justice rather than any substantive fairness. Specifically, the place of damage took into account the expectations of the victims. Since victims often sustain damages in the country in which they reside, the application of the law of that place would satisfy their expectations with respect to the applicable law and provide a level of redress that matches their social and economic backgrounds.

The exception of Art. 687(2) referring to the common residence shall apply where the tortfeasor and the victim have a place of residence in the case of (individuals) or place of establishment (in the case of legal entities) in the same country. In this scenario, the laws of the country of common residency shall apply instead of those of the place of damage.

A notable feature is that where there is no agreement between the parties, Vietnam has only one general rule of place of damage, rebuttable by a common residence exception. This rule would apply to most kinds of torts, except for maritime torts[14] and torts caused by aircraft,[15] which are regulated separately in the Vietnamese Maritime Code 2015 and Law on Aviation 2006.

Another feature is that the article on conflicts of law rules does not provide an escape clause of closer connection to the tort[16] in order to reach justice in individual

[13] Ministry of Justice, *supra* note 1, at 98.

[14] Art. 3 of the Vietnamese Maritime Code 2015.

[15] Art. 4 of the Vietnamese Aviation Law 2006.

[16] *See* S. Symeonides, *Codifying Choice of Law in Tort Conflicts – The Oregon Experience*, 12 Yearbook of Private International Law 201 (2010) (for the three different types of escape clause in worldwide codi-

cases. As such, there is no flexibility provided for in Art. 687 of the rules for conflicts of law. However, there is another possibility, which is to fall back on the principle which was designated for determining the applicable law for the whole of civil relations with foreign elements, which is enshrined in Art. 664(3) of the Civil Code 2015. It provides that the law applicable to civil relations with foreign elements is the law of the country that has the closest connection to the relations. Moreover, the intention of the legislation given in the Ministry of Justice's report confirmed this overall principle. It stated that the connecting factors prescribed in the conflicts of law rules in the Civil Code are, in nature, concretized from the closest connecting laws. The legislation has tried to break down this default principle into presumptive rules for different relations, aiming to identify as far as possible the connecting factors that represent the most closely connected laws.[17]

Therefore for tort actions, if the parties do not agree on the applicable law, the law of the place of damage is believed to be most closely connected to the tort; and where the parties have a common residence, that country is more closely connected and its laws are applicable. The question is whether this default principle, i.e. of applying the law most closely connected, which was given in an article intended for general application, can itself generate the effect of a default clause for conflicts of law rules in tort actions, without having it expressly codified in the wording of the specialized article on conflicts of law for torts. Why is such a default clause, i.e. of a closer connection principle, codified directly in the article on conflicts of law for contracts, but not for tort actions? Arguably, this means that the legislators did not intend the conflicts of law rules for tort actions to have a default clause.

As such, the formula for Vietnamese law involving conflicts of law in tort actions, in the absence of an agreement by the parties, is the place of damage rule, which in turn gives way to the common residence rule, and arguably to the closer connection approach as a last resort.

## 2. THE APPLICATION OF THE GENERAL CONFLICTS OF LAW RULES FOR TORTS INVOLVING ENVIRONMENTAL DAMAGE

In studying the cases of cross-border environmental damages involving the Vietnamese people, one might think first of the Agent Orange/dioxin case filed before US courts by Vietnamese nationals in 2004 (represented by the Vietnam Association for Victims of Agent Orange – a Vietnam-based organization). The claims were brought under the Alien Tort Statute against the chemical companies that produced the dioxin-contaminated herbicides which were employed by US troops to protect against

fications: general (simple/pure) clause; "pre-existing relationship escape"; and a combined clause incorporating the closer connection principle and a significant pre-existing relationship).

[17] Ministry of Justice, *supra* note 1, at 92.

ambushes in South Vietnam during the Vietnam war. Apart from the claims that the defendants were in violation of international law and had committed war crimes, the plaintiffs also lodged tort claims based on state law. The claims were mainly for product liability, not environmental damages. However, the environmental damage claim would have failed as well, as the court concluded that "the governmental contractor defense operates as a complete bar to plaintiffs' state law claims."[18]

One can imagine a scenario in which a Vietnamese court hears a similar case, and it applies the current conflict of law rules to ascertain the applicable law for the environmental damage tort claim. The rigid place of the damage rule points strictly to Vietnamese law. If the Vietnamese conflict of law rules for tort actions are interpreted strictly, there would be no chance to evoke the US government contractor defense (if the Vietnamese court was to characterize it as substantive), in which case the Vietnamese victims might have a better chance of succeeding in the case. If the stance of favoring the victims and substantive justice is taken, the Vietnamese conflict of law rules may succeed in this example. However, if the aim is at the international harmonization of decisions and conflict justice, the Vietnamese conflict of law rules fail, as they offer no opportunity to take into account the law of the place of acting, even though this law may contribute to the substantive result of the case.

Meanwhile, two contemporary cases of very severe environmental damage concern two companies that were established in Vietnam, but with 100 percent of their shares being held in Taiwan, namely Vedan Vietnam[19] and Formosa Ha Tinh.[20] The two respective companies discharged toxic chemicals and caused severe pollution to the Thi Vai river in 2008 and the ocean coast of central Vietnam in 2016. The damages did not spread to a second country, and the assumed defendants (the two companies) were regarded as Vietnamese legal entities since Vietnamese conflict of law rules use the incorporation theory to determine the nationality of the companies.[21] Therefore, when the Vietnamese victims sued the two companies to seek compensation for the damages to their health and property that they had suffered as a consequence of the discharges of toxic chemicals from the two plants, they filed their complaints in local courts and the cases were considered as domestic civil litigations. Notably, in the *Formosa Ha Tinh* case, the local court of the Ky Anh District (Ha Tinh Province) dismissed 506 petitions from people requesting Formosa Ha Tinh to compensate for damages caused by the

[18] *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 92d Cir. 2008), III, at 16.

[19] The main products of *Vedan Vietnam* are monosodium glutamate and ingredients. The company's website in the Vietnamese language is available at: http://vedan.com.vn/vi-vn/Aboutvedan/CategoryId/28 (accessed 30 May 2021).

[20] According to Wikipedia, Formosa Ha Tinh Steel Corporation (Chinese: 台塑河靜鋼鐵興業責任有限公司, Vietnamese: Công ty TNHH Gang Thép Hưng Nghiệp Formosa Hà Tĩnh, abbr. FHTS) is a steel plant established in the Vung Ang Economic Zone, Vietnam, by the Hung Nghiep Formosa Ha Tinh Steel Company under the backing of the Taiwanese conglomerate Formosa Plastics Group. Development of the plant began in the 2010s and steel production started in May 2017.

[21] Art. 676(1) of the Civil Code 2015 provides that "the nationality of a legal entity shall be determined in accordance with the law of the country in which the legal entity was established."

company to the sea, resulting in massive fish deaths.[22] The Vietnamese plaintiffs have brought further litigations before a Taiwanese court against the mother company, but the Taipei District Court dismissed the case against Formosa Plastic Group for lack of jurisdiction.[23]

Given such precedents, let us assume a hypothetical situation whereby Vietnamese victims bring an environmental damage claim before a Vietnamese court directly against the controlling company in Taiwan, or in conjunction with its subsidiary, the Vietnamese company. The direct claim would need to succeed first at the jurisdictional level. The separate legal personality of the Vietnamese company could possibly be disregarded and/or the court could accept the theory of *piercing the corporate veil*[24] to allow the direct claim against the mother company.[25] If the victims can successfully overcome these hurdles, in turn the choice of law rules for torts comes into play. The place of damage rule will obviously prescribe Vietnamese law. But what if Taiwanese law, which has successfully been established as the law of the place of acting (the place where the fraudulent decisions were made), is more favorable to the victims, e.g., prescribing a higher level of precautionary principles or, and more possibly, a higher level of redress? From the point of view of the substantive policy considerations of protecting the environment and victims, the application of the law of the place of damage is too rigid; there should be a way for the law of place of acting to prevail. European countries actually employ substantive justice just for environmental damage torts through Art. 7 of the Rome II Regulation, which grants the person seeking compensation due to the damage the right to opt for the law of the country in which the event giving rise to the damage occurred if she/he does not wish the place of damage rule to apply.

What would occur in the case where the damages spread to a second neighboring country, like Thailand's coast, and claims were brought by Thai nationals against the Vietnamese polluters? The jurisdiction of the Vietnamese courts for this case is obvious, but the applicable law would be Thai law. There is no chance for Vietnamese law

[22] According to the leading news website "Thanhnien.vn," the reason why the Ky Anh Town People's Court dismissed the petitions was that the petitions and documents of the people suing failed to provide the necessary documents and evidence proving the actual damage according to Clause 5, Art. 189 of the Civil Procedure Code 2015, and that the incidents have been settled by the effective decision of the competent State agency under Point C, Clause 1, Art. 192 of the aforementioned Code. Specifically, the Prime Minister issued Decision 1880 on 13 October 2016 regarding the levels of compensation for the victims in the four central provinces damaged by marine environmental incidents, regarding which Formosa Ha Tinh agreed to pay 500 million US dollars as compensation to the victims.

[23] *See* more information at the JFFV-Justice of Formosa Victims website, available at: https://jffv.org/2020/01/17/taipei-times-vietnamese-plaintiffs-to-fight-dismissal-of-fpg-case/ (accessed 30 May 2021).

[24] Vietnamese laws do not contain codified rules employing the *piercing the corporate veil* theory to enable such claims.

[25] *See more* M. Renner, *Companies, transnational groups of*, in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Elgar Publishing, Cheltenham: 2017, at 412. Most states have only a few codified rules on *piercing the corporate veil*, mainly in bankruptcy law: "Generally, English and US common law as well as French civil law allow for tort liability of controlling companies only under a narrow set of circumstances, namely when the control over the subsidiary was excessive and used in a fraudulent way."

to intervene, although it is the law of the place of acting and also the *lex fori*. More dramatically, when the conflict involves conduct-regulating rules (if it is assessed in light of US law in The Restatement of the Law Third, Conflict of Laws[26]) the Vietnamese law could produce more favorable results to the victims. What if the Vietnamese national plaintiffs also sue the same defendants and have Vietnamese law applied to the same tort action? Should applying Vietnamese law to both claims promote a solution of better fairness between the different claimants?

Based on the above analysis, it is suggested here that the current Vietnamese conflicts of law rules for torts are not equipped to handle complex cases of cross-border environmental damage. The proposed solution is that a separate conflict of law rule for environmental damage tort actions be enacted; one that would give victims the option to base their claim on the law of the country where the event giving rise to the damage occurred, in order to ensure the highest level of protection for them as well as for the environment. When the victims are given the right to choose between the two different laws, they are likely to choose the law more favorable to them, usually the law giving them a higher level of redress. Thus the Thai victims in the above-mentioned case example would be able to choose Vietnamese law, which may be more favorable to them. The proposed conflict of law rule would treat victims in different jurisdictions with greater fairness, in that in their cases they could resort to the national laws which are better for their claims.

The most difficult scenario involves a cross-border collective redress action, for example, where both Vietnamese and Thai plaintiffs sue the same defendant seeking compensation for private damages to their life, health, and property due to environmental pollution caused by a plaintiff in Vietnamese territory.[27] Indeed, the Vietnamese Civil Procedure Code 2015 does not provide a definition of "collective redress," but it does allow multiple organizations/individuals to sue an agency/organization/individual for one or more related legal relations in order to resolve the same case.[28] However, the suits must be filed individually and the right to join or separate the cases belongs to the court, and court practice with respect to either consolidating or treating such suits separately is inconsistent,[29] and with regard to cross-border litigation the practices

[26] The Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 2 (12 August 2016) makes a distinction between loss-allocating and conduct-regulation rules and prescribes different conflict rules for the two categories. In doing so, the US method is different from the unilateral approach in EU law that aims to ascertain the applicable laws to the entirety of tort relations.

[27] It should be noted that in the field of environmental law (notably in Decree No. 03/2015/ND-CP dated 6 January 2015 providing for the determination of environmental damage), Vietnam only allows the relevant state administrative organizations to act as the plaintiff in claims of ecological damages caused by pollution. This right has not been granted to individuals and civil social organizations. Individuals can however file claims for private damages to health, property, etc., which they have suffered as a result of environmental pollution caused by the alleged tortfeasor.

[28] Clause 2 of Art. 188.

[29] There has been a domestic case wherein the trial court decided to join the cases, but the appeal court cancelled the judgment because of an issue connected with the joining of the cases.

would be even more unpredictable. Given the situation described, Vietnam should have a careful jurisdictional design for cases of collective redress related to environmental damage, especially for those cases with cross-border aspects.[30] In terms of choice of law rules, a similar careful design should also be prepared for this difficult situation, perhaps to allow for a more-defendant-focused connecting factor to enable the same applicable law.[31]

## 3. THE APPLICATION OF THE GENERAL CONFLICTS OF LAW RULES FOR TORTS INVOLVING PRODUCT LIABILITY

Product liability is another complex type of tort (with the conduct and the injury often taking place in different states), where the place of damage rule cannot properly fulfill its role in designating the applicable law. The major attack on the rule is the lack of provision for a foreseeability defense, by which the producers may argue that they could not be able to foresee the marketing of the product in the place where the damage actually occurred, thus making the application of the law of the place of damage unforeseeable to them. To tackle this problem, EU law has developed a special conflict of law rule[32] for this complex tort. It employs a cascading system of connecting factors, pointing first to the residence of the plaintiff, next to the place of acquisition of the product, and then to the place of damage, provided that each of the three factors coincided with the place of the marketing of the product. The Hague Convention on the law applicable to product liability of 1973 also employs complex rules for determining the applicable law for tort liability.[33] In the US, special rules for product liability were drafted later for The Restatement of the Law Third, Conflict of Laws.[34]

With regard to Vietnam, it is very likely that Vietnamese manufacturers will increasingly be sued by consumers in countries to which their products are exported.[35] Let us examine the case scenario whereby foreign consumers file product liability claims against Vietnamese manufacturers in Vietnamese courts.[36] The applicable law, in accordance with the current Vietnamese conflicts of law rules for tort actions, is the product safety

[30] For collective redress in private international law, *see* H.M. Watt, *Collective redress*, in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Elgar Publishing, Cheltenham: 2017, pp. 373-381.

[31] It may be that both a special jurisdictional rule and choice of law rule for collective redress are needed.

[32] Art. 5 of the Rome II Regulation.

[33] Arts. 4-7. *See* more in M. Illmer, *The New European Private International Law of Product Liability: Steering through Trouble Waters*, 73 Rabels Zeitschrift für ausländisches und internationales Privatrecht 269 (2009), p. 271.

[34] S. Symeonides, *The Third Conflicts Restatement's First Draft on Tort Conflicts*, 92 Tulane Law Review 1 (2017), fn 132.

[35] *See supra* note 8.

[36] Although they may usually also sue in the courts of their place of residence, still we should not rule out the possibility of a suit brought in a Vietnamese court.

laws of the foreign countries where the consumers sustained the damages. The current general conflicts of law rules give no possibility for the Vietnamese manufacturers to argue that they could not have foreseen the marketing of the product which caused damage in the foreign state. Neither can they rely on Vietnamese laws on product liability to possibly reduce their responsibilities, as Vietnamese laws on product liability, due to having been newly developed, are considered as rather general and cannot guarantee mechanisms for the enforcement of consumer rights.[37] As such, Vietnam's rigid conflicts of law rule of place of damage, mandating that foreign laws can be applicable to product liability claims against domestic manufacturers, appears not to encourage manufacturing investments. Such a regulation will not be beneficial to a country that wants to attract investment in production like Vietnam.

Moreover, with regard to product liability actions brought by multiple plaintiffs from different countries against Vietnamese manufacturers of the same products before Vietnamese courts, which happens often in US case law,[38] this is a peculiar and difficult scenario which Vietnamese private international law rules should also be prepared for. Given the complex nature of such situations, and the probability of many places of damages, one may propose the adoption of a special choice of law rule for collective redress in product liability cases which may be more defendant-focused, so that the possibility of applying one law to a joint action is advanced. However, it is worth considering that if a defendant-focused choice of law rule is designated for mass product liability actions, the producer might be given an incentive to cause damage to more people so that they can get the laws of their affiliated states applied, instead of the foreign laws of the places where damages were sustained by victims in other countries. While such a concern may seem far-fetched – as normally producers do not want to hurt their consumers by means of their products – the consequences of such a bad intention, if that were ever to happen, is worth contemplating. For cross-border collective redress in product liability actions, if a special choice of law rule is not in place in the future hopefully the courts in Vietnam, when facing such a case, will be able to anchor their decisions on a thoughtful choice of law rule.

The second case scenario for product liability cases in Vietnam would be claims by Vietnamese consumers against imported products or products hand-carried to Vietnam. Art. 687 provides for Vietnamese law to apply, as the place where the damage occurred is in Vietnam. Vietnamese plaintiffs can thus rarely obtain the application of the law of the country where those products were manufactured, even if such laws may provide more plaintiff-friendly rules. Although this scenario may happen less often than the first one, as court filings on consumer product safety in ASEAN countries[39] and Vietnam

[37] Vietnam has not had separate laws on product liability. Product liability is mainly governed by the Civil Code tort provisions and the law on consumer protection.

[38] *See* S. Symeonides, *Choice of law in the American Courts in 2018: Thirty-Second Annual Survey*, 67(1) The American Journal of Comparative Law 1 (2019).

[39] *See* L. Nottage et al., *ASEAN Consumer Law Harmonisation and Cooperation: Achievements and Challenges*, Cambridge University Press, Cambridge: 2019, pp. 122-204.

are still rare, plaintiffs in product liability claims before Vietnamese courts should be able to rebut the application of only the place of damage law. For example, where hand-carried goods were brought to Vietnam, the sales prices to the purchasers of these goods are usually much higher than for the imported goods. While the manufacturers located in many countries, such as the US and Europe, may not reasonably foresee the marketing of their products in Vietnam, it might be that Vietnamese plaintiffs will wish to evoke the law of the place of manufacture to possibly request better levels of redress. Regrettably, the current conflicts of law rules for torts in Vietnam does not provide the possibility for them to do so.

Putting the two scenarios together, it can be seen that the current conflicts of law rules for tort actions may encourage Vietnam to become an importing country rather than an exporting one. Manufacturers located in Vietnam will have to abide by the usually stricter laws of product liability in the countries they export goods to, while many local consumers may not be able to request the laws of the manufacturer's countries to be applied in place of the Vietnamese laws.

When considering the reform of the conflicts of law rules, it is suggested that Vietnam should legislate a separate provision containing a special choice of law rule mechanism for product liability tort actions. As such rules in other jurisdictions and global instruments have been very complex and diverse, it should not be so difficult to make exact proposals for the Vietnamese rules in this paper. However, an important point should be discussed, i.e. whether to keep the place of damage rule as the default rule, or to change to the place of acting rule as the beginning of a presumptive rule. The default rule will certainly contain rebuttal criteria. To begin with the place of acting, Borchers has pointed out that when this connecting factor is set as the default rule, to be challenged by other connecting factors such as place of damage and so on, it leads to the result that the law of the place of conduct will usually apply in product liability case law, as in the US.[40] Although Vietnam has had ineffective laws on product liability, such a default rule of place of acting would be appealing to manufacturers who wish to locate their plants and headquarters and to create manufacturing jobs in the country. However, in our opinion the country should, for its long-term development, encourage manufacturers located in Vietnam to produce the safest products possible, and the applicable legislation should provide incentives for higher rather than lower product standards. Therefore, it is proposed that the special conflicts of law rule on product liability should default to the place of damage rule, which is still in line with the general rule and can make a greater contribution to the international harmony of decisions, rather than change to a new rule which defaults to the place of acting. The place of damage rule at the same time should be rebuttable by certain requirements, which need to be developed.

[40] P.J. Borchers, *How "International" Should a Third Conflicts Restatement be in Tort and Contract?*, 27 Duke Journal of International and Comparative Law 461 (2017), p. 478.

## 4. THE APPLICATION OF THE GENERAL CONFLICTS OF LAW RULES FOR TORTS INVOLVING INTELLECTUAL PROPERTY

Civil litigation in the intellectual property (IP) field in Vietnam's courts has, in general, been known to be lengthy. There are hurdles for rights holders to overcome. Meanwhile, the damages granted are usually low and gauging the actual damages is still difficult due to a lack of expertise and precedents.

However, in recent years there have been positive developments in the enforcement of IP law in Vietnam, especially with regards to claims against patent infringements. The courts have issued many landmark judgments, influencing and setting good precedents for dealing with claims of damages and compensation.[41]

It can be seen that the plaintiffs in IP cases with foreign elements which have been heard by Vietnamese courts are mainly foreign companies, being the IP rights holders, who seek compensation from Vietnamese companies for producing infringing products. The foreign plaintiffs, as such, have thus brought an action in the defendant's jurisdiction. However, they usually apply to administrative agencies for injunction relief against acts of infringement. As the last resort for claims mainly seeking damages, the courts have been solely applying Vietnamese laws on IP protection and the relevant laws on technology.

It is notable that, apart from the general conflicts of law rules for torts, the Civil Code 2015 provides for a special conflict of law rule for intellectual property rights. Art. 678 of the Civil Code 2015 provides that "Intellectual property rights shall be determined in accordance with the law of the country in which the objects of intellectual property rights are required to be protected." This rule lays down the *lex loci protectionis* rule for claims arising out of infringements of intellectual property rights. As such, Vietnam has adopted a universally acknowledged principle,[42] the principle of territoriality, to design the law applicable to infringement of intellectual property rights claims. Accordingly, the law of the country where the protection is claimed will apply to remedies as well as to questions of the existence and the validity of the alleged infringement rights.

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[41] *See* the website Managing Intellectual Property – The Global IP Resource for Vietnamese cases, https://www.managingip.com/Search-Results.html#?term=Vietnam%20court (accessed 30 May 2021). One judgment rendered by Ho Chi Minh City Court on 28 August 2014 was between the plaintiff – a US company named Videojet and the defendant – a Vietnamese company named Nam Trinh. Nam Trinh traded infringing products bearing Videojet's trademarks. The court ruled in favor of Videojet and awarded, for the first time, the full sought amount of damages and attorney's fees. In another judgment dated 2 February 2015, Ho Chi Minh City Court for the first time enforced an agrochemical patent of a European entity against a local pesticide producer. There is also a judgment of the Da Nang Court dated 22 April 2014, in which a French company was successful in applying for revocation of a domain name registered by a Vietnamese plaintiff (a cross-border online IP infringement case).

[42] *See* D.M. Vicente, *Intellectual Property, Applicable Law*, in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, Cheltenham: 2017, pp. 961-969.

In the reported cases of IP infringements in Vietnam, there is no information about whether the issue of the applicable law has been expressly or impliedly addressed. It appears that the court simply assumed that the applicable law was local law.[43]

Notably, most IP cases that the Vietnamese courts have handled so far have not been particularly complex, in the sense that they have not involved the most challenging scenarios of multi-state infringements and damages in IP rights cases. The infringement acts and the place of damages have solely occurred in Vietnam, hence local law has been applied, which is consistent with the principle of territoriality given in Art. 679.

However, the rule should be prepared for those difficult scenarios where the infringement of the IP rights takes place in many countries, for example an unauthorized act of distribution via the internet of works protected by copyright. The localization of the ubiquitous infringements and the application of the *mosaic* principle[44] generate the need for additional provisions that can enable the application of only that law with the closest connection to the dispute. In terms of further examination and suggestions, the legislation should be able to make references to modern developments which have been enshrined in principles such as the ALI Intellectual Property Principles,[45] the *Waseda* Principles,[46] or the CLIP Principles.[47]

Attention should be paid to a study published in 2017, namely Private International Law Principles for Ubiquitous Intellectual Property Infringement – A Solution in Search of a Problem.[48] This study envisaged that an additional rule on ubiquitous IP infringements, especially online infringements, which adopted the closest connection rule as the main connecting factor was unnecessary and constituted "a solution in search of a problem."[49]

The findings provided by this empirical study were striking. However, one of the features of a typical cross-border online IP infringement case like the one given in this

[43] The application of local laws to cases of cross-border IP infringements is common, if not to say nearly absolute. A. Christie, *Private International Law Principles for Ubiquitous Intellectual Property Infringement – A Solution in Search of a Problem?*, 13(1) Journal of Private International Law 152 (2017); the empirical study says that in almost 95% of the evaluated cases local laws were applied.

[44] The court considers the infringement of IP rights and applies the law of each state for which the protection is sought.

[45] American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes*, St Paul: 2008.

[46] The Principles of Private International Law on Intellectual Property Rights drafted by members of the Private International Law Associations of Korea and Japan in a Project coordinated by Waseda University (published in 2010).

[47] Principles on Conflict of Laws in Intellectual Property promoted by the European Max Planck Group on Conflict of Laws in Intellectual Property (published in 2011).

[48] Christie, *supra* note 43, pp. 2, 3. This article "reports the outcome of an empirical study commissioned by, and undertaken with the assistance of, the World Intellectual Property Organization (WIPO). It analyses the factual and legal features of a sample of cases, drawn from a range of jurisdictions, dealing with online IP infringement with cross-border elements. Using the results of that analysis, it draws conclusions about the typical features of such cases, the practical consequences for the interface between PIL and IP law, and the need for special PIL rules dealing with the situation generally regarded as the most problematic from a PIL perspective, namely "ubiquitous infringement."

[49] *See ibidem*.

study is that it is brought by a local plaintiff before its own jurisdiction against a foreign defendant who caused damages to a local IP rights holder. Meanwhile, although a quantitative examination of the cases in Vietnamese jurisdiction is not yet available, most of the reported IP infringement cases up to the present time, whether online or offline, which have been dealt with by Vietnamese courts have been brought by foreign plaintiffs. This creates the impression that the findings in the empirical study mentioned above might be of more relevance for the jurisdictions of more developed countries with more IP rights holders, rather than smaller countries with greater occurrences of infringements by local residents.

## 5. THE APPLICATION OF THE GENERAL CONFLICTS OF LAW RULES FOR TORTS INVOLVING COMPETITION

Vietnam has recently passed a new law on competition, the Law on Competition 2018 (which entered into force on 1 July 2019). This law regulates competition by restraining agreements, market dominance, economic concentration and unfair practices.[50] With regard to anti-competitive practices that have international dimensions, the new law introduces a provision for extra-territorial jurisdiction. Art. 1 provides for the scope of the application of the law as follows: "This law sets forth anti-competitive practices, economic concentration that causes or may cause anti-competitive effects on the market of Vietnam, unfair competition practices, competition legal proceedings, sanctions against violations of competitive law, and state management of competition."[51] Accordingly, the law expands its provisions to include offshore anti-competitive practices if there is an impact on the domestic market. The law also provides for its application to both domestic and foreign agencies, organizations, and individuals.[52]

Unlike with regard to intellectual property rights, where the Civil Code 2015 provides for a special choice of laws rule ordering the law of the country where the protection is claimed to apply, the Civil Code 2015 does not contain any special conflict of law rule for acts of anti-competition. The Law on Competition instead adopts a unilateral conflicts rule, providing for its application to cross-border competition acts that meet the requirement that they have an anti-competitive effect on the domestic market.

It can be seen that Vietnam has not used the civil law doctrine of providing a multilateral choice of laws system to deal with choice of law issues in the competition field. It rather employs a common law doctrine of unilateral conflict of laws, as the specialized Law on Competition determines its reach to international transactions. This can be explained by the fact that the Competition Law 2018 has taken examples and

[50] In Vietnam, competition law is essentially enforced by administrative authorities.

[51] Translation provided by the Law Firm "Antlawyers," available at: https://www.antlawyers.vn/library/vietnam-competition-law-2018-effective-jul-1st-2019.html (accessed 30 May 2021).

[52] Art. 2(3) of the Vietnamese Law on Competition 2018.

experiences from Australian law.[53] The purpose of the rule is, *prima facie*, not to resolve a choice of laws problem, but to empower the domestic competition authority to rule on deals or transactions conducted outside the territory of Vietnam but which have an adverse effect on competition in the domestic market, so as to allow Vietnamese enterprises and consumers to assert rights and claims for any damages they suffer.

The rule has however produced conflicts of law effects, and it is a market-effects rule,[54] mandating that the Vietnamese market competition law apply to competition acts which are having competitive restraining effects on the Vietnamese market, whether the competition activities are carried out inside or outside the territory of Vietnam.

By prescribing only the law of the market affected, the rule mentioned above is applied equally to both acts of unfair competition and restriction of competition. Indeed, the place of the market affected is not a default from the place of damages rule in the general rules enshrined in Art. 687 of the Civil Code. Rather, it helps to clarify the position in circumstances of unfair competition and restriction of competition, and thereby enhances the foreseeability of the applicable law to tort liability arising from anti-competitive acts.

However, in order to regulate the complicated scenarios of various practices restraining competition, many points need to be clarified. Firstly, how is this special rule related to the general rules for tort conflicts in the Civil Code? If the former is seen as an attempt to clarify the latter, does the exception of the common residence rule in the general rule prevail over the affected market rule where the parties have the same residence in another country? Furthermore, can the clarification rule be superceded by an escape clause of a manifestly closer connection? Can the law of the market's place be derogated from by an agreement to apply another law? The tentative answers to these questions, with reference to EU law, should be that the specific rule should not be subject to the intervention of the parties' agreement or those exception rules due to the concentration on the market functions, on which the rule is based.

The second issue is whether to differentiate between market-related and competitor-related acts, as the EU law does in Art. 6(2) of Rome II, by providing that where an act of competition exclusively affects the interests of a specific competitor, the general rule shall apply, meaning that the common habitual residence and the escape clause retain their functions in this scenario.

The most difficult and complex scenario is where there are multiple damaged states, which is especially relevant for cartels since claims of this sort often involve many affected markets. Consider a situation where a Vietnamese court hears a claim for economic

[53] T. Van, *Vietnam amends Competition Law to better manage cross-border deals*, Vietnamese Invest, Review, 24 September 2018, available at: https://www.vir.com.vn/vietnam-amends-competition-law-to-better-manage-cross-border-deals-62550.html (accessed 30 May 2021). The project name: "Australia Supports Economic Reform in Vietnam" sponsored by the Australian Department of Foreign Affairs and Trade.

[54] The effect principle nowadays appears to be the prevailing conflict of laws rule in international competition law. *See* more in J. Basedow, *Competition law (Antitrust)*, and T.W. Dornis, *Competition, unfair*, in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, Cheltenham: 2017, pp. 425-432 and 432-441.

loss encountered in many jurisdictions, including the forum, as a result of a violation of a law on economic concentration. Practically speaking, the court would apply Vietnamese law to cover the national part of the entire damage. However, EU law goes further, as Art. 6(3)(b) of Rome II gives the plaintiff(s) the option to base its/their claim on the law of the defendant's country of domicile if the plaintiff chooses to sue there, as long as that country is also one of the countries whose market is directly and substantially affected. As far as it can be ascertained, Vietnamese courts have not yet heard any cases of such consolidated claims. However, if such a hypothetical scenario ever arises, the experiences with such legislation would be useful for Vietnamese judges.

## 6. METHODOLOGY

It can be seen that when it comes to particular types of torts in Vietnam, such as those of environmental damage, product liability, IP and competition, the general rule of place of damage can no longer fulfill the role of designating the law to which the case at hand is most closely connected. The place of damages rule needs to be either replaced by another connecting factor, such as the place of acting or the rule of closest connection, or it has to be made more concrete and precise. In other scenarios, it has to be rebuttable by the unforeseeability defense or it has to give way to a ubiquity rule granting the plaintiff the choice.

The ultimate question is whether there is a need for separate rules for specific torts, or whether the general rule should be revised so that it is able to cover those special torts and provides reasonable results in terms of the applicable law. The first option has been taken by EU law. Rome II adopted various specific conflict rules to prepare for the various tort scenarios. Another rationale supporting this option is based on the example of France before Rome II, which did not have specific rules for different categories of torts, which in turn resulted in considerable uncertainty with regards to the designation of the law applicable in complex torts.[55]

In finding a method that is learnable and suitable for a developing country, having regard to the experiences in international tort cases decided by average judges it seems more reasonable for Vietnam to follow the path of adopting specific rules for specific torts. Indeed, initial steps have already been taken in this direction with regard to IP rights and competition. Environmental damage is of such major relevance to Vietnam that the country should have a separate rule. Even the US had to develop special and separate rules for product liability in its Third Restatement of Conflict Laws project.[56]

The second question concerning methodology is whether the distinction between conduct-regulating rules and loss-distribution tort rules,[57] a key feature of the tort

[55] T.K. Graziano, *Torts,* in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, Cheltenham: 2017, p. 1715.

[56] Symeonides, *supra* note 34.

[57] Prof. Symeonides speaks of this distinction as being one of the major breakthroughs in American conflicts' thought and one of its major contributions to international conflicts torts (Symeonides, *supra* note 34).

chapter of the US Third Conflicts Restatement's Draft, could shed light on Vietnamese conflicts of laws tort rules. EU law has rejected this fully-fledged different treatment of tort rules, but provides for the application of the rules of safety and conduct[58] as an exception with a limited scope of intervention from the main rules. In light of the US experiences, this distinction might be difficult to apply for Vietnamese judges, and might facilitate the resolution of tort conflicts of law instead of producing a unitary approach of identifying the country most closely connected to the tort as a whole. However, it should be borne in mind that this method is rooted in the theory of interest analysis[59] and the consideration of policies of different state laws, while the Vietnamese conflicts law has been established traditionally in line with the continental approach of assigning the legal issues to the jurisdictions with which they have the closest geographical connections. The difficulties in deploying a distinction between conduct-regulating rules and loss-distribution tort rules might outweigh the benefits it might bring to the Vietnamese rules.

## CONCLUSIONS

Assuming that infectious diseases will not dominate the future and that globalization continues, torts with international dimensions involving Vietnam will definitely rise in both number and complexity. Vietnamese courts will be increasingly chosen by both foreign plaintiffs, as they just want to ensure a higher chance of enforcing any judgments. The local courts are also the first option for a local plaintiff. Apart from the increase in cases, the quality of the conflicts of law rules contribute to the court's capacity and influence the decisions of the parties as to which forum to sue in. The rules designating the laws applicable to conflicts of law in tort actions therefore should be unambiguous and at the same time be able to ensure certainty and predictability and justice in particular cases. The current conflicts of law rules in Vietnamese legislation are not compatible with the need to regulate the growing variety and complexity of tort cases. The general rules, therefore, must be supplemented with special rules, e.g., for environmental damages, product liability, intellectual property rights and competition torts. The prescriptive principles and rules proposed for each particular tort given in this article should be seen as tentative and initial. Sufficient rules need to be elaborated and further experimented on using possible case scenarios or hypotheticals. Various international experiences should also be taken into consideration, together with paying attention to their founding theories as well as the countries' legal systems and circumstances.

[58] Art. 17 of the Rome II Regulation.

[59] R. Micheals, *The Conflicts Restatement and the World*, Symposium on the Third Restatement of Conflict of Laws, 2016, p. 158.