Indonesia Law Review

Volume 12
Number 1 *Thematic Issue: Private International Law*

Article 5

4-30-2022

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¸Indonesia Law Review (2022) 1: 56 - 69
ISSN: 2088-8430 | e-ISSN: 2356-2129

CHOICE-OF-LAW PRINCIPLES IN INHERITANCE RELATIONS INVOLVING FOREIGN ELEMENT(S) UNDER VIETNAMESE PRIVATE INTERNATIONAL LAW

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Article Info
Received : 4 August 2021 | Received in revised form : 27 October 2021 | Accepted : 1 April 2022
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Abstract

Inheritance relations with a foreign element(s) are a part of civil relations with a foreign element(s) and are governed by Vietnamese private international law. This article aims to introduce the general principle and its supporting principles in the choice-of-law rules applicable to inheritance relations with a foreign element(s) under the private international law of Vietnam. In addition, the authors also look into the relevant regulations in the Law of the People's Republic of China on the Law applicable to Foreign-related civil relations and the most recent draft of Private International Law of Indonesia[3] to review the trend of national laws concerning matters of inheritance relations involving foreign element(s). Based on that analysis, the authors point out some inadequacies in Vietnamese private international law on matters such as the unclear scope of exercising inheritance rights on immovable assets and the uncertain meaning of the rule to choose "law of the closest connection" as the applicable law. With regard to the first question, the authors suggest that the exercise of inheritance rights over immovable properties should only be considered after a person has inherited the estate, thus he becomes the owner of the property and exercises his rights related to the property. In reference to the second question, it is suggested that the "law of the closest connection" should be the law of the country where the immovable property is located; however, if the estate does not include any immovable property, the "law of the closest connection" is the law of the country where all or most of the property is situated.

Keywords: *Inheritance, private international law, foreign elements, choice-of-law principles, Vietnamese Civil Code.*

I. INTRODUCTION

Inheritance relationships with foreign elements are parts of the cross-border legal relations that increasingly appear in contemporary times of globalization. In many cases, these legal relations go beyond national law because they involve two or more legal systems from different countries. Therefore, when an inheritance dispute involving foreign element(s) is brought before the court, the questions of determining the applicable law to solve the substantive law issues (e.g. rights and obligations of the parties) as well as the issue of court proceedings will inevitably be raised.

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[3] In this article, the author will analyze the 2014 Bill of the Indonesian Private International Law, which can be seen as the common opinion of the local scholars on the relevant matters. The document is a draft law and therefore has not entered into force.

DOI : https://doi.org/10.15742/ilrev.v12n1.4

Within the scope of this article, the authors will focus on analyzing the principles for determining the applicable law to deal with inheritance cases involving foreign element(s) specified in Article 680 of the current Vietnamese Civil Code. Based on such analysis, the authors conclude that the current regulations are generally quite adequate and appropriate; however, there are still some shortcomings due to a lack of explanation on certain matters, resulting in different interpretations of the same issues. To solve these problems, the authors also make some suggestions to improve the relevant regulations in this area.

II. INTRODUCTION TO VIETNAMESE PRIVATE INTERNATIONAL LAW AND INHERITANCE RELATIONS INVOLVING FOREIGN ELEMENT(S)

A. Vietnam's private international law at a glance

The Vietnamese legal system is not explicitly divided into public law and private law, nor does Vietnam have a separate private international law (hereinafter referred to as the PIL) system. To deal with PIL issues, we have to rely on several legal documents. Currently, the Constitution must be mentioned first because it establishes the fundamental ground for PIL in the country[4]. Besides this, the Civil Code (hereinafter referred to as the 2015 CC)[5], the Civil Procedure Code (hereinafter referred to as the 2015 CPC)[6], the Marriage and Family Law[7] and several other legal documents also contain the regulations governing PIL matters.

Regarding terminology, local scholars, through textbooks and research, have a consensus on using the term "tư pháp quốc tế"[8] in the sense of "private international law", while the term "xung đột pháp luật", which is translated from the term "conflict of laws", is used in a narrower context which refers to a situation in which two or more legal systems are mentioned at the same time when resolving a foreign-related legal relationship[9].

B. Civil relations involving foreign element(s) – Central issues of Vietnam's private international law

In general, "civil relations involving foreign element(s)" can be seen as the heart of Vietnamese PIL. In essence, only when a civil relationship is determined to have "foreign element(s)" will it fall within the scope of the PIL in Vietnam. This term appeared for the first time in the first Civil Code of 1995[10] and has been taken up in the latter versions of this document. Currently, to define "civil relations involving foreign element(s)", Art.663(2) of the CC 2015 provides that

"[…]

2. Civil relation involving a foreign element means any of the following civil relations:

a) There is at least one of the participating parties is a foreign natural person or

[4] Articles 18, 48, and 50 of The Constitution of Vietnam (version of 2013).

[5] Law No. 91/2015/QH13, adopted on 24/11/2015.

[6] Law No. 92/2015/QH13, adopted on 25/11/2015.

[7] Law No. 52/2014/QH13, adopted on 19/06/2014.

[8] Quy, Mai Hong, ed. *Giáo trình Tư pháp quốc tế (phần chung) Textbook of Private International Law [General Issues]*, (Nhà xuất bản Hồng Đức- Hội Luật gia Việt Nam, 2013), 31.

[9] Dai, Do Van and Quy, Mai Hong. *Tư pháp Quốc tế Việt Nam - Quan hệ dân sự, lao động, thương mại có yếu tố nước ngoài [Vietnamese Private International Law – Civil, Labor, Commercial relations involving Foreign element(s)]*. (National Political Publishing House, 2010), 177.

[10] Law No. 44-L/CTN, adopted on 28/10/1995.

juridical person;

b) The participating parties are Vietnamese natural persons or juridical persons but the basis for the establishment, modification, or termination of such relation arose in a foreign country;

c) The participating parties are Vietnamese natural persons or juridical persons but the subject matter of such civil relation is located in a foreign country."

According to the above provisions, factors to be considered when determining a "civil relation involving foreign element(s)" shall include: the parties participating in the civil relationship, its legal characteristics, and its subject matter. When applying this provision to inheritance, an inheritance relationship with a foreign element(s) is determined if it falls into one of the following cases: (1) At least one party to the inheritance relationship is a foreign citizen or legal person, for example, the heir is a foreign individual or organization, the person leaving the estate is a foreign individual; (2) The parties to the inheritance relationship are Vietnamese citizens or legal entities, but the establishment, implementation, change or termination of such relationship occurs in a foreign country. For example, an inheritance relation occurs when a Vietnamese individual dies overseas; and (3) The parties to the inheritance relationship are Vietnamese citizens and legal entities, but the subject of such inheritance relationship is overseas. For example, a Vietnamese individual dies in Vietnam but his or her estate is abroad.

Within the framework of this research paper, the authors will focus on analyzing the principles of choosing the applicable law when dealing with inheritance cases involving foreign element(s) under current Vietnamese law. The analysis will also be limited to considering legal inheritance relationships that do not include issues related to probate inheritance. In this case, the inheritance relations considered will have some characteristics such as the heir can only be an individual, and the inheritance relationship arises when a person dies without the will to share his estate.

III. CHOICE-OF-LAW PRINCIPLES FOR INHERITANCE RELATIONS INVOLVING FOREIGN ELEMENT(S)

As aforementioned, the subject matters of PIL in Vietnam are civil relations with a foreign element(s). To deal with such relations, one of the tasks of PIL is to determine the applicable law, and choice-of-law rules are designated for this purpose. Theoretically, these principles can exist in international treaties to which Vietnam is a contracting party; however, in the following analysis, the authors will limit the research to the extent that an inheritance relationship with a foreign element(s) falls within the jurisdiction of the Vietnamese court, and this court applied the choice-of-law rules in Vietnamese PIL to choose the applicable law, for example, because there is no international treaty signed between Vietnam and the country concerned which contain choice-of-law rule(s) or because the case is deemed to fall under the jurisdiction of the courts of Vietnam[11].

In such a case, generally, the court must choose the laws to be applied for procedural (judicial procedure) and substantive matters.

[11] See Art.470 of the 2015 CPC.

A. Choice-of-law principle for civil procedural matters

With regard to procedural issues, Art.2(3) of the 2015 CPC provides as follows:

"The Civil Procedure Code shall apply to the settlement of civil cases and matters involving foreign element(s); where international treaties which Vietnam has signed or acceded to provide otherwise, the provisions of such international treaties shall apply."

The consequence of the above regulation is very simple, i.e. if the Vietnamese court is competent to hear the inheritance dispute involving foreign element(s), given that there are no contrary regulations provided by international treaties to which Vietnam is a contracting party, Vietnamese law on the civil procedure will apply when considering issues such as the litigation process.

B. Choice-of-law principles for substantive matters of inheritance relations involving foreign element(s)

According to current regulations, the principle of choosing a law applicable to the substantive issues of an inheritance relationship involving foreign element(s) is specified in Article 680 of the 2015 Civil Code as follows:

"1. Inheritance must be in accordance with the law of the country of which the deceased was a national prior to his or her death;

2. The exercise of the right to inherit immovable property must comply with the law of the country where such immovable property is located."

In the above regulation, we can see that Vietnamese legislators introduce the general principle lex patriae in the first clause and the additional principle, or the exception, lex rei sitae, in the second clause. In the following analysis, the authors will focus on clarifying these two principles when applied to a legal inheritance relationship involving foreign element(s). Besides these, the analysis also includes other exceptions concerning certain special cases when the deceased individual is stateless or has multiple nationalities. In some parts of the analysis, PIL of some countries such as China and Indonesia are introduced to compare the relevant issues.

1. The general rule – lex patriae

As introduced in the previous paragraph, Article 680(1) of the CC 2015 states the core rule that "inheritance [relation involving foreign element(s)] must be in accordance with the law of the country of which the deceased was a national prior to his or her death." Applying this provision, the nationality right before the death of a person leaving the estate the law of the country thereof shall be applied to govern the inheritance relation. For example, Mr. A (with French nationality) resided, worked, and lived in Vietnam for a long time. He died in Vietnam without making a will. In this case, to deal with the matter of his inheritance, we will apply the law of France.

The application of *lex patriae* to inheritance relations involving foreign element(s) is not a new factor within Vietnamese PIL. Prior to the 2015 CC, the Civil Code

promulgated in 2005[12] (hereinafter referred to as the 2005 CC) also stipulates that the inheritance at law must comply with the law of the country of which the estate leaver bears the nationality before his or her death (Art.767(1)). In general, the rules to determine the applicable law of the two Codes are the same; however, the scope of *lex patriae* introduced by the 2005 CC is narrower than that of the 2015 CC as the rule is only applied to inheritance at law. Besides this, the 2015 CC explicitly provides that only the law of the country of which the deceased was a national "prior to his or her death" is chosen. The change is slight, but it is useful to determine which country's law will apply if the deceased changed his or her nationality, or had different nationality at different times during life. In such a case, applying the rule in Art.767(1) of the 2005 CC would lead to many legal systems that can be applied and cause difficulties for the court to determine the applicable law.

The principle of *lex patriae* also appears as a choice-of-law rule dealing with matters of cross-border inheritance relationships in Chinese and Indonesian PIL, but at different levels. In China, choice-of-law rules are designated separately for "legal succession" and "inheritance by the will"; however, in both cases, the general rule is "law of the country where the deceased permanent resides" will govern the related inheritance relation[13]. Unlike Vietnamese law, China's PIL only recognizes *lex patriae* as an option among several principles to be considered in the case of inheritance according to the will[14]. In Indonesia, the draft of PIL of Indonesia[15] introduces the general principle that all inheritance, will, and other legal matters arising from the event of death are governed by the law of the deceased's nationality[16]. Regarding the general rule for inheritance relations in such countries, it is obvious that Vietnamese law is similar to the Indonesian draft law, while China's PIL tends to be based on "*the law of the habitual residence*" of the testator[17].

2. The supporting rules – exceptions to the application of lex patriae

In support of the general rule *lex patriae,* there are other choice-of-law rules for particular circumstances. These additional principles are noted in three cases where:

[12] Law No. 33/2005/QH11, adopted on 14/06/2005.

[13] See Articles 31 and 33 of the China Law on choice-of-law (Law of the People's Republic of China on the Law applicable to Foreign-related civil relations, hereinafter referred to as the 2010 CLC). In this writing, the analysis of this law will base on an English version of this law translated by Prof. Lu Song, link: https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/cn/cn173en.html (last accessed 28/06/2022).

[14] According to Articles 32 and 33 of the 2010 CLC, the form of a will is determined by the law of the place where the testator habitually resides, the law of his nationality, or the law of the place where the will was made, while the validity of the will shall be governed by the law of the place in which the person habitually resided at the time of making it or when the person died, or the law of the place of his nationality.

[15] Indonesia does not have an official PI; however, the draft of the Indonesian PIL (the most recent version is in 2014, hereinafter referred to as the Bill of 2014) is considered an unofficial source and the *communis opinio doctorum* on Indonesian PIL. See Basedow, Jürgen, Giesela Rühl, Franco Ferrari, and Pedro A. de Miguel Asensio, eds. *Encyclopedia of private international law. Vol. 3.* (Cheltenham: Edward Elgar Publishing, 2017), 2162. See also Allagan, Tiurma. "Foreign PIL–Developments in Indonesia: The Bill on Indonesian Private International Law." *Nederlands Internationaal Privaatrecht 215, no. 5 (2015):* 390.

[16] See Chapter VI – Inheritance in the Bill of 2014. Except for the general rule, the Bill also introduces other principles such as *lex domicilii,* the law of the place of habitual residence, and *lex rei sitae*; however, these principles concern the matter of inheritance according to will. In this writing, the analyses of this document will be based on an English version translated by Allagan Tiurma in Allagan, Tiurma. "Foreign PIL–Developments in Indonesia: The Bill on Indonesian Private International Law." *Nederlands Internationaal Privaatrecht 215, no. 5 (2015):* 390-403.

[17] Zhang, Mo. "Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings." *NCJ Int'l L. & Com. Reg.* 37 (2011): 137.

(1) the deceased is a stateless person; (2) the deceased is a person of more than one nationality; and (3) the exercise of the right to immovable property. Principles (1) and (2) are intended to deal with cases where the general rule of *lex patriae* cannot be applied, while principle (3) only makes an exception for cases where the inherited property is immovable.

a. Rules applicable in case of a person is stateless

According to Article 3(1) of the Law on Nationality[18], a stateless person is "a person who has neither Vietnamese nationality nor foreign nationality." For example, Mr. A has renounced his Vietnamese nationality in order to apply for naturalization in another country. In this case, he becomes a stateless person during the period of applying to have citizenship in the latter country.

Regarding the issue of choice-of-law rules to be applied in the case of stateless persons, the 2015 CC stipulates in Article 672(1) as follows:

"Where the law referred to is the law of a country of which a person is a national but he/she is a stateless person, the applied law shall be *the law of the country of residence* of such person at the time when the civil relation involving foreign element(s) were established. If that person has multiple residences or his/her residence is not identifiable at the time of establishing the civil relation involving foreign element(s), the applied law shall be *the law of the country with which such person has the closest connection*."

Considering this provision from the perspective of inheritance, it will be applied in the event that the deceased is a "stateless person", then the law applicable to this inheritance relationship will be governed by the law of the country where that person resides (*lex domicilii*) at the time the inheritance relationship is established. However, this principle will not be applicable if the court cannot determine the place of residence of the stateless person. At that time, the principle of *"the law of the closest connection"* will apply.

In the deed, the previous Civil Code (the 2005 CC) also contains a principle specific to a stateless person[19]. According to this Code, the principle of "*lex domicilii*" is also recognized, however, it does not include the expression "at the time when the civil relation involving a foreign element(s) was established" when considering the place of residence. The addition of this factor by the current law (the 2015 CC), therefore, seems to be an appropriate improvement because it simplifies the choice-of-law analysis when a stateless individual changes his/her residence during his/her lifetime. Another limitation of the 2005 CC is that the principle to apply "the law of the place of the closest connection" is not recognized as an alternative when no place of residence is found. Instead, this document states that if the stateless person has no place of residence, then Vietnamese law shall apply. In this regard, the 2005 CC's solution is rather limited and strained because it would be more proper to have Vietnamese law as the last possibility when other principles, e.g. law of the closest connection, failed.

Chinese PIL also recognizes a solution to the "stateless person" problem, according to which, when the case of law referred to is the law of the country of which the individual has a nationality, but such an individual is a stateless person or whose the

[18] Law No. 24/2008/QH12, adopted on 13/11/2008.

[19] Art.760(1) of the 2005 CC stipulates that: "In the event that this Code or other legal documents of the Socialist Republic of Vietnam refer to the application of the law of a foreign country of which the foreigner is a citizen, the law applicable to a stateless person shall be the law of the country where such stateless person resides; if such person have no residence, the law of the Socialist Republic of Vietnam shall apply."

nationality is unknown, then the law of the place where the person habitually resides shall apply[20]. The same solution is found under the provisions of the Bill 2014 of Indonesia[21]. In this respect, the solutions Vietnamese law likely provides are the most comprehensive of the three countries because it considers many cases that may arise in reality, particularly in the case of an individual who has no place of residence or whose place of residence cannot be determined.

b. Rules applicable in case of a person having multiple nationalities

In the case of a person with multiple nationalities, Article 672(2) of the 2015 CC provides solutions for the following two circumstances[22]:

- In the first circumstance, that person has many nationalities and among them is Vietnamese, the solution provided by the law is very simple, that is, Vietnamese law shall be applied. This resolution is first introduced by the 2015 CC which both facilitates the choice-of-law analysis and expresses the protection for people of Vietnamese nationality. Indeed, giving priority to the application of Vietnamese law, in this case, is not a new issue in Vietnamese PIL because previously this was introduced by the 2004 CPC[23] regarding the determination of civil-procedure legal capacity and civil-procedure act capacity of an individual[24].
- In the second circumstance, the person has multiple nationalities and among them does not have Vietnamese nationality, then the solution of the law is to choose "the law of the place where the person resides" (*lex domicilii*) among the places where the person has his/her nationality when the civil relationship involving foreign element(s) arises (in the case of inheritance, i.e. the time of the death the person leaving the succession) to be the applicable law. In this case, it is obvious that the application of "*lex domicilii*" will only lead to the application of the law of one of the countries in which the person is a national. In other words, the solution here is a combination of *lex domicilii* and *lex patriae.* However, if it turns out that (1) the person has more than one place of residence, (2) the place of residence cannot be determined, or (3) the place of residence and the place of nationality are different, then the law where the person has the nationality and has the closest connection shall be applied. Thus, the resolution introduced here is *lex patriae* combined with *the law of the closest connection*.

Based on the above regulations, we give a typical example as follows: Mr. C holds two foreign nationalities (one the United States (the U.S.) nationality, one Polish nationality). Mr. C died and did not make a will. When the inheritance dispute arises,

[20] Art.19 of the 2010 CLC states that: "[…] Where a natural person is stateless or his/her nationality is unknown, the law of his/her habitual residence shall be applied."

[21] Art.3(e) of Chapter I of the Bill of 2014 provides that: "For a person, according to Indonesia law, is a stateless person (*apatride*), the applicable law is the law where he has his habitual residence". However, the Bill limits this rule to matters of "the status and authority to commence any legal action".

[22] Art.672(2) of the 2015 CC: "Where the law referred to is the law of a country of which a foreigner is a citizen but that person has multiple foreign nationalities, the applied law shall be the law of which the person holds nationality and where he/she resided at the time when the civil relation involving foreign element(s) was established. If that person has multiple residences or his/her residence is unidentifiable or his/her residence is different from the country of which he/she holds nationality at the time when the civil relation involving foreign element(s) was established, the applied law shall be the law of the country with which such person has the closest connection."

[23] Law No. 24/2004/QH11, adopted on 15/06/2004.

[24] Art.407(1a) of this Code provides that the civil procedure-legal capacity and civil procedural act capacity of a people shall be governed by Vietnamese law if such a person bears the Vietnamese nationality and foreign nationality. This rule is repeated by Art.466(1c) of the later version of this Code (the 2015 CPC).

it is unable to apply the general rule (*lex patriae*) in Art.680(1) of the 2015 CC because the person has more than one nationality. In this case, we have to rely on Art.672(2) of the 2015 CC. At the time of the inheritance relationship arising, if Mr. C resided in the U.S., the U.S. law will be applied, but if he resided in Poland, Polish law will be applied. If Mr. C had multiple places of residence or the place of his residence is unknown, or he resided in a country other than the country of which he has a nationality (e.g. he resided in Singapore) at the time the inheritance relationship was raised, then we have to choose between the U.S. and Poland, which country he has the closest relationship, the country of which law shall be applied.

Thus, similar to the case of stateless persons, Vietnamese legislators have also created primary and complementary principles for the case of multiple citizenships. In this regard, the approach of combining two principles such as "nationality and place of residence" or "nationality and the closest relation" is very special. In fact, this approach was introduced very early in the 2005 CC (e.g. in Art.760(2)[25]). Although the association with the factor "nationality" will limit the consideration of the factors of "residence" and "closest connection", it is a proper solution in so far as it demonstrates compliance with the general rule *lex patriae* (as defined in Art.680(1) of the 2015 CC).

The solutions dealing with people with multiple nationalities are also described in detail by PIL of China and Indonesia. According to the 2010 CLC, to deal with issues related to persons of multiple nationalities, the solution is to choose the "law of habitual residence"[26] or "law of place of the closest connection" to be the applicable law[27]. Unlike China, the Bill of 2014 of Indonesia offers the solution to choose the law of the country where the person's nationality is "the most effective and active"[28].

[25] Art.760(2) of the 2005 CC provides:

"In cases where this Code or other legal documents of the Socialist Republic of Vietnam refer to the application of the law of a country of which a foreigner is a national, the law applicable to a person with two or more nationalities is the law of the country of which that person is a national and where he/she resides at the time the civil relation arose; if this person does not reside in one of the countries of which he/she is a national, the law of the country of which he/she has the respective nationality and has the closest relation with regard to civil rights and duties shall apply."

It was not until the adoption of the 2015 CC, that the rule to choose the law of the closest connection became a general rule for civil relations involving a foreign element(s) (under Art.664(3)) rather than dealing only with cases of a stateless person or a person of multiple nationalities. See Thuy, Le Thi Bich. "Nguyên tắc luật có mối liên hệ gắn bó nhất trong tư pháp quốc tế và một số kiến nghị hoàn thiện pháp luật Việt Nam" [The principle of closest relationship in private international law and some recommendations to improve Vietnamese law]. *[Hanoi Law Review]*. No.2 (2021): 71.

[26] Scholars provide several explanations regarding the terms "domicile" and "habitual residence"; however, within the scope of this article, the authors do not aim to analyze the matter in depth. For further reference, see Rogerson, Pippa. "Habitual residence: the new domicile?." *International & Comparative Law Quarterly* 49, no. 1 (2000): 86-107; Zohar, Gadi. "Habitual residence: an alternative to the common law concept of domicile." *Whittier J. Child. & Fam. Advoc.* 9 (2009): 169 or Zhang, Mo. "Habitual Residence v. Domicile: A Challenge Facing American Conflicts of Laws." *Me. L. Rev.* 70 (2017): 161.

[27] Art.19 of the 2010 CLC provides that "Where national law is applicable pursuant to this law and a natural person has dual or multiple nationalities, the national law of the country where the natural person has his/her habitual residence shall be applied. Where no habitual residence can be found in any country of his/her nationalities, the national law of the country with which he/she is most closely connected shall be applied." According to Xu (2017), the rule to choose the law of the closest connection can be seen as a *gap-filling* principle. See Xu, Qingkun. "The Codification of Conflicts Law in China: A Long Way to Go." *The American Journal of Comparative Law* 65, no. 4 (2017): 933.

[28] Art.3(d) of Chapter I of the Bill of 2014: "In the event that the national law of a person is applied, but the respective person has two or more nationalities, the applicable law is the law appointed by the most effective and active nationality (of the person). In the event of any dispute concerning the citizenship of a person having two or more nationalities, and one of the nationalities (concerned) is the Indonesian nationality, the applicable law is Indonesian law."

When comparing the three countries, it seems that the solutions of Vietnamese law are, here again, the most comprehensive, while the solution provided by the Bill of 2014 seems to make it difficult to prove the "effective and active" characteristics of a person's nationality.

c. Rule applicable to the exercise of inheritance rights on immovables

According to the provisions of Art.680(2) of the 2015 CC, the exercise of inheritance rights over immovable property is determined according to the law of the country where such immovable property is located. Thus, the solution of the law to this matter is to apply the law of the place where the property is located – *lex rei sitae*.

In fact, the recognition of a separate principle dealing with real estate has appeared since the 2005 CC, according to which, Article 767(2) stipulates that in the case of inheritance involving foreign element(s), the inheritance rights to immovable property must comply with the law of the country where such property is located. In comparison to the scope of *lex rei sitae* under the 2005 CC, it can be seen that the application of *lex rei sitae* under the 2015 Civil Code is narrower because it only concerns "the exercise of inheritance right" related to real estate. The common point between the two Codes, however, is that Vietnamese legislators always tend to pay special attention to real estate issues. The same trend can be found in the PIL of China and Indonesia. While the 2010 CLC stipulates that statutory inheritance of real estate will be governed by the law of the place where the property is located[29], the Bill of 2014 of Indonesia also clearly defines that the form of a will can be governed by the law where the real property is situated[30], while the legal consequences relating to immovable property in Indonesia will according to the law of this country[31].

IV. SOME INADEQUACIES CONCERNING THE CHOICE-OF-LAW PRINCIPLES FOR INHERITANCE RELATIONS INVOLVING FOREIGN ELEMENT(S) AND PROPOSALS TO IMPROVE THE RELEVANT REGULATIONS

When considering relevant regulations such as Art.672 and Art.680 of the 2015 CC, it can be seen that the current rules are quite complete because the legislators have foreseen several situations, especially in relation to cases of stateless persons and persons with multiple nationalities. Besides, the law also has a reasonable combination of the general principle *lex patriae* and supporting principles such as *lex domicilii, lex rei sitae*, and the *law of the closest connection*.

However, when considering the application of such rules in practice, some inadequacies that can make it difficult to apply the regulations emerge, focusing on the lack of detailed explanation of the expressions "exercise of inheritance rights over immovable property" and "law of the closest relation."

A. What is the "exercise of inheritance rights on immovable properties"?

Currently, while Vietnamese law does not have any explanation for the matter of

[29] Art.31 of the 2010 CLC stipulates: "[…] statutory succession of immovable property is governed by the law where the immovable property locates."

[30] Actually, besides *lex rei sitae,* the Bill of 2014 also introduces several rules to deal with the matter, such as *lex domicilii, lex patriae,* and the law of the place of the habitual residence. See Chapter VI – Inheritance in the Bill of 2014.

[31] Art.3(m) of Chapter I of the Bill of 2014.

exercise of inheritance rights over real estate, there is also no case law to clarify it. In that context, several local scholars decided to explain the law on their own, however, there is no consensus on the understanding of the expression of the relevant provision. Generally, two opinions are widely accepted.

The first point of view is that the rule under Art.680(1) of the 2015CC – *lex patriae* – is generally applicable to inheritance relations, whether they relate to movable or immovable. This point of view is supported by the majority of the local scholars studying PIL in Vietnam[32]. As for the exercise of the rights of succession to real estates, such as the registration of the right of ownership over it, these should be governed by the rule under Art.680(2), the *lex rei sitae*. From this point of view, the issue of the exercise of the rights of succession over the immovable property should be seen only after a person has inherited the estate (thus he became the owner of such property) thus he can exercise/enjoy his rights in relation to this property.

The second point of view is that the provisions of Art.680(2) shall apply to the inheritance of immovable property, which means that Art.680(1) only applies to movable property[33]. Considering this point of view, it is probably based on Art.609 of the 2015 CC which aims to define "inheritance rights." According to this provision, inheritance rights shall include (1) the right to leave one's property to another person, and (2) the right to inherit another person's property. On this basis, proponents of the second view may infer that the exercise of inheritance rights to immovable property, as indicated by Art.680(2), must be read together with Art.609. Therefore, such rights shall include "the exercise of the right to leave an inheritance " and "the exercise of the right of inheritance property from another person." Therefore, as mentioned above, Art.680(2) is believed to be designated to deal with immovable property, and this leads to the scope of Art.680(1) being applied only to movable property.

However, we are of the view that such understanding and explanation of the second opinion is inappropriate for two reasons.

First and foremost, the opinion is unintentionally well-adapted to the expression of Art.767(1)(2) of the 2005 CC as follows:

> *"The inheritance at law must comply with the law of the country of which the deceased bears the nationality before his/her death.*
>
> *2. The inheritance rights to immovable property must comply with the law of the country where such property is located.*
>
> *[…]"*

According to the above provisions, two rules are explicitly provided. The first rule in clause 1, *lex patriae,* applies to the inheritance of movable properties, while the

[32] For example, this opinion is supported by Do Van Dai and Le Nam Giang. See Ngoc, Tran Minh. and Lan, Vu Thi Phuong, eds. *Giáo trình Tư pháp quốc tế [Textbook of Private International Law]*. (Judicial Publishing House, 2019), 290. See also Dai, Do Van, and Giang, Le Nam. See Dai, Do Van. *Bình luận Khoa học những điểm mới của BLDS năm 2015 (2nd Edition) [Scientific commentary on new features of the Civil Code 2015].* (Hong Duc Publishing House – Vietnam Lawyer Association, 2016), 616 and Giang, Le Nam. *Tư pháp quốc tế [Private International Law]*. (VNU Publishing House, 2016), 409. The same opinion is also expressed by the authors in Huong, Bui Thi My, and Anh, Nguyen Huynh. "Quan hệ thừa kế theo pháp luật có yếu tố nước ngoài - Kiến nghị hoàn thiện" [Inheritance at law with foreign element – Issues and recommendations]. *Tạp chí Công thương [Industry and Trade Magazine]*. No.11 (20210: 54.

[33] For example, this opinion is agreed by Banh Quoc Tuan. See Tuan, Banh Quoc. *Giáo trình Tư pháp quốc tế [Textbook of Private International Law].* (National Political Publishing House, 2017), 387.

second rule in clause 2, *lex rei sitae,* is designed for the inheritance of immovables. In fact, the *lex rei sitae* rule in Clause 2 is currently repeated by Art.680(2) of the 2015 CC; however, the phrase "inheritance rights to an immovable property" is replaced by "exercise of the right to inherit immovable property" in the latter document. With this change of wording, we believe that the two expressions must be understood differently because it is not likely that the legislators provide such a change for no reason. In this case, while clearly indicates the matter of "exercise of the right to inherit" in the latter expression, the scope of *lex rei sitae* at present must be narrower than the former. Therefore, the second point of view cannot explain such changes in wording and scope of *lex rei sitae* in current law.

Furthermore, it is proper to consider that the *lex patriae* given in Article 680(1) of the 2015 CC is the general rule for inheritance because it is repeated consistently in the supporting principles[34]. However, from the second point of view, the principle in Article 680(1) does not appear to be a general principle, instead, there would exist two separate principles for movable and immovable properties as in the previous version of the Civil Code. In other words, the second view seems to devalue the *lex patriae* principle and also fails to explain why it appears in conjunction with principles dealing with persons having multiple nationalities.

On the contrary, the first point of view is more appropriate for certain reasons. Firstly, it emphasizes the role of *lex patriae* as the general principle and this is also consistent with the appearance of this rule when combined with other principles such as "law of the residence" or "law of the place of the closest connection" when dealing with cases of people with multiple nationalities. Furthermore, it explains that the "exercise of the rights to inherit immovable property" includes only the rights acquired after inheriting such immovable property. From this perspective, the second point of view is also consistent with the provisions on the rights of foreigners to immovable property in the territory of Vietnam. According to the provisions of Article 186(3) of the Land Law[35], if foreigners are entitled to inherit land-use rights (which are considered immovable properties), they cannot register those rights, instead, they can only enjoy the equivalent value[36]. Similarly, Article 161(2b) of the Law on Housing[37] also stipulates that if a foreigner inherits houses (houses are also deemed real estate) but the number of such houses exceeds the limit, he/she can only be entitled to enjoy the value corresponding to the overrun of that limit. In such cases, the provisions of the Land Law and the Law on Housing confirm the interpretation of the first point of view above, according to which, the inheritance of foreigners related to real estate in Vietnam is still according to the general principle *lex patriae*; however, how they enjoy that right, either directly through the property or only to receive the value of that property, will be determined by the law of the location of the real estate.

B. Uncertainty in the definition of "law of the closest connection"

When Article 680(1) of the Civil Code 2015 refers to the application of the law of the country of which the deceased had a nationality immediately before his death, but he/she is a stateless person or a person with multiple nationalities, the supporting rules

[34] See more in *supra* Section III.B.2.b.

[35] Law No. 45/2013/QH13, adopted on 29/11/2013.

[36] In this regard, Art.34 of the 2010 CLC also provides that matters of estate administration are governed by the law where the estate locates.

[37] Law No. 65/2014/QH13, adopted on 25/11/2014.

always lead to the application of the law of the country with which that person has the closest relationship. However, while there is no explanation for the term "closest connection" from legal documents and precedents, it is very difficult to predict the law to be applied because the "law of the closest connection to the inheritance" may be understood differently by the courts.

Within the scope of this article, we propose to have an explanation on the matter, and in such explanation, the "law of the closest relationship" in an inheritance relationship with a foreign element(s) should be:

- The law of the country where the immovable property is located; however
- In case the inheritance does not have any immovable property, the law of the country to which it is closely related is the law of the country where the entire or most of the property is located.

With regard to the first rule, this is compatible with the provisions of Article 680(2) of the 2015 CC regarding the exercise of inheritance rights to real estate. Regarding the second rule, this solution is also not new because it exists in another provision of the 2015 CC related to the location where the inheritance begins, whereby the law stipulates that the place where the inheritance is commenced is the last place of residence of the person leaving the estate; if the last place of residence cannot be determined, the place of commencing the inheritance is *the place where the entire estate is located or where the majority of the estate is located*[38]. In this case, if the same rule to apply the law where the majority of assets are located for the inheritance of movable property, it will also facilitate related activities, such as the management and distribution of the property.

IV. CONCLUSION

To determine the applicable law in inheritance relations involving foreign element(s), Vietnam's PIL provides several principles to choose the applicable law. For procedural matters, the Vietnamese civil procedure law shall apply. For substantive law issues, PIL of Vietnam provides the general principle to apply the law of the place of the nationality of the deceased (*lex patriae*) and several sub-principles such as *lex domicilii*, *lex rei sitae,* and *the law of the closest connection*. Vietnamese legislators tend to uphold the role of *lex patriae* while stipulating it as a general principle and combining it with other principles for special cases of inheritance. In general, the relevant choice-of-law principles for inheritance relations are quite comprehensive as they cover cases that may occur in practice. Besides this, the application of the principle of *the law of the closest connection* is likely to reduce the imposition to apply Vietnamese law in certain circumstances. However, if there is a clearer explanation for issues such as the exercise of the right of inheritance to immovable property and the principle of the law of the closest connection to the inheritance, it is supposed to create a unified understanding and facilitate the handling of cross-border inheritance disputes in the future.

[38] Art.611(2) of the 2015 CC.

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