THI HONG TRINH NGUYEN

# Private International Law in Vietnam

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# Private International Law in Vietnam

## On General Issues, Contracts and Torts in Light of European Developments

Mohr Siebeck

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Hamburg, July 2015 *Trinh Nguyen*

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# List of Abbreviations

| | |
|---|---|
| AC | Law Reports; Appeal Cases, House of Lords and Privy Council |
| ALI | American Law Institute |
| All ER | The All England Law Reports |
| Art. | Article |
| ASEAN | Association of Southeast Asian Nations |
| AWD | Außenwirtschaftsdienst des Betriebsberaters (Journal) |
| BGH | Bundesgerichtshof (Federal Supreme Court of Germany) |
| Brussels I Regulation | Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters |
| CA | Court of Appeal |
| CESL | Common European Sales Law |
| Ch. | Chancery |
| Chinese Act 2010 | Statute on the Application of Laws to Civil Relationships Involving Foreign Elements of the People's Republic of China |
| CISG | United Nations Convention on Contracts for the International Sale of Goods (1980) |
| CLC | Commercial Law Cases |
| CLR | Commonwealth Law Reports |
| Clunet | Journal du Droit International, founded by Clunet |
| DP | Dalloz périodique (Journal) |
| ECHR | European Convention on Human Rights |
| ECJ | Court of Justice of the European Union |
| ECR | European Court Reports |
| ER | English Reports |
| EU | European Union |
| EU Succession Regulation | Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession |
| EuZW | Europäische Zeitschrift für Wirtschaftsrecht (Journal) |
| EWCA | England and Wales Court of Appeal |
| EWHC | High Court of England and Wales |

| | |
|---|---|
| FOB | Free on Board |
| German Introductory Act 2011 | German Introductory Act to the Civil Code, last amended by Law of 12 April 2011 |
| Giuliano & Lagarde Report | Mario Giuliano/Paul Lagarde, Report on the Convention on the Law applicable to Contractual Obligations (O.J. C 282 of 31 Oct. 1980). |
| HCA | The High Court of Australia |
| ICC | International Chamber of Commerce |
| ILPr | International Litigation Procedure |
| Incoterms | International Commerce Terms |
| Inter-American Convention | Inter-American Convention on the law applicable to international contracts, done at Mexico on 17 March 1994 |
| IPRax | Praxis des Internationalen Privat- und Verfahrensrechts (Journal) |
| Japanese Act 2006 | Japanese Act on the General Rules of Application of Laws, Law No. 10 of 1898 (as newly titled and amended 21 June 2006) |
| LG | Landgericht (Regional Court, Germany) |
| Lloyd's Rep | Lloyd's Law Reports |
| MüKo | Münchener Kommentar |
| NJW | Neue Juristische Wochenschrift (Journal) |
| NIPR | Nederlands Internationaal Privaatrecht (Journal) |
| No. | Number |
| OLG | Oberlandesgericht (Court of Appeals, Germany) |
| PECL | Principles of European Contract Law |
| PICC | Unidroit Principles of International Commercial Contracts |
| PIL | Private International Law |
| PILA 1995 | United Kingdom Private International Law Act 1995 |
| QB | Law Reports ; Queen's Bench Division |
| Rev. crit. dr. int. dr. | Revue Critique de Droit International Privé (Journal) |
| RG | Reichgericht |
| RGZ | Amtliche Sammlung von Entscheidungen des Reichsgerichts in Zivilsachen |
| RIW | Recht der Internationalen Wirtschaft (Journal) |
| Rome Convention 1980 | Rome Convention on the law applicable to contractual obligations of 19 June 1980 |
| Rome I Regulation | Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) |

| | |
|---|---|
| Rome II Regulation | Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) |
| Rome III Regulation | Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. |
| Swiss Private International Law Code 1987 | Federal Act on Private International Law of 18 December 1987 |
| The Hague Conference | Hague Conference on Private International Law |
| UCC | Uniform Commercial Code (United States of America) |
| UCP | The Uniform Customs and Practice for Documentary Credit |
| UK | United Kingdom |
| UN | United Nations |
| UKHL | United Kingdom House of Lords |
| US | United States of America |
| VAL 1991 | Vietnamese Civil Aviation Law 1991 |
| VAL 2006 | Vietnamese Civil Aviation Law 2006 |
| VCA 2010 | Vietnamese Law on Commercial Arbitration 2010 |
| VCC 1995 | Vietnamese Civil Code 1995 |
| VCC 2005 | Vietnamese Civil Code 2005 |
| VCL 1997 | Vietnamese Commercial Law 1997 |
| VCL 2005 | Vietnamese Commercial Law 2005 |
| VCPC 2004 | Vietnamese Civil Procedure Code 2004 |
| VCPL 2010 | Vietnamese Law on Consumer Protection 2010 |
| VIAC | Vietnamese International Arbitration Centre |
| VLA 2010 | Vietnamese Law on Adoption 2010 |
| VLC 1994 | Vietnamese Labour Code 1994 |
| VLEC 2005 | Vietnamese Law on Enforcement of Civil Judgments 2005 |
| VLI 2005 | Vietnamese Law on Investment 2005 |
| VLN 2008 | Vietnamese Law on Nationality 2008 |
| VMFL 2000 | Vietnamese Law on Marriage and Family 2000 |
| VMC 2005 | Vietnamese Maritime Code 2005 |
| VOA 2003 | Vietnamese Ordinance on Commercial Arbitration 2003 |
| VOPC 1999 | Ordinance on Protection of Consumer Interests 1999 |
| VRL 2006 | Vietnamese Residence Law 2006 |
| WAR | Western Australia Reports |
| WASC | Supreme Court of Western Australia |
| WL | Westlaw |
| WLR | The Weekly Law Reports |

# Introduction

Nowadays many civil relations such as marriage, contracts, and labour are no longer limited to the borders of a country. Accordingly, the number of private international disputes has increased significantly in recent years. Vietnamese private international law, which regulates civil relations beyond the borders of Vietnam, is therefore facing a new wave of demand for improvement.

Vietnamese private international law, over a sixty-year long journey, has achieved certain developments. The first significant milestone could be dated to 1995, when private international law was first codified in thirteen articles in the Vietnamese Civil Code 1995. The next step was seen in 2000, when the Marriage and Family Law 2000 provided for, in its eleventh chapter, marriage and family relations with foreign elements. The most significant development was made in 2005, when the new Civil Code 2005 increased the number of provisions regarding civil relations with foreign elements to twenty. At nearly the same time, the Civil Procedure Code 2004 reunited scattered provisions relating to international civil procedure in two chapters, namely international civil jurisdiction and the recognition and enforcement of foreign judgments. All the provisions listed above constitute the backbone of currently effective Vietnamese private international law.

However, Vietnamese private international law is still young and incomplete in terms of modern codifications. While some countries (such as China, Japan, some Latin American countries and many European states) have enacted comprehensive private international law statutes, Vietnam is still quiet in the field. The provisions of Vietnamese private international law are scattered in numerous documents such as the Civil Code, Civil Procedure Code, Law on Marriage and Family, Commercial Law, and Labour Code. Unfortunately, some of the provisions are hard to understand and apply. Some even contradict others.

Besides the matter of the body of the laws, in their practical application the courts often neglect the private international law perspective. In most cases the applicable law is Vietnamese law, without a reason for it being provided, and without a conflicting rule cited.

Meanwhile, because of the increasing need for international legal assistance in the civil and commercial matters before the Vietnamese courts, the Vietnamese Government has made the effort to sign a considerable number of

relevant treaties and agreements. Several countries with whom Vietnam wishes to sign legal assistance treaties are contracting states of certain conventions of the Hague Conference. In this context, Vietnam became the 73rd member of the Hague Conference in 2013.

In respect of regional cooperation, in recent years Vietnam has played a dynamic role in ASEAN. Nevertheless, with the exception of a treaty of legal assistance in criminal matters between ASEAN members in 2004, the movement for treaties in civil matters has been slow.

Vietnamese jurisprudence on private international law has not kept pace with the increasing level of international civil relationships and requires improvement and updating. There have been a limited number of dissertations and journals written about private international law, and these works mainly focus on some aspects of private international law such as marriage and family relations or some basic issues of contract. There has not been any doctoral thesis studying Vietnamese private international law under a comparitive approach in which innovations and lessons of developed countries are considered with the purpose of finding a proper way to foster Vietnamese private international law.

This thesis, therefore, is an original dissertation that studies European and Vietnamese private international law under a comparative perspective. It will focus on evaluating the stage of development of Vietnamese private international law in respect of the general principles and main issues of contracts and torts. Based on that analysis and together with the knowledge of European private international law, the thesis will propose future development of Vietnamese private international law with respect to those issues.

The thesis consists of three parts. Part 1 will examine the general principles of Vietnamese private international law and will cover a number of issues, from the historical development, definition, scope, position and sources of Vietnamese private international law to technical matters of incidental questions, connecting factors for personal status, the application of foreign law, *renvoi,* and public policy. Regarding each matter, the thesis will assess the level of theoretical acknowledgement in Vietnam, as well as the relevant practice of Vietnamese courts. A suggested approach for each matter will be made at the end of each sub-section.

Part 2 will deal with contracts. It will nevertheless emphasise certain aspects, including the scope of the applicable law, party autonomy, and the law applicable in the absence of choice. It does not discuss, for example, specific contracts such as consumer contracts, insurance contracts, or individual employment contracts. This part will introduce the current private international law of Vietnam on international contracts. Having pointed out its shortcomings, the part will search for the most appropriate approaches or provisions that are suitable for the Vietnamese situation.

Part 3 will present Vietnamese private international law regarding torts, together with an assessment of its level of development. Unlike part 2, part 3 will focus on the law applicable to tort relations in the absence of choice, with particular emphasis given to the search for a suitable connecting factor for the general tort conflict rule. Apart from that, the proposal for Vietnamese law also covers the flexiblisation from the *lex loci damni,* which includes the exceptions for specific torts, the common habitual residence rule, and the escape clause.

The general conclusion will then give a summary of the suggestions for the future development of Vietnamese private international law.

It is necessary to note a particular feature of the Vietnamese cases referred to in this thesis. Vietnamese cases, in particular those regarding private international law (with the exception of the cassation decisions of the Council of Judges of the Supreme People's Court), have not, until very recently, been collected and commented on in any systematic and official way in a periodical or review such as IPRax. Some authors, through their individual contacts with the courts, gather cases and comment on them. Consequently, some of the cases cited in this thesis are collected by the present author or cross-referred from other Vietnamese authors. The coverage of cases, therefore, is not comprehensive and cannot present the overall practice of Vietnamese courts in reality, although most of the cases are indicative and significant.

The promising news is that there has been, from 2012, a project focused on developing the case law of the Supreme People's Court, which plans to uphold the use of case law and to sort and publish cases in specialised collections, accompanied with the commentary of experts. This movement is expected to facilitate research into the practice of the courts on private international law matters.

Part 1

# General Principles of Vietnamese Private International Law

## I. Historical Development

In comparison to other countries, private international law rules appeared in Vietnam relatively late. The first milestone was a statutory rule (Art. 33) contained in the *Gia Long* Code of 1812.[1] The rule provided for the application of local laws to foreigners. Although the rule itself had a criminal law basis, it was extended by the courts to be applied to civil matters as well.[2] The influence of Chinese law on Vietnamese law, at this stage of the history, is noticeable: the *Gia Long* Code of 1812 was nearly a copy of the Chinese Code of the Qing Dynasty.[3] Nevertheless, there was not enough evidence to affirm this influence in the field of private international law. One reason is possibly that the Chinese system of private international law itself in this period was not developed.[4]

The second rule was found in the *Bộ Luật Dân sự Giản yếu* [Simplified Civil Code],[5] published in 1883. This rule (Art. 3(3)) regulated the extraterritorial application of local laws to Vietnamese citizens resident abroad. Later, the same rule was embodied in Art. 2 of the *Bộ Hoàng Việt Trung kỳ Hộ Luật* [Hoàng Việt Middle Region Code], issued in 1936. It is noticeable that the French authority imposed the second and third rules during their colonisation period,[6] and the content of those rules was identical to French law.[7] The influence of French private international law was so extensive that it penetrated the *South Vietnam Civil Code* of 1972,[8] when South Vietnam was under the control of the United States of America. Accordingly, Arts. 5, 6 and 7 of this Code nearly replicated the principles embodied in Art. 3 of the French Civil

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[1] Đỗ Văn Đại/Mai Hồng Quỳ 2010, p. 37.

[2] Đỗ Văn Đại/Mai Hồng Quỳ 2010, p. 57.

[3] Vũ Văn Mẫu 1975, pp. 252, 258, 259.

[4] Đỗ Văn Đại/Mai Hồng Quỳ 2010, p. 52.

[5] This Code applied to Nam Kỳ [South Region] and three Cities of Hà Nội, Hải Phòng and Đà Nẵng.

[6] Đỗ Văn Đại/Mai Hồng Quỳ 2010, p. 57.

[7] Phạm Xuân Chánh 1964, p. 25.

[8] The French period of colonisation ended in 1954.

Code. Moreover, Arts. 18[9] and 19[10] imported Arts. 14 and 15 of the French Civil Code to grant the Vietnamese courts with far-reaching jurisdiction.[11]

In North Vietnam, because of the war, private international law did not develop in the period from 1945 to 1974. From 1975 (the year in which the two parts of the country were unified) until 1986, civil relations with foreign elements mainly arose out of relationships with other socialist countries. Private international law rules were mostly unified conflict, substantive, and jurisdictional rules contained in legal assistance treaties. In addition, there were some random national conflict rules, which were unilateral.[12]

From 1986 until present day, because of the "Open Policy", civil relations with foreign elements have begun to blossom. A system of rules on private international law has been developed in a number of Acts. Moreover, Vietnam has strived to sign, or join, a significant number of international treaties and organisations, which has contributed to the improvement of private international law in the country.[13] The influence of French private international law nowadays is no longer as significant. Vietnamese legislators have shown their independence in referring to foreign law and selecting rules that they consider appropriate for the circumstances of the country.[14]

## II. Definition, Scope and Position of Private International Law in Vietnam

### *1. Definition*

#### *a) Divergences*

Private international law is the subject for which "dispute starts from the title page".[15] Surpassing some labels such as "inter-municipal law", "trans-municipal law", "private transnational law", "law of multi-state problems", or "law on collision of laws", the two competing terms "private international law"

[9] Art. 18 *South Vietnam Civil Code* 1972: "An alien, even if not residing in Vietnam, may be cited before Vietnamese courts for the performance of obligations contracted by him in Vietnam with a Vietnamese person; he may be called before the courts of Vietnam for obligations contracted by him in a foreign country towards Vietnamese persons."

[10] Art. 19 *South Vietnam Civil Code* 1972: "Vietnamese persons may be called before a court of Vietnam for obligations contracted by them in a foreign country, even with an alien."

[11] Đỗ Văn Đại/Mai Hồng Quỳ 2010, p. 53.

[12] Nguyễn Trung Tín 2005, p. 16.

[13] Nguyễn Trung Tín 2005, pp. 20–23.

[14] Đỗ Văn Đại/Mai Hồng Quỳ 2010, p. 54.

[15] Mance 2005, p. 185.

and "conflict of laws" are widely used nowadays by continental and common law writers respectively.

Nevertheless, most temporary writers acknowledge that "no name can command universal approval"[16] or that "terminology is ephemeral";[17] therefore, they tend to be neutral. However, some strictly favour the term "private international law" and see it as descriptive and more idealistic.[18] Conversely, others perceive it as "potentially misleading"[19] and insist on the term "conflict of laws".[20]

In fact, there is a crucial misunderstanding between the two sides. The authors that reject the term "private international law" attack the word "international", pointing to the confusion between private international law and public international law,[21] but the expression "international" just implies the nature of disputes handled by this branch of law. Meanwhile, although the opponents of "conflict of laws" claim that it is too broad,[22] the term traditionally does not cover public law subjects such as criminal law.[23] Therefore, "the title of the subject is of little important".[24] Admittedly, however, more countries, world conferences, and even some common law writers use the term private international law.[25]

Vietnam writers use both terms, but to describe different issues. The term currently in use for the university subject is "Tư pháp quốc tế", which is correctly translated into English as private international law. The use of "private international law" results from the influence of the leading Vietnamese textbooks of Hanoi Law School, Hanoi National University, and Ho Chi Minh Law School. The term used in the South before 1975 was however different. One leading book published in Sai Gon[26] before 1975 was titled "Quốc tế tư pháp",[27] meaning "international private law", which conveyed the idea of "a supranational body of private law".[28]

Vietnamese academics also mention "conflict of laws" as the part of "private international law" that designates which substantive law is applicable to legal relations with foreign elements, rather than relating to jurisdiction and

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[16] Fawcett et al. 2008, p. 16.
[17] Kegel 1985, para. 1-4.
[18] Scoles 2004, p. 2.
[19] Morris et al. 2009, p. 4.
[20] Clarkson/Hill 2011, p. 3.
[21] Fawcett et al. 2008, p. 17.
[22] Kegel 1985, para. 1-4.
[23] Morris et al. 2009, p. 5.
[24] Fawcett et al. 2008, p. 16.
[25] Fawcett et al. 2008, p. 18.
[26] Saigon was the former name of Ho Chi Minh City before 1975.
[27] Nguyễn Huy Chiểu before 1975.
[28] Juenger 2001, p. 206. Using this term, private international law seems to emphasise its universal character.

enforcement of judgments. In other words, in Vietnam "conflict of laws" is not interchangeable with "private international law".

### *b) Subject defined*

To formulate a definition of private international law, different writers have based it on different factors. Those focusing on the function of private international law define it as the branch of law that determines one of several simultaneously valid legal systems applicable to a given set of facts.[29] This definition, based on the referral method, prevails in Germany.[30] With the primary purpose being to identify the applicable law, procedural issues are not given sufficient attention.[31] Others who emphasise the subject matter of the discipline point out that private international law is the part of the private law of a particular country that deals with cases which have foreign elements.[32] England and France are two representatives, amongst others, of this approach. Nevertheless, the French perception also includes the law regulating the status of foreigners.[33]

The second approach is so far the most widely adopted. Vietnam also conceives private international law as an independent branch of law and jurisprudence,[34] whose object for research is civil relations (in its broad sense) involving foreign elements.[35]

## *2. Scope*

Consequently, Vietnamese authors unanimously regard choice of law rules as the major part of private international law. International procedure in the matter of private law is touched on in all textbooks although its importance is often underestimated. The textbook of Hanoi Law School in particular includes one chapter dealing with the legal status of foreigners.[36] Meanwhile, authors in the South, especially young Vietnamese scholars, restrict themselves solely to choice of law and international procedure.[37] They no longer examine issues of the status of

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[29] Wolff 1950, p. 5.

[30] Basedow 2012a, pp. 1339, 1340: Prof. Basedow also points out four limitations of this narrow understanding of private international law: "[I]t, a priori, excludes any attempt to deal with cross-border legal conflicts by way of harmonisation or unification of substantive law; there is a questionable neglect of procedural issues; the law of citizenship, the law of the incorporation of companies and the law of the flags to be flown by vessels are not considered as part of private international law; and it excludes substantive rules which directly regulate the rights and legal positions of foreigners".

[31] Basedow 2012a, p. 1340.

[32] Morris et al. 2009, p. 2.

[33] Basedow 2012a, p. 1340.

[34] Lê Thị Nam Giang 2005, p. 8.

[35] Hanoi Law School 2006b, p. 8.

[36] Hanoi Law School 2006b, pp. 322–336.

[37] Lê Thị Nam Giang 2005; Đỗ Văn Đại 2007, p. 49.

foreigners in their treatises.[38] They also place international procedure at the beginning of their treatises in the belief that most of the time, "if the question of jurisdiction is not satisfied, the question of choice of law does not arise."[39]

The textbook of Hanoi Law School shares another similarity to those of the former Eastern European socialist countries, which is the inclusion of national substantive law for foreign trade while "the topic is usually regarded as distinct from private international law."[40] This textbook devotes section B of chapter V (on contract) to international sales contracts and the whole of chapter VI to international payments.[41] This causes an overlap between private international law and international commercial law in Vietnam, creating an on-going misunderstanding of and between the two subjects.

### *3. Position*

Locating private international law in the legal system is a difficult task because its position is not as visible and identifiable as that of other sections of law. Moreover, it has both private and public characteristics.[42]

Writers in countries in which private international law is developed to a certain degree seldom discuss the matter,[43] but most of them give emphasis to justice between individuals,[44] and therefore consider that private international law is appropriate for private rather than public law.[45] Meanwhile, private international law is still an undiscovered area in Vietnam; consequently, ordinary readers and academic writers have wondered about its position. Legal education treats the two disciplines (private international law and public international law) as separate subjects although the curriculum does make comparisons between them,[46] often borrowing from Soviet textbooks.[47] Private in-

[38] See Đỗ Văn Đại/Mai Hồng Quỳ 2010.

[39] Morris et al. 2009, p. 6; Đỗ Văn Đại/Mai Hồng Quỳ 2010.

[40] Kegel 1985, para. 1-2.

[41] Hanoi Law School 2006b.

[42] Weeramantry 2004, p. 169.

[43] Kegel 1985, para. 1-4.

[44] Kegel 1985, para. 1-6.

[45] Morris et al. 2009, p. 5.

[46] It is different than the situation of Australia, where comparisons between the two ordinarily fall outside the curriculum. See Svantesson 2005, p. 1.

[47] The comparisons are included in a Subject Guide on Private International Law of a lecturer of Hanoi Law School, delivered to Hue law students in 2006. The same comparisons are found in books authored by Boguslavskiĭ 1988 and Kalenský 1971, and they consist of two similarities and five differences. The similarities are that the common purpose of both private international law and public international law is to promote efficient cooperation between nations; and, secondly, fundamental principles of public international law play a vital role in private international law. The differences are many: i) in subject matter, ii) in the governing methodology, iii) in the researched subject of the legal disciplines involved, iv) in the sources, v) in punishments.

ternational law textbooks do not include any public international law. A full professorship in public international law does not require expertise in private international law and vice versa.[48] Some professors however teach the two subjects at the same time. Yet, this is neither required nor common.

In that context, Vietnamese literature gives three opinions: i) private international law is a part of international law together with public international law; ii) private international law is national law; and iii) it is a legal discipline that lies between the two systems of national law and international law. The internationalists produce many arguments. First, they allege that private international law principles derive from those of public international law, in particular the principle of "sovereign equality" between different states.[49] The second fulcrum of their opinion is the international function of private international law. Private and public international law are claimed to share the same goal, which is to foster effective cooperation between nations. Every dispute, every conflict between individuals and firms could eventually develop into conflict between states.[50] The third argument of the internationalists is that treaties are an important source shared by both public and private international law. They are the main source of public international law and an increasingly significant source of private international law, especially in the age of international cooperation.[51] Finally, some Vietnamese textbooks of private international law still cover the status of foreigners,[52] issues of international judicial assistance and immunity of foreign sovereigns, diplomats,[53] and rules on foreign trade.[54] The overlapping with public international law reveals the international state of the discipline.

The second view is that it belongs to the national system because national law sources prevail over international rules and principles.[55] Moreover, the

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[48] See de Boer 2010, p. 184.

[49] Lê Thị Nam Giang 2005, p. 27. Examples are also given: i) principle of equality in the legal perspective of different possession regimes of different states; ii) principle of not discriminating between Vietnamese nationals and foreigners nor between foreigners in the territory of Vietnam; iii) principle of respecting the immunity rights of states in private international law relationships.

[50] Lê Thị Nam Giang 2005, p. 27; Nguyễn Ngọc Lâm 2004, p. 45.

[51] Lê Thị Nam Giang 2005, p. 27.

[52] Stevenson 1952, p. 562: "All rights accorded foreign nationals are related to public international law, for public international law establishes certain broad standards for the treatment of foreign nationals to which municipal law must conform."

[53] Stevenson 1952, p. 563: Some authors concede that public international law regulates this aspect of judicial jurisdiction.

[54] In Vietnam, most private international law textbooks address issues of sale contracts in terms of foreign trade and international payment, in which there is a combination of national substantive rules, rules of international treaties, and common practice of international trade. See Hanoi Law School 2006b; Hanoi Law School 2006a.

[55] Hanoi Law School 2006b, p. 16.

presumption that there is no common private international law for all states is widely adopted.[56] Accordingly, every nation has its own solutions for the problems of private international law, and national courts have the tendency to apply their own laws to cases with an international dimension.[57]

The third opinion is a kind of compromise, which supposes that private international law is composed of two parts: one lies in national law and the other resides in international law. These two components are inextricably linked and do not exclude each other.[58] Other scholars however see this opinion as an isolated precept.[59] When I conducted a survey with Vietnamese law students of their views on the matter, interestingly a large majority of them nevertheless agreed with the third approach.

It is notable that most Vietnamese textbooks somehow learn blindly from Soviet legal science,[60] and the overwhelming tendency is to rely on the Russian approach.[61] Hence, one can find the arguments for the three opinions above in the book of Boguslavskiĭ.[62]

In choosing a stance in the controversy, most Vietnamese authors opt for the national view. Most textbooks and commentaries either conclude or imply that private international law is, more reasonably, a special discipline within the national law system.[63] Those authors however cannot explain the increase of treaties and international custom as a source of private international law because, according to their knowledge, this is characteristic of no national legal discipline.[64] In fact, the increasing significance of international agreements containing unified conflict rules is the result of the efforts of many international conferences or organisations (e.g., the Hague Conference) in promoting "the harmony of decisions as the ultimate goal of private international law".[65]

The placement of the subject in law faculties throughout Vietnam is interesting. Among the eight long-established faculties,[66] in seven of them private

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[56] Lê Thị Nam Giang 2005, p. 28.

[57] Lê Thị Nam Giang 2005, p. 28.

[58] Đoàn Năng 2001, p. 51.

[59] Nguyễn Ngọc Lâm 2004, p. 46.

[60] Lê Thị Nam Giang 2006.

[61] Nguyễn Ngọc Lâm 2004, p. 45.

[62] Boguslavskiĭ 1988, p. 15.

[63] Lê Thị Nam Giang 2005, p. 25; Hanoi Law School 2006b; Đỗ Văn Đại/Mai Hồng Quỳ 2010; Nguyễn Ngọc Lâm 2004, p. 49; Nguyễn Trung Tín 1996, p. 24.

[64] Lê Thị Nam Giang 2005, p. 30.

[65] Basedow 2012a, p. 1342; the linkage between public and private international law has been addressed by many foreign authors; for example, see Mills 2009, p. 211. Meanwhile, it is still not covered in Vietnamese legal scholarship.

[66] The eight faculties, in chronological order beginning with the oldest: Hanoi Law School, Faculty of Law (belonging to Hanoi National University), Ho Chi Minh Law

international law lies beside public international law to form the "International Law" departments.[67] Hue Law Faculty, on the other hand, has recently moved private international law from the international law section to the civil law section, which is a very individual turn to the nationalist approach.

## III. Sources

While common law private international law textbooks and treaties[68] exclude a section dealing with sources of the subject, a German one[69] contains a brief description. Boguslavskiĭ's book on the Soviet approach to private international law,[70] on the other hand, devotes a larger number of pages to the issue. Most significantly, the great treaty of Rabel[71] and the International Encyclopedia of Comparative Law[72] attempt to give a comprehensive overview of the sources, as well as a comparative analysis of different legal traditions and countries in the world.

In Vietnam "sources" is an important section in the introductory part of every textbook. While professors of universities in the North[73] generally rely on Russian legal jurisprudence, the leading author in the South,[74] who holds a French qualification, approaches the issue differently by concentrating more on practical analysis. They nevertheless agree on four basic sources of private international law: domestic legislation, international treaties, custom and case law.

### *1. International treaties*

International treaties of which Vietnam is a member, by way of ratification or accession, prevail over national legislation where there are differences between

School, Hue Law School, Can Tho Law Faculty, Da Nang Law Faculty, Vinh Law Faculty and Da Lat Law Faculty.

[67] This placement does not deviate from the common practice of the developing world. Take the Netherlands as an example: in the 1990s it was decided that public and private international law, together with even European law and the law of international organisations, would merge into one "Department of International Law". Strikingly, a new course with the combination of various types of international relationships in a conception of "International Law" was indeed launched. The abandonment of the course afterwards due to the need for a new curriculum and the consolidation with Department of Private law has been a concern expressed in de Boer 2010, p. 185, referring to the "bumpy" relationship between public and private international law.

[68] Clarkson/Hill 2011, Dicey et al. 2012, Fawcett et al. 2008, Morris et al. 2009, Scoles 2004.

[69] Kropholler 2006, pp. 3–6.

[70] Boguslavskiĭ 1988, pp. 23–44.

[71] Rabel 1958.

[72] Drobnig/Makarov 2008.

[73] Hanoi Law School 2006b.

[74] Đỗ Văn Đại/Mai Hồng Quỳ 2010.