Non-Qualifying Ceremonies: The Futility of Foreign Registration of Islamic Marriages under English Law

This blog note is kindly provided by Dr. ***Muhammad Zubair Abbasi*** *(Lecturer, School of Law, Royal Holloway, University of London; zubair.abbasi@rhul.ac.uk).* *It follows the author's previous post on this topic, which was published earlier* ***on this blog****.*

Introduction

In *MA v WK* [2025] EWFC 499, three women had undergone Islamic marriage (*nikah*) ceremonies in England. Each argued that subsequent registration of her marriage in Pakistan had converted it into a valid foreign marriage entitled to recognition in England and Wales. The Family Court rejected this argument because the *lex loci celebrationis* is fixed at the place and moment of the ceremony; no later act of registration in another jurisdiction can alter it.

The more important question is why the argument was made at all. Each applicant had already accepted that her ceremony was a non-marriage or non-qualifying ceremony (NQC) under English matrimonial law. Each had therefore been excluded, by the rule established in *Attorney General v Akhter & Others* [2020] EWCA Civ 122 from the financial remedies that the Matrimonial Causes Act 1973 would otherwise have provided. The argument from Pakistani registration was, in substance, a desperate attempt to find through private international law a route that domestic law had closed. It was always going to fail but the fact that it was attempted is itself instructive. When the law systematically denies recognition to a form of marriage that a significant part of the population regards as valid, litigants will look for whatever route remains open. *MA v WK* is a record of one such attempt, and it is unlikely to be the last as long as the existing legal framework remains unreformed.

The Facts

There were three female applicants, each of whom had celebrated a *nikah*-only in England and sought to rely on subsequent registration in Pakistan. The first, MA, had celebrated a *nikah* with WK in Oxfordshire on 1 April 2013. She produced a Pakistan Marriage Registration Certificate recording both the marriage date and entry date as 1 April 2013, with an issue date of 26 August 2024. The second, TM, had celebrated a *nikah* with MM at a mosque in England on 19 January 1992. She produced a Pakistan Marriage Registration Certificate, but the entry date was 2 October 2025 — thirty-three years after the ceremony and after MM had already remarried in Pakistan in 2017. The third, AM, had celebrated a *nikah* with RK in England in 2005. No evidence of registration was produced.

Non-Qualifying Ceremonies and Private International Law

The formal validity of a marriage is governed by the *lex loci celebrationis*, as restated by Moylan LJ in *Tousi v Gaydukova* [2024] EWCA Civ 203. All three ceremonies took place in England; all three applicants accepted that none had complied with the Marriage Act 1949. Each was therefore a non-qualifying ceremony (NQC). The question was whether subsequent registration in Pakistan could convert them into valid foreign marriages capable of recognition in England and Wales. The court held that it could not: the *lex loci* is determined by the place of celebration, not by any later administrative act. There is no authority for the proposition that registration can substitute for, or supplement, the ceremony for the purposes of legal recognition.

The applicants advanced two arguments. First, that registration is the operative event for *lex loci* purposes, deriving from *Sottomayor v De Barros (No 1)* (1877) 3 PD 1, a principle elevating it to the “pinnacle” of matrimonial law [para 16]. That reading does not survive examination: in *Sottomayor* ceremony and registration happened simultaneously at an English register office, and their coincidence does not make registration the constitutive event. The three further authorities relied upon, *Boughajdim v Hayoukane* [2022] EWHC 2673; *Entry Clearance Officer v Firdous* [2018] HU/04562/2016 (Upper Tribunal); and *Farah v Farah* 16 Va. App.

329 (Va. Ct. App. 1993), each turned on where the ceremony, or its dominant elements, had taken place. None held that registration of an English ceremony abroad could shift the *lex loci*; they are authority for the opposite proposition.

The second argument assumed what it needed to prove. The principle in *Berthiaume v Dastous (*Quebec) [1929] UKPC 73, that a marriage valid where celebrated is valid everywhere, operates in favour of a marriage validly formed at its place of celebration. It avails nothing where the ceremony was not valid there in the first place. A further difficulty lay in Pakistani law itself. On the expert evidence, accepted in *Rana v Manan* 2011] EWHC 2132 and applied here, registration under section 5 of the Muslim Family Laws Ordinance 1961 is directory rather than mandatory: it is the *nikah* contract that creates the marriage. What Pakistani law had done in registering these marriages was not to create new Pakistani marriages, but to record marriages that Pakistani law treated as having taken place in England.

On the presumption of marriage, the answer was straightforward. The presumption, as Evans LJ explained in *Chief Adjudication Officer v Bath* 1999] EWCA Civ 3008 at [31]–[32], fills evidential gaps; it does not operate where there is positive evidence of non-compliance with the statutory formalities. The circularity this produces is uncomfortable. A party who wishes to argue for recognition of her marriage must disclose to the court the circumstances of the ceremony; and once she has done so honestly, she will typically have foreclosed the only doctrine that might have assisted her.

Commentary

The judgment in this case is the latest in a sequence that has progressively narrowed the legal options available to parties in religious-only or a nikah-only marriages. Until *Attorney General v Akhter & Others* [2020] EWCA Civ 122, the courts had available to them a range of tools: the "hallmarks of marriage" test from *Gereis v Yagoub* [1997] Fam Law 475; the presumption of marriage from long cohabitation from *Chief Adjudication Officer v Bath*1999] EWCA Civ 3008; and a generally flexible approach to the non-marriage category, which had been applied in reported cases almost exclusively to polygamous unions (*A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6; *Gandhi v Patel* [2002]

1 FLR 603; *Shagroon v Sharbatly* [2012] EWCA Civ 1507; and *El Gamal v Al-Maktoum* [2011] EWHC B27.

The Court of Appeal's introduction of the NQC category in *Attorney General v Akhter & Others* [2020] EWCA Civ 122 changed the landscape. A court asked to classify a religious-only ceremony now asks a single, decisive question: did the ceremony comply, at least to some degree, with the statutory requirements? If the answer is no, the ceremony is outside the regulatory framework entirely, and neither the hallmarks test nor the presumption can operate to bring it back in. The present case is a private international law application of the same logic: the question is what happened at the ceremony, assessed as at the date of the ceremony, and later events, including registration abroad, are irrelevant.

The choice of jurisdiction made no difference to that conclusion. The applicants sought declarations of marital status under section 55(1) of the Family Law Act 1986, which enables a person to apply for a declaration that a marriage was at its inception valid, or that it subsisted on a particular date. That jurisdiction is declaratory, not constitutive: it identifies the status that the law recognises, it does not create one. The argument from foreign registration was in substance an invitation to the court to use the section 55 jurisdiction to confer a status that English law does not recognise. It was always going to fail, not because of any deficiency in the evidence or any technical point of procedure, but because the declaratory jurisdiction cannot be deployed as a means of circumventing the requirements that the Marriage Act 1949 imposes.

None of this is a criticism of the applicants, who were doing what people in their position typically do: looking for whatever route the law might offer. It is a comment on the law itself. The Attorney General had foreshadowed a public policy objection under section 58(1) of the 1986 Act had the court found in the applicants' favour, an indication that the state's interest in maintaining the integrity of the marriage framework is regarded as sufficiently strong to resist even a successful argument from foreign registration [para 30]. That the argument failed means the public policy point did not arise, but its potential invocation confirms that the current framework is not one the courts are inclined to look for ways around.

Conclusion

The decision in *MA v WK* is easy to justify on the law as it stands. The *lex loci celebrationis* is not a rule that administrative convenience in another jurisdiction can displace, and the section 55 jurisdiction does not exist to remedy the deficiencies of the Marriage Act 1949. But the case is a reminder that when domestic law closes every available door, litigants will look elsewhere.

The failure in this case is not one of private international law. The Marriage Act 1949, built on foundations laid by Lord Hardwicke's Clandestine Marriages Act 1753, which transformed the private marriage contract into a public act requiring the sanction of the church-state — was not designed with cultural and religious diversity in mind. The Government has committed to reform. But the proposed changes are prospective. They will not assist the three women in this case, nor the many others in the same position. Until Parliament addresses that gap, family courts will continue to turn away women whose marriages are real to everyone except the law.

A few takeaways from the Conclusions & Decisions of the HCCH governing body (CGAP – 2026 meeting): parentage/surrogacy, jurisdiction project, cross-border recognition

and enforcement of protection orders and a Note on the Trusts Convention

This week the Conclusions & Decisions (C&D) of the HCCH governing body, the Council on General Affairs and Policy (CGAP or Council), were published. Click the links below for the relevant language versions (English, French and Spanish).

Although a wide range of topics were discussed, I would like to focus on four items: parentage/surrogacy project, the cross-border recognition and enforcement of protection orders, the jurisdiction project and a Note on the Trusts Convention.

In my view, the C&D are significant for two reasons. First, the work related to a possible new instrument of a long-standing topic at the HCCH has been concluded (without a Convention) and secondly, a "new" topic has been inserted into the agenda of the HCCH. For more information, see below.

Parentage/surrogacy project

The parentage/surrogacy project has been a recurrent topic in the work of the HCCH. It has expanded more than a decade, starting in 2010 with some preliminary research, which resulted in the establishment of an Experts Group (EG) and subsequently, a Working Group (WG).

In preparation for this meeting, a document was drawn up by the Working Group (WG) on Parentage / Surrogacy entitled: *Final Report on the Feasibility of a possible Convention on the Recognition of Judgments on Legal Parentage* (Preliminary Document (Prel. Doc.) No. 1). This is a monumental work, which includes a text of a draft Convention (as of p. 13).

The specific proposal of the WG to the Council was the following:

"The WG acknowledged the importance of the HCCH Parentage / Surrogacy Project to develop an international instrument on legal parentage in cross-border situations. The WG agreed that such an instrument is desirable, as it could enhance legal certainty, predictability and continuity while protecting the rights of children and families, and all persons involved."

It further acknowledged that policy differences remained and for some experts these were fundamental, and as a result, consensus could not be reached on a way forward (*i.e.* advancing to a Special Commission, which is the usual path when negotiating a HCCH Convention and which are meetings held prior to a Diplomatic Session).

With this Final Report, and as its name suggests, the work of the WG has concluded and this Preliminary Document is the last document drawn up by the WG on this topic.

Reflecting the disagreement existing at the WG level, the Council decided on this topic the following: "While recognising the progress made by the Working Group, CGAP decided not to advance to a Special Commission at this stage, with the understanding that this issue may be revisited at a later stage."

Accordingly, this year marks the end of this project (if not the end of an era), with the exception of monitoring legal and practical developments on the subject that are to be presented at the 2028 meeting of the Council (C&D No. 5). Perhaps this topic may be revived in the future when and if the time is ripe.

Cross-border recognition and enforcement of protection orders

While the ashes of the Surrogacy/Parentage project were still warm, a "new" proposal for a Convention emerged and was tabled by the UK as: *Prel. Doc. No 25 of January 2026 – Proposal from the United Kingdom to establish a Working Group on Recognition and Enforcement of Protection Orders* – not publicly available.

The Council mandated the establishment of a WG on a potential future convention on cross-border recognition and enforcement of protection orders (see C&D No. 22).This is remarkable and underlines the importance of keeping women and children safe. By tabling this proposal, the UK makes clear that this is an absolute priority.

This initiative will build on previous work conducted by the Permanent Bureau from 2011-2018, during which an Experts Group was established (see C&D No. 23 and 24). At its 2018 meeting, the Council noted that "14. The Council decided to remove from the Agenda of the HCCH the topic of recognition and enforcement of foreign civil protection orders, with the understanding that this issue may be

revisited at a later stage." A statement that now is history.

This will be an important initiative to follow in the future.

Jurisdiction project

The decision on the future of the jurisdiction project has been delayed until the next meeting of the Council in 2027. At that meeting a decision will be made whether that project advances to a Special Commission "or decide on any other outcome of the Project" (C&D 9).

A Report of the Chair of the Working Group on matters related to jurisdiction in transnational civil or commercial litigation was presented as Prel. Doc. No 2A of December 2025. This Report includes a draft text of a future convention on parallel proceedings and related actions (from p. 13, with many [square brackets], signalling lack of consensus or agreement on the text).

Last year a public consultation was launched on the Draft Text of a possible new convention on parallel proceedings and related actions, the results of which still need to be analysed. The Council mandated that a document be submitted analysing such responses by the end of September 2026 and gave specific instructions on how it should be drafted (C&D No. 8). The responses will be published subject to the permission of the respondents.

We will keep you informed of any new developments.

A Note on the Trusts Convention

Finally, a Note on the Application and Interpretation of Article 2 of the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition and on the Institutions Analogous to Trusts was submitted as Prel. Doc. No 12B of January 2026 (for the actual Note see Annex V, p. 25). In particular, a fascinating explanation of the terms used in English (estate) and French (patrimoine) is included in pages 28-29. Equally interesting is Annex A to Note (for Section V) – Institutions Meeting the Criteria in Article 2 of the Trusts Convention. This Note was approved and will be published together with its Annexes (C&D 69).

In sum, this Council's meeting decided on crucial matters related to treaty making on Private International Law at the HCCH. The next meeting of the Council in 2027 will also be of great importance as it will decide on the future of the jurisdiction project. With regard to specific projects, the cross-border recognition and enforcement of protection orders attests to the fact that a topic can indeed return to the agenda of the HCCH, and thus some experts may harbour the wish that the parentage/surrogacy project may rise one day like a phoenix from the ashes.

Muscles from Munich? How German Courts Might Stop US Companies from Violating Copyright through AI Training

Yesterday, the Regional Court of Munich (*Landgericht München I*) held a highly interesting oral hearing in a dispute brought by *GEMA*, a German collecting society representing composers, and *Suno*, a generative music AI company based in Cambridge, MA. The hearing was noteworthy, first, because it gave the public an opportunity to listen to numerous international hits, from Alphaville's Forever Young to Lou Bega's Mambo No. 5 (and their alleged copies created by *Suno*) in a courtroom; and secondly, because the dispute raises some interesting questions of private international law.

After *GEMA* had already scored a famous victory against *OpenAI* in November 2025, when the same chamber of the Munich Court had held that the company had been violating the copyrights of several artists and composers by reproducing their song texts, the present proceedings differed not just in scope (focusing on the musical arrangement rather than texts) but also in its international dimension.

For the first time, the claimant explicitly included the use of the protected works for training that had happened (according to both parties) exclusively in the US.

As far as those claims are concerned, the main obstacle to overcome for the claimant is the German court's jurisdiction. As Germany has no (codified) law on international jurisdiction over non-EU defendants, international jurisdiction is established by extending the rules on local jurisdiction (venue) to international jurisdiction (so-called 'double funtionality'; see Lutzi/Wilke, in Lutzi/Piovesani/Zgrabljic Rotar (eds), Jurisdiction over Non-EU Defendants (Hart 2024), 111 et seq). In the present case, this appears to provide an opportunity for the claimant to rely on a little-known norm of the German *Verwertungsgesellschaftsgesetz* (VGG; own translation and emphasis):

> ***§ 131 Exclusive Jurisdiction***
>
> *(1) For legal disputes concerning claims by a collecting society for infringement of a right of use or right of consent administered by it, the court of the district in which the* ***infringing act was committed*** *or in which the infringer has their* ***general place of jurisdiction*** *shall have* ***exclusive jurisdiction****. (…)*
>
> *(2) If, pursuant to paragraph 1, sentence 1,* ***different courts*** *have jurisdiction for multiple legal disputes against the same infringer,* ***the collecting society may bring all claims before any one of these courts.***

While the provision is clearly aimed at allocating local jurisdiction within Germany, nothing in its wording seems to exclude an international understanding, similar to other norms on local jurisdiction. While this would create a clearly exorbitant *forum actoris* for German collecting societies in cases falling under paragraph 2, this might be justified by the peculiar nature of collecting societies, which are heavily regulated in German law and are required, for instance, to enter into licensing agreements under 'appropriate' conditions (§ 34 VGG). Indeed, the Munich court appeared rather amenable to the proposition of applying § 131 VGG internationally.

In the present case, this would raise further interesting questions.

For once, does paragraph 1, according to which the courts of the place of infringing and the courts of the defendant's seat are competent, lead to 'different

courts' being competent in the sense of paragraph 2? Traditionally, the provision was supposed to solve the problem of traveling showmen performing committing similar infringements in numerous places. As far as the training of AI is concerned, there might only be a single place of infringement, though. Then again, paragraph 2 only requires multiple competent courts for proceedings 'against the same infringer', which should allow other infringements, such as the streaming of allegedly copyright-violating output in Germany to be taken into account.

Assuming that the court would not consider this sufficient to trigger the *forum actoris* of paragraph 2, it would need to answer another question, namely if paragraph 1 as a rule of exclusive jurisdiction would also prevent the claimant from (subsidiarily) relying on § 23 of the Civil Procedure Code (ZPO), which creates jurisdiction at the location of the defendant's property. In other contexts, authors have argued that provisions of exclusive *local* jurisdiction should not be understood as provisions of exclusive *international* jurisdiction so as not to render the recognition and enforcement of decisions from other fora impossible.

If the Munich court accepted its international jurisdiction on either of those bases, the applicable law would, of course, still be US copyright law (including its relatively far-reaching exceptions for 'fair use', which the defendants argue should apply here) pursuant to Article 8 Rome II. Thus, if the decision – which has been scheduled for **12 June** – includes a positive decision on international jurisdiction regarding the US-based training, it might not yet include a decision on the substance in this regard, but could instead include an order for expert evidence on foreign law (§ 293 ZPO).

The claimants would understandably still consider this as a win, though, as it would provide a basis for future claims by German collecting societies against AI companies. In this sense, it would fit neatly into what *Linda Kuschel* and *Darius Rostam* have described, in reaction to the previous decision against OpenAI, as '*the current popular narrative of a tightly regulating EU that protects rightsholders and a US that favors AI-friendly market solutions.*' While the Munich judges said rather little about their own preferred interpretation of the law at yesterday's hearing, especially with regard to international jurisdiction, they also made no effort to dispel this narrative.

German Federal Court of Justice on the Pegasus-Software Scandal: States do not have a general right of personality

This case note is kindly provided by *Dr. Samuel Vuattoux-Bock, LL.M. (Kiel)*, Freiburg University (Germany)

On February 24, 2026, the German Federal Court of Justice ruled on the Kingdom of Morocco's claim against the German news portal "Zeit Online" (Case no. VI ZR 415/23). In 2021, the journal alleged that Morocco had spied on several lawyers, journalists, and high-ranking politicians, including French President Emmanuel Macron, using the surveillance software "Pegasus". Morocco denied the allegations and sued the publication for damages, claiming an infringement of its general right of personality. The Federal Court of Justice of Germany, the highest court for civil and criminal matters, rejected Morocco's claim, arguing that states do not have such a right. This decision is interesting because it lies at the intersection of private international law, national tort law, and public international law. The following article aims to present the main points of this decision in terms of both its international and substantive aspects.

I. Aspects of Private International Law: A too Easy Gateway into German Law?

First, the court had to determine if it was competent and which law should apply to this claim (Nos. 7 et seq.). Despite the claimant's status as a Third State, the application of the Brussels Ibis Regulation (EU 1215/2012) was unproblematic here. Morocco's claim was not made "in the exercise of State authority (acta iure imperii)" (Art. 1(1) Brussels Ibis), and the defendant is based in a European Union

Member State (Hamburg, Germany).

However, the determination of the applicable law revealed some hesitation on the part of the Court (Nos. 11 et seq.). Surprisingly, the Court did not decide whether the Rome II Regulation or German autonomous private international law should apply to the case (no. 13). Although the court considered the possible application of the exception of Art. 1(2)(g) Rome II ("non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation."), the Court did not address whether an infringement of a legal person's reputation falls under this exception (nos. 15 and 16). However, infringements of rights relating to personality through the media clearly fall under the exception of Art. 1(2)(g) Rome II. The debate about applying this exception to legal persons is actually caused by the application of the Rome II Regulation to claims related to unfair competition (Art. 6(1) and (2) Rome II), not by their mere quality as legal persons (see CJEU, ECLI:EU:C:2017:766, Bolagsupplysningen and Ilsjan, mn. 38). However, the present case is not related to business matters or competition claims; therefore, the exception of Art. 1(2)(g) Rome II should clearly apply.

Therefore, German private international law should apply, which the Court also examined (nos. 18 et seq.). The Court found that the parties had made an implied choice-of-law agreement for German law (no. 19). The Court ruled that, throughout the entire procedure, the parties' exclusive reference to substantive German law satisfied the conditions of such an agreement under Art. 14(1)(a) Rome II (no. 17) and Art. 42 of the Introductory Act to the Civil Code (EGBGB). This decision, if it can be understood, left some kind of an aftertaste of insecurity of the Court, as it appeared to be the simplest way to reach German law. Art. 40 EGBGB, relating to the applicable law for torts, allows the claimant to choose between the place where the harm arose (*Erfolgsort*) and the place where the event which gave rise to the harm occurred (*Handlungsort*). The eventual question of the claimant's (Morocco) choice for determining where the harm occurred would have led to the well-known difficult question of the localization of such an infringement through the Internet and the possible application of Moroccan law. In such a case, the Court would also have had to consider the application of Art. 40(3)(2) EGBGB, which states that this law is inapplicable if the claimant's purpose is not actually to seek compensation (e.g. to exert pressure on the defendant). The Court did not address these issues and concluded that German law applies.

II. Aspects of Substantive Law: A Panorama of Public International Law for the Benefit of Private Law

German tort law is based on a restrictive approach. The central norm, Sect. 823(1) of the Civil Code (BGB), lists the legally protected rights: Life, Body, Health, Freedom, Property and "other right". This last category allows for the protection of interests comparable to those listed, such as the right to one's personality, or the protection of victims from certain types of professional pure economic loss. Schematically, damages can only be granted for other interests if the tortfeasor infringed upon a protective law (Sect. 823(2) BGB) or if the harmful act is immoral (Sect. 826 BGB), which conditions are stricter.

Therefore, the claimant first tried to obtain damages based on the general case law regarding the infringement of personality rights under Sect. 823(1) BGB, and second, based on the infringement of criminal laws as protective laws under Sect. 823(2) BGB. However, the claims based on criminal legislation (Sect. 90a, 90b, 185 et seq., 102 to 104a of the Criminal Code, StGB) failed because foreign states are not subject to these norms (nos. 62 et seq.).

Therefore, the debate focused on Sect. 823(1) BGB and, logically, if such a right of personality also exists for states. After establishing that domestic law does not grant states such a right according to settled case-law (nos. 21 et seq.), the Court considered whether such a right exists as a general principle of public international law (nos. 23 et seq). In doing so, the Court examined an extensive body of case law (nos. 28 et seq.) from international courts and arbitral tribunals, the European Court of Humans Rights, diverse international and regional organizations (e.g. the Council of Europe, the European Union, the OSCE…) and national courts (USA, England, Scotland, France and Germany). The Court concluded that a protection of an alleged right of personality for states against private individuals does not exist. Most of the relevant decisions involve cases concerning diplomats or claims from state to state. In fact, the Court noted that many organizations encourage states to refrain from suing journalists regarding questions of the state's reputation to guarantee freedom of speech and press freedom (cf. no. 54). Although the Court does not explicitly refer to it, the idea of extracontractual liability that does not "open the floodgates" of liability, as well as

the weighing of interests, are typical to German tort law. The interest of a foreign state in protecting its honor against statements by private individuals is neither necessary nor worthy of protection under civil law.

III. Final remarks

By ruling that foreign states do not have a right of personality that can be enforced against private individuals, the German Federal Court aligned itself with the decision of the French Cour de Cassation. The highest French court for civil and commercial matters also decided on the very same case in 2024, i.e. a claim of the Kingdom of Morrocco against a French journal regarding the very same accusations. In this case too, the French Cour de cassation – without spending a word on the aspects of private international law – decided that "a foreign state is not entitled to bring a public defamation action against an individual" (no. 12). These decisions are certainly welcome, as they reinforce the independence of the press against foreign attempts to influence press freedom in Europe, especially in these troubled times.

Climate Litigation Before the German Federal Court of Justice – "Too Complex" for Private Law instruments?

Written by Marc-Philippe Weller, Carolina Radke, and Marianna Dänner (all Heidelberg University)

On 2 March 2026, the German Federal Court of Justice (*Bundesgerichtshof*;

"BGH") held an oral hearing in two proceedings concerning the civil liability of companies regarding climate change. The authors of this blog post attended the hearing as members of the audience.

The German NGO *Deutsche Umwelthilfe (DUH)* is suing the car manufacturers *BMW* and *Mercedes Benz*, requesting a legal order obliging both companies to refrain from placing combustion engine cars on the market beyond 2030. These two proceedings join the club of (strategic) climate change lawsuits in Germany. Crucially, they are the first of their kind based on tort law to reach the German Federal Court of Justice. Accordingly, the hearing was eagerly awaited by many. The decision, which will be rendered on 23 March 2026, will undoubtedly have an impact on future climate lawsuits.

While no issues of international jurisdiction or applicable law arose in the proceedings in question – as all Parties are seated in Germany –, the judgment of the BGH could further motivate foreign parties to bring claims against German companies, thereby giving rise to questions of international jurisdiction and the applicable law (see for more details *Weller/Weiner*, Corporate Climate Liability in Private International Law, in: Japanese Yearbook of Private International Law, Vol. 26 (2024), 2). In this context, one may refer to the deliberations of the Higher Regional Court (OLG) Hamm in *Lliuya against RWE* (OLG Hamm, 28. Mai 2025, 5 U 15/17).

1. Legal Framework

The climate goal of the German Constitution (*Grundgesetz*; GG) derived from its Art. 20a was specified by the German Constitutional Court (*Bundesverfassungsgericht*) in line with the Paris Agreement, namely, to limit the rising global average temperature to well below 2°C and preferably to 1.5°C above pre-industrial levels. Combustion engine cars contribute to the global CO2 emissions and hence to the greenhouse gas effect and the global warming. Against this background, the question arises whether the constitutional climate goal can (additionally) be enforced through private lawsuits against companies, notwithstanding the fact – as emphasized in the present case – *BMW* and *Mercedes* are acting in accordance with the existing public regulatory framework in Germany.

In both proceedings, the claim of *DUH* relies on Section 1004(1) of the German

Civil Code (*Bürgerliches Gesetzbuch*; BGB) in conjunction with Section 823(1) BGB.

Section 1004(1) BGB allows an owner of an absolute individual right (like property or health) to demand that a disturbing party ("Störer") – i.e. the party interfering with the individual right – remove an interference or *refrain from future interferences*. Section 823(1) BGB provides claims for damages in the event of a violation of such a right.

DUH bases its claim – to prevent the manufacturers from placing combustion engine cars on the market from 2030 onwards – on an infringement of the so-called "General Right to Personality" (*Allgemeines Persönlichkeitsrecht*), which is provided for by the German constitution (Art. 2(1) in connection with Art. 1(1) GG) and which is recognized as protected right within the meaning of Section 823(1) BGB and Section 1004(1) BGB. Hence, infringements of that personality right can be stopped via an injunction based on Section 1004(1) BGB.

In the proceedings against *BMW* and *Mercedes-Benz*, the claimants want to activate an intertemporal dimension of that "General Right to Personality" called "Right to greenhouse gas-related freedom" (*Recht auf treibhausgasbezogene Freiheit*). This approach would be new in private law. It builds upon the famous "Klimaurteil" (climate judgment) of the *Bundesverfassungsgericht* from 24 March 2021. In this judgment, the Constitutional Court established a new legal figure called "eingriffsähnliche Vorwirkung". It extends the basic rights protection to a protection against infringements *by the state* in the future that are grounded in present state omissions or insufficient actions (in the sense of a right to intertemporal freedom). By analogy to this legal concept in public law, *DUH* argues that the legal figure "eingriffsähnliche Vorwirkung" should also apply in tort law to actions by private companies (such as BMW and Mercedes).

The claims of *DUH* were rejected in the previous instances (LG München I, 07 Feb 2023, 3 O 12581/21, OLG München, 12 Oct 2023, 32 U 936/23 for the claim against *BMW* and LG Stuttgart, 13 Sept 2022, 17 O 789/21, OLG Stuttgart, 08 Nov 2023, 12 U 170/22 for the claim against *Mercedes*).

2. Inside the courtroom: key legal arguments

In the oral hearing before the BGH, the arguments focused on two legal aspects:

(1) Does the legal figure of intertemporal protection of basic freedoms in the form of an *"eingriffsähnliche Vorwirkung"* apply also to private actors if – as is currently the case in Germany – the national CO2 budget has not yet been attributed among industrial sectors, the federal states, or even single actors? According to the Constitutional Court, the state has the obligation to concretize the remaining national budget ("Konkretisierungsauftrag") by assigning CO2 budgets to the different actors. What does this mean for the duties of private actors if the state fails to comply with this obligation by not assigning specific reduction targets? May civil courts assign specific reduction targets?

According to the claimant (*DUH*), the intertemporal protection of basic freedoms subsidiarily applies to such private actors that considerably contribute to global greenhouse gas emissions. The less reduction measures were taken now, the more strenuous reduction measures would be needed in the future, which would interfere in the basic rights freedoms more severely. CO2 budgets for private actors such as the car manufacturers could in that case be measured by scientific data (such as attribution science), so even without state-allocated CO2 budgets.

In the opinion of the defendants (*BMW* and *Mercedes*), it would exceed the competences of the courts if they were to allocate individual CO2 residual budgets to companies in such climate lawsuits. The counsels for the defendants relied on the argument of separation of powers and the complexity of climate change requiring multi-level solutions. Climate change would be a topic too complex to be solved by courts and by private law – instead, a mixture of legal instruments and a balancing of interests by the democratic legislator was needed. Any private law based litigation, being bilaterally restricted to the involved parties, would be arbitrary and could not solve the climate challenge which was a problem of societal scale. Courts would put themselves at the place of the legislator or at least thwart the legislator's concept or solution. The defendants' counsels also argued with the margin of appreciation granted by the German Federal Constitutional Court in its 2021 decision.

The defendants also raised the argument that a CO2-budget for civil actors would be ineffective, as the climate reduction goals could only be achieved globally – as such, if in other states major emitters did not comply with their obligations, the national emitters had to make "extra" efforts to make up for the gaps. Besides, "national solo runs" would endanger international cooperation.

(2) Can private actors, such as *BMW* and *Mercedes*, be treated as "disturbing" within the meaning of Section 1004(1) BGB for contributing to the risk of future state climate protection measures? The BGH raised the question whether the manufacturers could be qualified as indirect disturber by action (*"mittelbare Handlungsstörer"*). This was argued to result from an evaluative tailoring of the manufacturers' responsibility (*"wertender Zuschnitt von Verantwortungsbereichen"*). A main point in the arguments in that respect revolved around the question if a private actor can be a disturber within the meaning of Section 1004(1) BGB if it complies with all legal requirements and duties. This was at least an indicator against a disturbance triggering liability under Section 1004(1) BGB.

The defendants argued that Section 1004(1) BGB as a *bilateral* claim was per se not suitable for resolving issues like climate change, which is a problem concerning our society *as a whole*, not only two parties in a civil proceeding. Civil law could not provide for protection if the threat caused concerned a mass of persons, not only another party.

Furthermore, according to the defendants, the disturber and the affected party would coincide since everyone contributed to climate change. It therefore would remain unclear where a distinction was to be drawn between who qualifies as a disturber and who does not. Besides, there was neither a general duty of care (*"Allgemeine Verkehrspflicht"*) nor specific CO2-budgets that the defendants are currently violating. Where the contested conduct was currently lawful, it could not be prohibited under civil law through the mechanism of Section 1004(1) BGB.

The claimant's counsel argued that formal concerns against emitters being disturbers in the legal sense had to remain unapplied, as otherwise private law in general could not provide legal protection in the field of climate change.

The defendants relied finally on the argument that private law based litigation such as the given proceedings were arbitrary for the reason that (1) it was "random" which emitter would be the target of such litigation and (2) that there could be no redress in a bilateral two party relationship as this would lead to the same emission being litigated in several proceedings (e.g. car manufacturers, car rental agencies and car drivers).

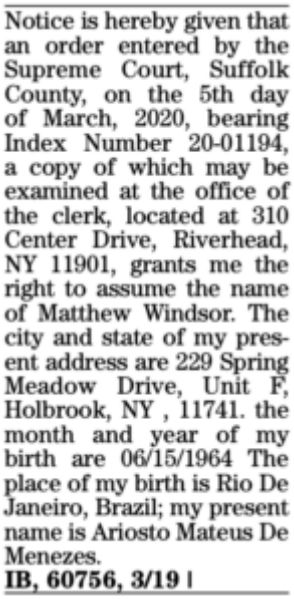
III. Assessment and outlook

The final decision of the German Federal Court of Justice will be rendered on 23 March 2026. The Court will implicitly decide whether combating climate change primarily falls within the responsibility of the legislator, or whether civil courts can also play a meaningful role in addressing this global challenge.

Brazilian Ruling Recognises US Name Change

Written by Prof Dr João Costa-Neto, Assistant Professor, Faculty of Law, University of Brasília
and Dr Pedro Pagano Payne, Academic Assistant, Faculty of Law, University of Brasília

In April 2025, the highest chamber (*Corte Especial*) of the Brazilian Superior Court of Justice (STJ), under Justice Maria Isabel Gallotti as rapporteur, ruled on 'Recognition of a Foreign Judgment' (HDE) no. 7.091/EX. The case concerned the recognition of a United States ruling changing the last name of a Brazilian national who had acquired US nationality. The Plaintiff sought recognition of (i) his US naturalisation and (ii) a ruling of the Supreme Judicial Court of Suffolk County, Massachusetts, which changed his name from 'Ariosto Mateus de Menezes' to 'Matthew Windsor'.


Notice is hereby given that an order entered by the Supreme Court, Suffolk County, on the 5th day of March, 2020, bearing Index Number 20-01194, a copy of which may be examined at the office of the clerk, located at 310 Center Drive, Riverhead, NY 11901, grants me the right to assume the name of Matthew Windsor. The city and state of my present address are 229 Spring Meadow Drive, Unit F, Holbrook, NY , 11741. the month and year of my birth are 06/15/1964 The place of my birth is Rio De Janeiro, Brazil; my present name is Ariosto Mateus De Menezes.
IB, 60756, 3/19 |

The Court decided it had no competence to ratify the naturalisation. Granting US citizenship is a prerogative of the US Government. And loss of Brazilian nationality is ruled by a specific domestic administrative procedure, under the

Brazilian Ministry of Justice. The Court concluded that, because of lack of competence, the documents presented did not satisfy the statutory requirements for recognition under the Brazilian Code of Civil Procedure and the Court's internal rules. By contrast, the Court granted recognition of the name-change judgment. It found that the formal requirements for recognition had been met: the decision was rendered by a competent authority, had become stable, and was properly documented and translated. The decisive issue, therefore, was whether recognition would violate Brazilian *ordre public*.

Justice Gallotti grounded her analysis in Article 7 of the Introductory Statute to the Norms of Brazilian Law (LINDB), a statute inspired by the German *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (EGBGB). LINDB provides that the law of the person's domicile governs name and capacity. The applicant was domiciled in the United States. The name change was carried out under US law. The case did not fall within any area of exclusive Brazilian jurisdiction (Article 23 of the Brazilian Code of Civil Procedure).

The Attorney General's Office (*Ministério Público Federal*) argued that Brazilian law does not permit total suppression of family names. The foreign judgment therefore offended public policy. The Court rejected this view. It held that the mere fact that Brazilian legislation does not provide total suppression or change of surnames does not invalidate a foreign act. The prohibition is not a "nuclear" or foundational norm of the Brazilian legal order. There was no violation of *ordre public*, national sovereignty, or human dignity. Justice Gallotti stated: 'The "*ordre public* clause" is intended to prevent the recognition of rights that contradict the fundamental principles of our legal order. In general, private international law doctrine considers, for example, that Western countries tend not to recognise more than one spouse, even when the husband is domiciled in a country governed by Islamic law. Polygamy (the marriage of a man to multiple women) is understood to violate the basic and core rules of national family law and succession law.' Nothing of that nature was present in the case, said the Court. A foreign name change, even one involving the substitution of a surname, does not approach the level of structural incompatibility exemplified by polygamy.

The Court also placed the case in the context of recent domestic legal reform. Brazilian Law no. 14.382/2022 significantly facilitated changes of forenames in Brazil. A person may now change their first name extrajudicially (before a notary), without demonstrating a relevant reason. But such a change can only happen

once in a lifetime and solely encompasses first names. Surname changes have also been made more flexible, but exclusively by allowing the recovery and inclusion of ancestral surnames. Brazilian law therefore no longer reflects a rigid immutability model, even if surnames remain harder to change than forenames. In HDE 7.091/EX, the Court considered it understandable and reasonable that the applicant adopted anglophone first and last names in the United States in order to avoid possible discrimination in the country of his new nationality. The change did not harm any relevant public or third-party interest.

From a comparative perspective, the decision sits at an interesting point. In Common Law jurisdictions, name change is generally available with considerable freedom, often through unilateral instruments such as a deed poll, subject to modest administrative formalities. In Germany and Austria, by contrast, name changes are treated as exceptional and typically require an 'important or relevant reason' under public-law procedures. Christian von Bar's comparative study *Gemeineuropäisches Privatrecht der natürlichen Person* (pp. 567–604) illustrates precisely the different models regarding name change. Some systems conceptualise the name primarily as an element of personal identity. Others see it as a structured institution embedded in family and public-order concerns. Brazil's domestic law still reflects elements of the latter approach. Yet in recognition proceedings, Brazil's highest Court with private law jurisdiction clearly opted for continuity of status formed at the domicile.

The decision is also consistent with a long Brazilian tradition of construing public policy narrowly in cross-border cases. As noted in a recent article, Brazilian law was frequently referenced in Ernst Rabel's writings. For instance, Rabel noted how Brazilian Courts would recognise foreign divorces at a time when divorce was not yet permissible in Brazil. HDE 7.091/EX fits that pattern: foreign status effects may be recognised even when domestic law would not have produced the same result internally.

Ultimately, HDE 7.091/EX is a restrained and technically precise decision. It does not liberalise Brazilian internal surname law. It does not dissolve the state's control over civil status. What it does is confirm that *ordre public* remains a high threshold in recognition proceedings of foreign rulings. In an era of increasing personal mobility and multi-layered identities, this approach reinforces a central intuition of private international law: the stability of personal status across borders is itself a value worthy of legal protection.

Anti-Arbitration Injunction in Foreign-Seated Arbitrations: The Delhi High Court's Controversial Intervention in Engineering Projects (India) Limited v. MSA Global LLC (Oman)

This post is posted on behalf of Arnav Sharma, Jindal Global Law School, Sonipat, India

Introduction

On 25th July 2025, a single judge bench of the Delhi High Court delivered a judgment in *Engineering Projects (India) Limited v. MSA Global LLC (Oman)* in *CS (OS) 243 of 2025****[1]*** that has stirred considerable discourse in international arbitration circles. The fundamental question at issue in the instant case was whether an Indian Court can grant an anti-arbitration injunction to stay proceedings in a foreign-seated arbitration on grounds of the proceedings turning oppressive and vexatious due to procedural impropriety, notwithstanding internationally well-settled principles of minimal judicial intervention, party autonomy, and *lex arbitri* that govern international commercial arbitration? The Delhi High Court answered in the affirmative, holding that Indian civil courts possess inherent power under Section 9 read with Section 151 of the Code of Civil Procedure, 1908 ("**CPC**") to intervene under exceptional circumstances where the arbitral process itself becomes a vehicle of abuse.

This ruling carries profound implications for India's aspirations to position itself as a global arbitration hub. By granting relief that undermines the exclusive jurisdiction of the Courts at the Seat (Singapore in the instant case), the ruling has invited scrutiny vis a vis its alignment with the territorial principle as elaborated upon in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*** ("**BALCO**")[2], and with internationally accepted 'best practices' which are well-settled considering that they promote predictability and finality in cross-border dispute resolution.

Facts

Engineering Projects (India) Limited ("**EPIL**"), a public sector enterprise, entered into a sub-contract agreement with MSA Global LLC (Oman) ("**MSA**") for the design, supply, installation, integration, and commissioning of a border security system at the Yemen-Oman border. The agreement contained an arbitration clause stipulating that any disputes would be resolved by way of arbitration under the rules of the International Chamber of Commerce ("**ICC**") with Oman's law being the governing law, while conferring exclusive jurisdiction upon the courts at New Delhi, India. For the sake of clarity, Article 19 of the agreement between the parties containing the aforementioned arbitration clause, is extracted in its entirety as under:

"ARTICLE 19

LAW AND ARBITRATION

19.1 *Disputes if any, arising out of or related to or any way connected with this agreement shall be resolved amicably in the First instance or otherwise through arbitration in accordance with Rules of Arbitration of the International Chamber of Commerce. The jurisdiction of the Contract Agreement shall lie with the Courts at New Delhi, India.*

19.2 *This Agreement shall be governed by, construed and take effect in all respects according to the Laws and Regulations of the Sultanate of Oman.*

19.3 *Any dispute or difference of opinion between the parties hereto arising out of this Agreement or as to its interpretation or construction shall be referred to arbitration. The Arbitration Panel shall consist of three Arbitrators, one Arbitrator to be appointed by each party and the third Arbitrator being appointed by the two Arbitrators already appointed, or in event that the two Arbitrators cannot agree upon the third Arbitrator, third Arbitrator shall be appointed by the International Chamber of Commerce. The place of the Arbitration shall be mutually discussed and agreed.*

19.4 *The decision of the Arbitration Panel shall be final and binding upon the parties."*

In the course of performance of the contract, disputes arose between the parties concerning alleged delays in contractual performance. Consequently, MSA invoked the arbitration agreement in 2023 nominating Mr. Andre Yeap SC ("**Mr. Yeap**") as a co-arbitrator. Thereafter, on 20.04.2024, Mr. Yeap submitted his statement of acceptance, availability, impartiality and independence to the ICC, expressly declaring that he had "nothing to disclose" with respect to any facts or circumstances that could give rise to justifiable doubts as to his impartiality or independence. EPIL nominated Hon'ble Justice Mr. Arjan Kumar Sikri (Retd.) as its co-arbitrator. The Tribunal was duly constituted on 05.09.2023 with Mr. Jonathan Acton Davis KC being appointed as the presiding arbitrator by the co-arbitrators.

In June 2024, the tribunal rendered a first partial award on MSA's application for interim measures. EPIL challenged this award before the Singapore High Court. In December 2024, in preparation of the evidentiary hearings, EPIL, through a Gujarat High Court Judgment dated 05.07.2024 titled ***Neeraj Kumarpal Shah v. Manbhupinder Singh Atwal***, discovered the Mr. Yeap had been previously appointed as an arbitrator in separate proceedings involving Mr. Manbhupinder Singh Atwal who happens to be MSA's Managing Director, Chairman, and

Promoter. This prior involvement had not been disclosed when Mr. Yeap accepted his appointment. As such, on 19.01.2025, EPIL filed a challenge application before the ICC Court under Article 14(1) of the ICC Rules alleging non-disclosure and raising doubts about Mr. Yeap's independence and impartiality. The ICC Court in its decision acknowledged the non-disclosure as "regrettable" but rejected EPIL's challenge on merits, finding that the circumstances did not establish justifiable doubts regarding Mr. Yeap's impartiality or independence. Subsequently, EPIL filed an application before the Singapore High Court under Article 13(3) of the UNCITRAL Model Law seeking determination on the validity of Mr. Yeap's continued participation, and also simultaneously approached the Delhi High Court by filing the instant suit seeking a declaration and permanent injunction restraining MSA from continuing the ICC arbitration with the present tribunal composition. Further complicating the matter, MSA filed an enforcement petition before the Delhi High Court for the recognition and enforcement of the First Partial Award while also obtaining an anti-suit injunction from the Singapore High Court restraining EPIL from continuing its proceedings before the Delhi High Court.

The Dispute

The crux of the legal controversy in this case was around three inter-related questions.

1. Whether an Indian Civil Court has the jurisdiction to entertain a suit seeking an anti-arbitration injunction against a foreign-seated arbitration, particularly in light of the fact that the parties had agreed to arbitrate under ICC Rules with Singapore being designated as the seat. In this respect, MSA relied upon the judgment in ***Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*** ("**Indus Mobile**")[3] to contend that once parties agree to a specific seat of arbitration, it is solely the Courts at that seat that retain supervisory jurisdiction over the arbitral process to the exclusion of all other Courts. MSA further argued that the suit was barred by Section 5 and Section 45 of the Arbitration and Conciliation Act of 1996 which are the statutory embodiment of the

principle of minimal judicial intervention and the territoriality doctrine affirmed in BALCO.

11. Whether the non-disclosure by Mr. Yeap rendered the arbitration proceedings vexatious, oppressive, and violative of Indian Public Policy. In this regard, EPIL argued that Mr. Yeap's failure to disclose this material information constituted a manifest violation of Article 11 of the ICC Rules, which mandates arbitrators to disclose any facts or circumstances likely to give rise to justifiable doubts as to their impartiality or independence. EPIL contended that such non-disclosure strikes at the root of party consent and procedural fairness thereby rendering the entirety of the arbitral process illegitimate. On the other hand, MSA relied upon Article 11.2 of the ICC Rules read with Clause 3.1.3 of the IBA Guidelines which mandate disclosure only if an arbitrator has been appointed on two or more occasions in the past three years by a party or one of its affiliates; MSA contends this requirement had not been satisfied in the instant case.

III. Whether EPIL was entitled to interim injunctive relief restraining the continuation of arbitral proceedings pending final disposal of the suit.

As such, this dispute was centred around reconciling party autonomy and minimal judicial intervention on one hand, with the Court's duty to prevent abuse of process and ensure procedural fairness on the other [4].

The Decision

On Maintainability

At the very outset, the Delhi High Court affirmed the strong presumption in favour of the civil court's jurisdiction as under Section 9 of the CPC, which

confers authority to adjudicate all suits that are of a civil nature unless the same is expressly or through implication barred by statutory law. The Court relied on the case of ***Dhulabhai v. State of Madhya Pradesh[5]*** and held that the exclusion of civil court jurisdiction cannot be readily inferred and must be clearly provided by law. Further, the Court distinguished the rulings in Indus Mobile and BALCO, noting that while these judgments do affirm the seat principle and the territoriality doctrine, they did not create an absolute bar on civil courts' power to grant an anti-arbitration injunction in exceptional circumstances. The Court found guidance in the ***Union of India v. Dabhol Power Company[6]*** and ***ONGC v. Western Company of North America [7],*** wherein it was held that Indian Courts do have the power to grant injunctions against foreign proceedings whenever the circumstances make the proceedings oppressive, or where such an injunction is necessary or expedient, or when the ends of justice so require; with the former specifically referring to Sections 5 and 45 of the Arbitration and Conciliation Act of 1996 and stating that neither of them oust, entirely, the jurisdiction of the Indian Courts. Additionally, the Court emphasised the distinction between anti-suit injunctions and anti-arbitration injunctions, noting that the latter require a higher threshold of oppression or vexatiousness to be met, citing examples along the lines of doubts as to the consent of the parties, allegations of forgery, or fundamental procedural impropriety which can meet the aforementioned threshold. Crucially, the Court held that the principle of minimal judicial intervention does not and must not translate into negligible interference[8], and said this crucial difference has been preserved to ensure that private dispute resolution mechanisms such as arbitration do not turn oppressive or operate in an unruly manner, which can be deemed contrary to the foundational principles of judicial propriety.

On Vexatiousness and Oppressiveness of the Proceedings

The Court began the discussion in this regard by defining "vexatious" as proceedings instituted in the absence of sufficient legal basis and primarily intended to annoy, harass, and/or burden the opposing party, and "oppressive" as conduct that unjustly imposes harsh burdens or unfair disadvantages upon a party to the proceedings. Thereafter, in reference to the ICC Rules, the Court noted that Article 11 therein casts a categorical obligation upon arbitrators to make full and frank disclosure of any circumstance that might give rise to justifiable doubts

regarding their impartiality or independence. It was emphasised that this obligation must be assessed from the perspective of the parties as is clear from the language of the provision insofar as it says "in the eyes of the parties", rather than from an arbitrator's subjective perception of bias. Further, it was noted that the arbitrator cannot withhold disclosure on the ground that the fact appears benign or remote in lieu of the fact that the obligation arises when there exists even a possibility that the information, if known to the parties, might give rise to an apprehension of bias in the parties' minds.

The Court found that Mr Yeap's non-disclosure was deliberate and calculated. Even though Mr. Yeap admitted in his response to the initial challenge application that he had made enquiries and was aware of the potential need for disclosure, he chose not to do the same based on his subjective assessment that four years had passed since the prior appointment in the matter concerning MSA's Chairman. Moreover, Mr. Yeap had acknowledged in the initial proceedings that "had I made the disclosure, the possibility of the Respondent seeking to challenge my impartiality could not be discounted". The Court viewed this statement as evidence of the fact that the non-disclosure was intentional and aimed at avoiding objection. Further, the Court held that the ICC Court's decision on the challenge, while acknowledging the non-disclosure as "regrettable", erroneously misplaced the burden on EPIL to demonstrate actual bias rather than focusing on the breach of the mandatory disclosure requirement, thereby noting that the decision was a classic case of *operation successful, but patient dead*. The logic behind this was that, while the ICC Court's decision may seem sound on the surface and in compliance with the formal procedure, it did not address the substantive loss of confidence in the arbitral process's neutrality.

On Interim Injunction

As such, applying the triple test of (i) prima facie case, (ii) balance of convenience, and (iii) irreparable harm for interim injunction as under Order XXXIX Rules 1 and 2 of the CPC, the Court found that all three conditions were satisfied and accordingly stayed the ICC arbitral proceedings until final disposition of the suit and restrained both parties from participating in the

arbitration with the tribunal's present composition.

Concluding Remarks

While the judgment articulates laudable concerns about procedural fairness and impartiality, the approach that has been adopted raises serious questions about jurisdictional overreach, inconsistency with India's pro-arbitration legislative intent, potential damage to India's credibility as an arbitration-friendly jurisdiction.

Firstly, the most fundamental flaw in the judgment lies in its erosion of the seat principle which is unarguably a cornerstone of international arbitration law[9]. The UNCITRAL Model Law, which forms the very basis of India's Arbitration and Conciliation Act, is predicated on the seat principle, which has also been unequivocally affirmed by the Indian Supreme Court in cases such as BALCO. By granting an anti-arbitration injunction in this matter, the Delhi High Court effectively usurped the supervisory jurisdiction of the Singapore courts. The Singapore Court had already considered and rejected EPIL's challenge to Mr. Yeap's appointment, yet the Delhi High Court substituted its own judgment on the same issue. This created an untenable situation of conflicting judicial orders: the Singapore High Court granted an anti-suit injunction restraining the Delhi proceedings on 23 May 2025, while the Delhi High Court proceeded to grant an anti-arbitration injunction on 25 July 2025. Judicial conflicts of such nature undermine the predictability and finality that parties seek when choosing arbitration, not to mention the violation of principles of comity between courts. Additionally, it's not as if EPIL was rendered remedy-less before the seat courts at Singapore. There were multiple appeals available to Singapore High Court's decision on the challenge to Mr. Yeap's impartiality. The Delhi High Court's position could still have been appreciated had EPIL had no remedy left at the seat courts except to continue with vexatious and oppressive arbitral proceedings, but this was not the case. Further, the judgment's reliance on ***Dabhol Power Company*** and ***ONGC v. Western Company*** were misplaced considering that those cases involved enforcement of foreign awards or bank guarantees, and not the question of intervening in ongoing foreign-seated arbitrations with active

supervisory courts. Not to mention that the judgment's characterisation of MSA's conduct as vexatious appears rather selective and outrightly ignores EPIL's own forum shopping tendencies, i.e., filing parallel challenges before ICC, Singapore Courts, and Delhi Courts simultaneously.

Secondly, while the Court correctly emphasised the importance of arbitrator disclosure, the underlying principles were applied in a problematic manner. The Court failed to consider that four years had passed since Mr. Yeap's prior appointment, and neither the ICC Rules nor the IBA Guidelines mandate disclosure of appointments separated by such a temporal gap unless it can be demonstrated that the same constitutes a pattern of repeated appointments; this standard is akin to Entry 20 of the Vth Schedule to India's 1996 Act. The ICC Court's decision carefully considered these standards and concluded that while disclosure would have been prudent, a failure to do the same did not give rise to justifiable doubts about Mr. Yeap's impartiality or independence. The Delhi High Court's characterization of this reasoned decision as *operation successful, but patient dead* is rather dismissive, fails to engage with the substantive reasoning, and fails to also take into account the fact that international arbitration institutions like the ICC possess expertise in assessing arbitrator conflicts; it is a clear case of 'due process paranoia' [10]. Domestic courts ought to be cautious about second-guessing such determinations, especially when institutional rules provide clear mechanisms and standards for such challenges. Further, the judgment entirely conflates two distinct issues: whether disclosure was required, and whether non-disclosure renders the arbitrator actually biased.

Lastly, the present judgment runs counter to India's objective to become an arbitration-friendly jurisdiction, as expressed in the Law Commission's 264th Report. By allowing a non-seat court to stay a foreign-seated arbitration based on alleged procedural impropriety, the decision sends a troubling signal to international parties i.e., choosing India as a contracting party, even with a foreign seat, exposes you to unnecessary intervention by Indian Courts; this is precisely what the BALCO regime sought to eliminate[11]. The judgment also creates a dangerous precedent for other jurisdictions. If Indian courts can intervene in Singapore-seated arbitrations, what is to stop Chinese courts from

intervening in London-seated arbitrations, or vice versa? The result would be a race to obtain competing injunctions, undermining the entirety of the international arbitration framework.? Beyond doctrinal concerns, this is also a clear case of practical ineffectiveness. The ICC tribunal and Singapore courts are not bound by the Delhi High Court's judgment and have continued to recognise the arbitration's validity. Singapore subsequently issued a permanent anti-suit injunction against EPIL on 18.09.2025, and initiated contempt proceedings when EPIL obtained yet another ex parte injunction from the Delhi courts restraining MSA from participating in the Singapore contempt proceedings. This cycle of competing injunctions serves neither party's interests and brings both judicial systems into disrepute, which is a massive concern, especially when this ordeal was wholly avoidable considering that under the New York Convention, any award rendered in this arbitration would have ultimately been enforceable in India only through the procedures in Part II of the 1996 Act, at which point EPIL could have raised objections under Section 48, including alleged violation of public policy. The availability of this post-award remedy also undermines the necessity for pre-emptive intervention.

A better approach would have been for the Court to (i) recognise that the seat court in Singapore has exclusive supervisory jurisdiction, (ii) acknowledge that EPIL has adequate remedies through the ICC challenge process and challenges before Singapore courts under Article 13 of the UNCITRAL Model Law, along with post-award resistance to enforcement, and (iii) decline jurisdiction on *forum non conveniens* grounds while allowing EPIL to pursue its remedies before the aforementioned appropriate fora.

[1] 2025 SCC OnLine Del 5072.

[2] (2012) 9 SCC 552.

[3] (2017) 7 SCC 678.

[4] See https://www.scconline.com/blog/post/2022/10/20/party-autonomy-or-the-choice-of-seat-the-essence-of-arbitration/ for a discussion.

[5] 1968 SCC OnLine SC 40.

[6] 2004 SCC OnLine Del 1298.

[7] (1987) 1 SCC 496.

[8] See https://disputeresolution.cyrilamarchandblogs.com/2025/08/delhi-high-court-clarifies-scope-of-anti-arbitration-injunctions-in-foreign-seated-proceedings/ for a discussion.

[9] See https://indiacorplaw.in/2025/09/08/jurisdictional-overreach-and-the-illusion-of-equity-a-critique-of-the-delhi-high-courts-intervention-in-epi-v-msa-global/ for a discussion.

[10] See https://forum.nls.ac.in/nlsir-online-blog/arbitrator-non-disclosure-before-the-delhi-high-court/ for a discussion.

[11] See https://legalblogs.wolterskluwer.com/arbitration-blog/a-shield-of-justice-or-a-sword-through-the-seat-the-delhi-high-courts-contentious-anti-arbitration-injunction/ for a discussion.

Cross-Border Personal Data Transfers: The Remaining Issues Following the Indonesian Constitutional Court Decision

Written by Dr Priskila Pratita Penasthika, Assistant Professor, Faculty of Law, Universitas Indonesia

INTRODUCTION

The Indonesian Personal Data Protection Law, Law Number 27 of 2022 (Indonesian PDP Law), came into effect on 17 October 2022. Before its enactment, data protection rules in Indonesia were fragmented across different sector-specific laws and regulations. The Indonesian PDP Law aims to unify these laws and regulations, providing greater clarity and ensuring consistent personal data protection across all sectors in the country. The Indonesian PDP Law sets out normative provisions on personal data protection; however, detailed, practical rules have yet to be specified in the implementing regulations. As of now, the drafting of these implementing regulations is still underway.

Many of the fundamental elements of the Indonesian PDP Law, including definitions of covered data and entities, lawful grounds, processing obligations, accountability measures, and relationships between data controllers and processors, are modelled after the European Union's General Data Protection Regulation (GDPR). Nonetheless, several key provisions are tailored specifically to the Indonesian context. For instance, the Indonesian PDP Law has broad extraterritorial reach, which shall apply to entities insofar as their personal data processing activities have legal implications within Indonesia or pertain to an Indonesian national data subject outside Indonesian jurisdiction.

To date, there have been five decisions by the Constitutional Court of the Republic of Indonesia (*Mahkamah Konstitusi Republik Indonesia*) concerning the Indonesian Personal Data Protection Law. Briefly, the Indonesian Constitutional Court functions as one of Indonesia's apex judicial authorities, alongside the Supreme Court. Its primary jurisdiction involves the constitutional review of enacted laws (*undang-undang*) in Indonesia to assess their conformity with the 1945 Indonesian Constitution (as lastly amended in 2002), thereby safeguarding the constitutional rights therein. Its decisions are final, legally binding, and possess immediate legal effect upon issuance, with no provisions for appeal or annulment by any other institutional body.

This piece will focus on the most recent ruling by the Constitutional Court issued on 19 January 2026 regarding the Indonesian PDP Law, namely Case Number 137/PUU-XXIII/2025, as it pertains to matters within private international law.

FACTS

The Petitioner mainly requests a constitutional review of Article 56 of the Indonesian PDP Law, which specifies the requirements for cross-border personal data transfers. Article 56 delineates a tiered set of prerequisites for such transfers. A personal data controller responsible for transmitting personal data abroad (data exporter) must verify that the recipient country offers an adequate or higher level of personal data protection than that provided by the Indonesian PDP Law. If this requirement is not met, the data exporter must ensure that sufficient and binding data protections are in place in the recipient country. If neither condition is satisfied, the data exporter is obliged to obtain consent from the data subject prior to transferring personal data abroad. Furthermore, the forthcoming implementing regulations are expected to provide further details on the specific requirements for cross-border data transfers.

The petition was initiated with the briefing announcement issued by the White House on 22 July 2025 concerning the Framework for Negotiating a Reciprocal Trade Agreement between Indonesia and the United States of America (Indonesia-USA Reciprocal Trade Agreement Negotiation Framework). As part of this framework, Indonesia has committed to establishing legal certainty regarding the ability to transfer personal data outside its borders to the United States.

The Petitioner argued that the Indonesia-USA Reciprocal Trade Agreement Negotiation Framework has led to a key interpretation of Article 56 of the Indonesian PDP Law concerning the transfer of citizens' personal data beyond Indonesian borders. The Petitioner maintained that, under a strict interpretive approach, the PDP Law allows data controllers to assess the adequacy requirement independently, without parliamentary oversight. This could potentially weaken democratic accountability and expose personal data vulnerable to misuse. Additionally, the Petitioner emphasised that such commitments should require approval from the House of Representatives, as they directly impact national sovereignty and the protection of citizens.

The foundation of the Petitioner's petition is based on Article 28G, paragraph (1) of the 1945 Indonesian Constitution, which protects citizens' rights to their dignity, family, honour, and property, as well as the right to be free from threats to their fundamental rights. Additionally, the Petitioner referred to Article 11 of the 1945 Indonesian Constitution, which confers authority on the House of Representatives and the President to conclude international agreements.

Therefore, the Petitioner requests that the Constitutional Court interpret the provisions of Article 56 of the Indonesian PDP Law to mean that transferring personal data to jurisdictions such as the United States should occur only if there is an international agreement approved by the Indonesian House of Representatives. Moreover, transfers to countries considered to lack adequate personal data protection standards should take place only with the consent of the data subjects, after informing them of the risks involved in the cross-border transfers of their personal data.

CONSTITUTIONAL COURT DECISION

The Constitutional Court rejected all of the Petitioner's petition and arguments. According to the Court, the cross-border transfer of personal data constitutes part of the administrative and technical measures carried out by the executive branch, rather than an agreement between nations that creates rights and obligations in the domains of politics, defence, or sovereignty. Based on this reasoning, the Court affirmed that there is no constitutional obligation to involve the Indonesian House of Representatives in any cross-border data transfer process, including in determining the adequacy decision regarding such a personal data transfer.

Regarding the adequacy decision, the Court held that the personal data controller (data exporter) shall undertake technical verification procedures to ascertain whether the recipient country of the personal data transfer maintains data protection standards that are adequate or even higher than those provided in the Indonesian PDP Law. Furthermore, the Court pointed out that cross-border personal data transfers do not rely solely on the personal data controller to ensure adequacy or higher protection standards in the recipient country. Instead, it also necessitates the existence and active involvement of the Personal Data Protection Authority (PDPA), as prescribed in Articles 58-61 of the Indonesian PDP Law. The PDPA is tasked with overseeing, evaluating, and implementing technical policy measures to ensure compliance with requirements for cross-border personal data transfers. Nevertheless, it is important to note that such authority has yet to be established.

REMARKS

Despite the Constitutional Court's rejection of the petition, Case Number 137/PUU-XXIII/2025 brings to light persistent concerns regarding the Indonesian

PDP Law, particularly its provisions on cross-border personal data transfers. These issues call for further discussion and highlight the pressing need to pass the implementing regulations and establish the PDPA.

First, clarification is required regarding the party responsible for conducting cross-border transfers of personal data. Article 56 of the Indonesian PDP Law exclusively employs the term 'personal data controller' (*pengendali data pribadi*) in the context of cross-border data transfers, which seems to imply that only personal data controllers are authorised to carry out such transfers.

Second, it is necessary to delineate which countries are recognised as having adequate or higher levels of personal data protection. In this context, Article 60(f) of the Indonesian PDP Law provides that the PDPA is empowered to assess whether the requirements for cross-border personal data transfers are satisfied. The significant role of the PDPA in cross-border personal data transfer is also emphasised by the Constitutional Court Judges in Case Number 137/PUU-XXIII/2025. Since the PDPA has not yet been established or designated to date, this situation underscores the urgent need to set up or appoint such an authority.

Third, the forthcoming implementing regulations of the Indonesian PDP Law are expected to clarify issues surrounding cross-border personal data transfers, including the incorporation of whitelists and blacklists of specific jurisdictions, standardised contractual language, and specific data processing activities such as pseudonymisation and encryption. It is also presumed that the personal data controller and the forthcoming PDPA will be required to report to the Indonesian Ministry of Communication and Digital regarding cross-border transfers of personal data.

Fourth, as set out at the outset of this piece, the Indonesian PDP Law has an extensive extraterritorial scope. In the event of a personal data breach involving cross-border transfer of personal data, any individuals, corporations, public entities, and international organisations—irrespective of their origin or residence—whether functioning as personal data controllers or processors, may be considered potential defendants for violations that affect the rights of an Indonesian data subject. Referring to Article 2 of the Indonesian PDP Law, this applicability is contingent upon the occurrence of their misconduct (1) within the jurisdiction of Indonesia or (2) outside of Indonesia, provided that such misconduct results in legal consequences (a) within the Indonesian jurisdiction or

(b) impacting an Indonesian personal data subject outside of Indonesian territory.

The subsequent issue concerns the court's jurisdiction. As no cross-border data protection litigation has occurred in Indonesia to date, the court's position in this matter remains indeterminate. Nevertheless, Indonesian courts are notorious for their indifference and insularity when addressing foreign-related issues. Furthermore, Indonesian civil procedural law does not specify provisions regarding parallel litigation. Consequently, in case of parallel proceedings concerning a cross-border data transfer dispute, it is likely that the Indonesian court would exercise jurisdiction and proceed with the legal proceeding in Indonesia, notwithstanding the existence of an ongoing legal proceeding involving the same dispute and parties in a foreign court.

If proceedings are conducted in a foreign court, the complexities of the issues may increase. Indonesia maintains a stringent stance that a foreign judgment is not enforceable unless it pertains to damages arising from marine salvage. Any foreign, other than those on damages resulting from marine salvage, must undergo re-examination by an Indonesian court. In light of this stance, it is apparent that Indonesian courts would not recognise or enforce foreign judgments concerning cross-border personal data transfer disputes and would require such disputes to be relitigated before an Indonesian court.

Practical challenges also include the complexities of seizing assets or digital evidence located in foreign jurisdictions, given that Indonesia has not yet acceded to the HCCH 1970 Evidence Convention.

Further details concerning the Indonesian PDP Law and its private international law aspects are available in Priskila Pratita Penasthika, "Chapter 12 – Indonesia" in Adrian Mak, Ching Him Ho, and Anselmo Reyes (eds.), Privacy and Personal Data Protection Law in Asia (Hart Publishing, 12 December 2024).

HUK-COBURG II: A Case on Mandatory Overriding Law or Jurisdiction?

By Ross Pey, Western University, Canada

1. Introduction

In Case C-86/23 *E.N.I. and Y.K.I. v HUK-COBURG-Allgemeine Versicherung AG II* (‘*HUK-COBURG II*’), the principal issue that arose was whether a Bulgarian compensation provision may be interpreted as having mandatory effect. In suggesting that it does not, the Court required the facts to have sufficiently close links with the forum. (Hereinafter the ‘sufficient connexion test’) Ostensibly, a freestanding sufficient connexion test could be viewed as a disguised jurisdictional control of the forum rather than part of a mandatory law analysis. In doing so, parallels to *renvoi* and *forum non conveniens* are drawn.

2. Facts

The daughter of the Bulgarian claimants died in a road traffic accident in

Germany. The person responsible was insured by the defendant. The claimants commenced a claim in Bulgaria against the defendant for non-material damages suffered for the loss of their daughter. (*HUK-COBURG II* at [16]–[17])

The case was dismissed on appeal. As German law governed the claim under the Rome II Regulation, the claimants 'had not established that the mental pain and suffering sustained had caused pathological harm' required under German law. (*HUK-COBURG II* at [20], [24], [51])

Crucially, the Court also said that Bulgarian law, in particular Article 52 Zakon za zadalzheniyata i dogovorite ('ZZD'), did not apply to the case as a mandatory overriding rule under Article 16 Rome II Regulation. This issue as to whether the ZZD applied as a mandatory overriding rule was appealed to the Varhoven kasatsionen sad (Supreme Court of Cassation), which then referred the question to the ECJ.

3. The CJEU's Reasoning

In essence, the ECJ said that although it is for the member state court to assess whether Article 52 ZZD was a mandatory overriding rule, it strongly suggested that it did not. (*HUK-COBURG II* at [47]-[54]). In the operative part, the Court said that that the Rome II Regulation must be interpreted as meaning that a forum law 'cannot be regarded as an 'overriding mandatory provision', within the meaning of that article, unless, where the legal situation in question has sufficiently close links with the Member State of the forum, the court before which the case has been brought finds, on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that national provision was adopted [.]' (Emphasis mine)

4. Issues with Linking Sufficient Connexion and Mandatory Law

When faced with an allegedly mandatory provision, *HUK-COBURG II* requires a three-step analysis: (1) identify whether the law has a mandatory effect, (2) identify whether the facts have a sufficiently close connexion with the forum, and (3) determine whether the facts fall under the statute. One reading of the sufficient connexion test in this context is that it is intrinsic to the concept of mandatory law and is read in by the ECJ into the requirements of Article 16 Rome II Regulation. [1] However, there are two issues with this view.

Firstly, it may be that a sufficient territorial connexion forms part of the reason why a forum statute is a mandatory statute and is relevant to determining whether a mandatory rule applies to the facts.[2] But linking territorial connexion and mandatory effect is problematic as they are analytically distinct. In *Soldiers, Sailors, Airmen and Families Association v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29, Lord Llyod-Jones warned that there is a risk of 'confusion' if both territoriality and mandatory effect are conflated. The former relates to the intrusion into the territorial affairs of another state, while the latter relates to 'whether the public policy of the forum displaces the more modest presumption that statutes only apply if they form part of the applicable law.'[3]

Secondly, one might argue that sufficient territorial connexion is *required* for a forum rule to be deemed a mandatory rule. But the difficulty here is why a territorial connexion with the forum matters at all. The point of mandatory overriding rules is that such rules are so important to the forum that they justify the departure from the law chosen by default choice of law rules. Viewed this way, it is difficult to see why the facts must be sufficiently connected with the forum for a mandatory law to apply. Forum mandatory overriding rules operate precisely because they are reflections of fundamental values of the forum. Requiring a territorial connexion could dilute this.

This is not to say that the Bulgarian law ought to be viewed as mandatory law. Rather, from an interpretative standpoint, grounding a rejection simply because the Bulgarian law fails to satisfy a sufficient connexion test is at least open to question.

5. A Disguised Jurisdiction Analysis?

From the above discussion, there exist questions regarding the role of a freestanding connexion test with the concept of overriding mandatory law. It is, however, plausible to read the judgment differently, where the sufficient connexion test is a jurisdictional analysis of forum choice disguised as a choice of law analysis.

Firstly, this interpretation is not precluded by the judgment itself. In the operative part, the ECJ stated that the 'legal situation in question has sufficiently close links with the Member State of the forum' before the forum court seised conducts a mandatory law analysis. Further, in the Court's own analysis of what constitutes

mandatory law from paragraphs 37 to 54, the Court did not place reliance on the lack of a sufficient territorial connexion. It was a factor in its own right (paragraphs 32 to 36) but does not seem necessary to the mandatory law analysis and the suggestion that Art 52 ZZD does not have a mandatory effect.

Secondly, both the ECJ judgment and the Advocate General's opinion suggest this. The Court observed at paragraph 36 that although the claim was brought by the parents, who are domiciled in Bulgaria, the accident took place in Germany and was insured by a German insurer. The daughter who died and the person who caused the accident were Bulgarians, but are now residents in Germany. To a common lawyer, this discussion bears a striking resemblance to Step 1 of the *forum non conveniens* analysis in *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, where the court asks which jurisdiction has the most real and substantial connexion with the dispute (ie. the 'natural forum'). The jurisdictional impetus is fortified by the Advocate General's opinion, which at paragraph 53 explicitly states that 'the requirement of a close link helps to prevent forum shopping.'

This jurisprudential instinct to discuss the sufficiency of connexion is not unwarranted. Under the Brussels I bis Regulation, jurisdiction is allocated by a series of brightline rules, normally based on the domicile of the defendant (Article 4), and at times the claimant (for instance, under Article 11). Crucially, in Case C-281/02 *Andrew Owusu v N. B. Jackson*, the ECJ erred on the side of certainty in rejecting the doctrine of *forum non conveniens*. But in doing so, it deprived the courts of a flexible tool to control jurisdiction, making an indirect control via choice of law rules understandable.[4]

In fact, controlling jurisdiction via choice of law is not new. Briggs observes in 1998 that the doctrine of *renvoi* has, in part, served such a function in English law historically.[5] In this vein, the doctrine of *forum non conveniens* was part of the 'tailor-made rules against forum shopping which went straight to the heart of the problem, and did not seek to operate by remote control.'[6]

If so, *HUK-COBURG II* is another example of the interrelatedness of the conflict of laws. When jurisdictional rules are understood rigidly, the pressure points move to other areas, including the choice of law.

[1] Eg. Dominika Moravcová, ‘Navigating the nexus: The Doctrinal Significance of close connection in the Enforcement of (not only) overriding mandatory norms’ (2025)

[2] Eg. Hague-Visby Rules scheduled to the Carriage of Goods by Sea Act 1971.

[3] *Soldiers, Sailors, Airmen and Families Association v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29 [36].

[4] The irony here is that the ECJ has now *read in* a sufficient connexion test into both Rome I and II Regulations, a move which it declined to do in the Brussels I bis Regulation.

[5] Adrian Briggs, ‘In Praise and Defence of Renvoi’ (1998) 47(4) The International and Comparative Law Quarterly 877.

[6] Adrian Briggs, ‘In Praise and Defence of Renvoi’ (1998) 47(4) The International and Comparative Law Quarterly 877, 879.

Book Review: L. d’Avout’s La Cohérence Mondiale Du Droit (Brill)

The general course in private international law delivered at the Hague Academy of International Law by Louis d'Avout during the 2022 Summer Session was published in the Academy's Pocket Books Series (1 032 pages). Louis d'Avout is Professor at Université Paris Panthéon-Assas. In addition to his numerous scholarly works, readers of this blog may recall that his special course on "L'entreprise et les conflits internationaux de lois" was also published in the Academy's Pocket Books Series in 2019. The general course is title « La cohérence mondiale du droit » (*"The Global Coherence of Law"*). The publication of a general course in private international law—particularly in the Academy's Pocket Books Series—deserves the attention of the readers of this blog. The aim of this review is, modestly, to offer a glimpse into this important work so readers who are sufficiently francophone may be encouraged to read it directly, while those who are not are offered a brief overview of the author's approach.

Two caveats. First, translations, and inevitable related inaccuracies, are mine. Second, it should be stated at the outset that a work of such scope is not easily summarized: the demonstration, subtle and original, is based on detailed and nuanced analyses and is supported by an impressive bibliographical apparatus, of remarkable diversity. One may note in that respect the author's relentless effort to draw on a very large number of courses delivered at the Academy of International Law, both in private and in public international law. It is unfortunately impossible to reflect such wealth in the present review other than in a very selective manner.

The course's program

The program of the course as encapsulated in the title is ambitious. The idea of "coherence" in law, and especially in private international law (PIL), is particularly evocative. On the one hand, it evokes the often recalled need to preserve the coherence of the forum's legal order in the face of the disturbance that foreign norms may generate. On the other hand, it also conveys the

traditional objective pursued by conflict of laws: the international harmony of solutions. The use of the term "global" (*mondiale*) gives this search for coherence a particular breadth: it does not concern merely the legal treatment of international or transnational private relationships—the traditional object of private international law—but rather the articulation of legal regimes (State and non-State, domestic and international, public and private) whose still largely disordered coexistence is one of the defining features of our time. As will be seen, the perspective adopted in the course is normative, oriented toward the pursuit of global legal coherence. This search must be understood in a double sense: to uncover coherence where it exists, and to restore it where it does not. At a first level, coherence refers to the rationality and predictability of legal regimes, as well as to their effectiveness. Such coherence (or at least the aspiration to it) is regarded by the author as consubstantial with law itself.

The context in which this search for coherence unfolds is marked by a triple dynamic. On the one hand, increased individual mobility and technological change have diminished the relevance of geographical distance, and even of the crossing of borders. On the other hand, and correlatively, new forms of inter-State cooperation or coordination have emerged. Added to this is the development of non-State and/or transnational legal regimes. These factors give rise to collisions between legal regimes, confronting individuals and enterprises alike. The author proposes to draw on the technical and conceptual wealth of private international law in order to bring coherence to this normative disorder. After all, PIL has a (multi-)millennial experience in resolving conflicts of norms.

Two points are central to the author's approach. First, the search for coherence must be conducted at the supra-State level. The State level is still relevant for reasoning about conflicts of norms and their resolution, but with a view to a "framework extended to global society" (p. 29). Second, although the search for coherence benefits individuals, it does not necessarily entail a subjective right of individuals to the transnational coherence of law, that is, a right to enjoy a single legal status notwithstanding the crossing of borders and the diversity of legal systems (p. 41).

Starting point and definitions

An introductory chapter, strikingly entitled *"Confronting Global Legal Anarchy"* ("Face à l'anarchie juridique mondiale"), provides the starting point of the demonstration and key definitional elements. Legal coherence does not mean "the uniformity of applicable rules and the absolute centralization of dispute resolution mechanisms, supplemented by a transnational enforcement police force," but rather "the state of a system in which coordination between partial legal systems is generalized and whose effects are guaranteed, for the benefit of the predictability and legal certainty expected by each subject or user of the law" (p. 54). The expression "partial legal systems" refers, it seems, to the incompleteness of any legal system in the perspective of a transnational relation (here at least, comp. p. 117). The definition of coherence introduces the idea of a spontaneous coordination, which plays an important role in the demonstration, as will become clear. The author also revisits the traditional definitions of private international law. Rather than a conceptual definition centered on the notion of internationality (internationality of sources or subject-matter internationality), he prefers a functional definition (p. 75), structured around two objectives: respect for the legitimate expectations of the parties despite their exposure to diverse legal regimes, and the international harmony of solutions, which implies an "aptitude for universality" (p. 75) and the exportability of the solution adopted. Again this definition will prove instrumental in the demonstration (particularly to show that the singularity of PIL rules should not be overstated, compared to other norms).

After a brief historical overview presented in six evocative tableaux, the author examines the merits of three intellectual representations of the discipline, all of which share a connection with general international law: State-centrism, inter-Statism, and the allocation of jurisdiction. The author's approach is structured by this concern with the relationship between private and public international law. In so doing, he deliberately continues a doctrinal current that has become rather minority in contemporary PIL scholarship (at least in France). In any event, private international law brings together mechanisms for opening State legal orders and articulating them with one another (p. 111).

The author then turns to defining "inter-State and transnational coherence of law" (p. 112). He devotes particularly dense pages to this issue, pages which are

difficult to summarize but are decisive for the originality of his perspective. He emphasizes institutional and procedural coherence—that is, the institutions, procedures, mechanisms and actors whose work produces coherence. This *procedural* coherence is fundamental and constitutes a *sine qua non* condition of a legal system, whereas *normative* coherence (the consistency and logical character of the solutions produced) is both secondary—since it flows from institutional and procedural work—and closer to an ideal, often imperfectly achieved.

Equally decisive is the author's conviction as to the necessity of coherence. The "praise of incoherence" (p. 127) is dismissed as stemming from a confusion between normative coherence and institutional coherence: the former, being ideal, may fail to convince, whereas the latter is genuinely necessary for the jurist. In short, coherence and incoherence are opposing poles of a complex reality; the existence of incoherences is not sufficient to discredit the need for coherence. As a result, coherence is both necessary and achievable.

Basically, incoherence arises from the tendency of legal systems—particularly the most sophisticated and robust among them, namely States—to reason in autarchy and to impose their own viewpoint (often in the name of their internal coherence) at the expense of the "global rationality of the law applied". What makes coherence possible is the openness of legal systems to one another (and thus openness to otherness) and their willingness to cooperate. The international (public) legal order itself is marked by a corresponding tension between unilateralism (each sovereign acting alone) and concertation (sovereigns acting together). Coherence in the international order may follow a horizontal (inter-State) or a vertical (supra-State) model. The vertical, supra-State and overarching (tending toward monism) model allows for a form of universality (a *jus commune*). By contrast, the horizontal model is characterized by pluralism. The author associates each model with a method of private international law: verticality and monism allow for bilateralism, whereas horizontality (and pluralism) implies unilateralism (p. 169).

The book's outline and summary

The horizontal/vertical distinction structures the book. The first part is devoted to

the study of horizontal interactions: independent “legal spheres” interact with one another, coherence is not guaranteed but may be produced through mutual consideration and interaction. The second part focuses on institutional verticalization, a partial and complementary dynamic (limited to certain sectors or regions of the world), based on the creation and intervention of supra-State bodies capable of producing coherence for the benefit of individuals.

Horizontal interactions between legal systems

The first part of the course is therefore devoted to what the author terms “horizontal” interactions between “independent legal spheres”. In this context, he examines the mechanisms of classical private international law: conflicts of laws and conflicts of jurisdictions or authorities. Here, the “conjunction” of viewpoints (that is, of legal orders) with respect to an international private relationship is, in a sense, voluntary rather than mandatory. It operates through two main sets of mechanisms: first, the attachment of situations to a particular law, court, or authority; and second, cross-border cooperation between authorities (for example, the taking of evidence, the delegation of formalities, or the enforcement of judgments).

The spirit of Relativism

In the first chapter, the author sets out the rudimentary elements of the discipline. These rudiments appear clearly in historical perspective. He explores the tools spontaneously used by courts in order to take account of the foreignness of a person or a situation vis-à-vis the forum. This perspective is original, in particular because it does not merely recount a historical evolution but demonstrates the persistence of these instruments in contemporary PIL. The earliest manifestations of the openness of State legal orders were guided by a concern to achieve equity “formulated from the standpoint of the *lex fori*”, through recognition of the foreign elements of the situation to be regulated, combined with interpretative techniques applied to the law of the forum to reach a fair outcome. The author emphasizes that these instruments, rudimentary though they may be, are not devoid of subtlety. At their root lies a form of judicial spontaneity oriented toward the pursuit of equity in cross-border relationships.

This pursuit is guided by a spirit of legal relativity: the transnational private relationship is exposed to a diversity "of laws, customs or values" (p. 187), and this diversity must be considered. The author thus shows how foreignness and relativity constitute the foundational elements of what he terms "international civil law". The foreigner receives particular treatment when the *lex fori* is applied, and the international or foreign situation calls either for a reception mechanism (and, correlatively, for limits to relativism, notably an international public policy exception subject to modulation), or for a form of spatial limitation of the *lex fori* (as exemplified by the presumption against extraterritoriality in U.S. law). The author further demonstrates how these instruments continue to be used in contemporary law to manage situations of legal otherness within the domestic legal order itself. States are prompted to limit the undifferentiated and uniform application of their own laws through compromise solutions, often entrusted to the judiciary (see, from this perspective, the discussion of the Molla Sali judgment of the European Court of Human Rights, p. 218). The identity of individuals may likewise warrant specific accommodations from the inward pull of communities. The author reflects on the relationship between this spirit of relativism (both international and internal) and a form of liberal individualism, particularly as expressed through the growing judicial consideration of fundamental rights. From this perspective, the application of the principle of proportionality in private law may be seen as a manifestation of this spirit of relativity.

The author then explores the tactics developed by judges—and still employed today—to loosen, where necessary, the constraints of the *lex fori*, which remains the unavoidable starting point for the forum judge when confronted with an international situation. These tactics include the self-limitation of the law of the forum (see, for example, the analysis of the Gonzalez-Gomez decision of the French Conseil d'État, p. 266), creative interpretation of the *lex fori*, *prise en consideration* of foreign law, and judge-made international substantive rules. Judicial creativity, however, has its limits: true conflicts are difficult to overcome (see the analysis of unilateral techniques, p. 290 et seq.). The spontaneous modulation of the *lex fori*, while significant, reveals certain weaknesses and highlights the need for a selective method that appears to "allocate competences among the various legal spheres or among the different poles of law production" (p. 217).

Connecting factors and conflicts rules

The following chapter is devoted to connecting factors, whether from the standpoint of jurisdictional competence or of the applicability of laws. One of the drawbacks of the spontaneous judicial method of adapting the *lex fori* described in the preceding chapter lies in its casuistic nature, which proves ill-suited to the massification of international private relationships. The author defines the technique of connecting factors in general terms as establishing a rational link between a transnational situation and either a specific legal regime, whether domestic or conventional, or a collective entity (a State or an international organization) (p. 319). He devotes particularly thorough and insightful developments to connecting factors, highlighting their richness, diversity and complexity (see the synthesis at p. 344 et seq.).

Among other points, the author rejects an overly rigid opposition between unilateralism and bilateralism, noting that "the connecting operation may function in both directions" (p. 323): the connecting factor may operate either on the side of the legal consequence or on that of the presupposition of the rule. He usefully distinguishes between the policy of the connecting factor—that is, the intention guiding its author—and the justice of the connecting factor, which results from it and may be assessed independently. The respective connecting roles of bilateral conflict-of-laws rules, unilateral applicability rules, and jurisdictional rules are thus clarified. In another original move, the author also draws a link between the recognition of a foreign judgment and the operation of connecting factors, particularly from the perspective of reviewing the origin of the judgment (indirect jurisdiction).

Following these general observations, the author successively examines jurisdictional connecting factors (judicial or administrative) and substantive connecting factors. With regard to the former, one may summarize (see p. 398) the rich analyses developed as follows. Jurisdictional (or administrative) connecting factors are distinct from substantive connecting factors. They are unilateral (save under conventional regimes) and generally plural and alternative (with some exceptions), giving rise to a situation of "concurrent international availability" of authorities belonging to several legal orders. These connecting factors are not purely localizing: they always have a purpose grounded in considerations of appropriateness, sometimes linked to substantive aspects of the

dispute. In any event, the connecting factor is not purely procedural. It affects the substance of the dispute (the forum applies its own procedural law and its own private international law), and it expresses a (legal) policy, understood as a balancing of the interests at stake. As regards administrative authorities, the connecting factors adopted are generally dictated by the applicability of the administrative law concerned, which the authority is tasked with enforcing (according to the model of the *lex auctoris*). The unilateral and diverse nature of jurisdictional rules creates risks for the coherence of the legal treatment of situations, thus calling for conciliatory mechanisms, namely the forum's consideration of foreign judicial activity.

With respect to "substantive connecting factors" (conflict of laws rules, then), L. d'Avout claims from the outset a "substantive impregnation of the rules, imbued with objectives and revealing legal policies forged by their authors" (p. 402). These considerations are sometimes specific to the international context and sometimes derive from the orientations of domestic substantive law (often a combination of both). Faithful to his commitment to methodological flexibility, the author develops the idea of a progressive crystallization of synthetic bilateral rules, starting from an intuitive unilateralism (see pp. 412–416). Here he draws on the German doctrine of *Bündelung* (with reference to Schurig). This approach is convincing with regard to the formation of connecting categories. It is complemented by a sophisticated functional approach (with reference to the work of Professor Brilmayer in the United States). The choice of a connecting factor is above all a matter of appropriateness, taking into account both the divergent interests of the individuals directly concerned and, through consideration of externalities, the collective interests affected by the situation (p. 435).

These balances are struck by the author of the rule and are therefore liable to vary from one State to another, or where the rule has been adopted at a supranational level (for example, at the European level). The author thus distances himself from an apolitical, universalist, but also singularist vision of the discipline: the conflict-of-laws rule is a rule like any other, a deliberate rule. On this basis, the author addresses the classical difficulties of the conflict-of-laws method: characterization and *dépeçage* (pp. 439 et seq.), conflicts of systems (p. 443), and the authority of the conflict-of-laws rule (p. 447). In each case, the analyses are guided by the previously articulated teleological precepts, without any particular search for originality for its own sake (as the author himself

acknowledges), but rather by a concern for… coherence.

The pragmatism advocated by the author is not exclusive of visceral attachment to the conflict-of-laws rule *as a rule*. Targeted adjustments that depart from this abstract mode of regulation (such as the escape clause or the recognition method) have their place, but they must remain subsidiary and be used with caution. Concluding on this point, the author offers a nuanced diagnosis of the connecting rule. As an international extension of domestic legislation, it is indeed an instrument of coherence (or at least of cohesion). Being anchored in the legal order that adopts it, it is however not capable—at least not systematically—of ensuring "the harmonious junction of legal spheres" (p. 473). Mechanical application must therefore be avoided, and the rule must be accompanied by a cooperative attitude, thus offering a transition to the following chapter.

Transnational cooperation

The final chapter of the first part is accordingly devoted to "transnational cooperation" and "communications between authorities". The author adopts a broad conception of transnational judicial cooperation, ranging from ancillary technical cooperation (such as the taking of evidence or service of documents) to what he terms cooperation-communication, and even co-determination of solutions (p. 477). These mechanisms are important because they offer some remedy to the shortcomings identified earlier (competing jurisdictions and divergence in substantive connecting rules).

The prominence given to these instruments and the analyses developed in this chapter constitute arguably one of the course's most strikingly original contributions. To be sure, significant scholarly work has already been devoted to international judicial cooperation (see the references cited in the chapter's introduction). The analyses presented here stand out nonetheless both for their ambition to offer a comprehensive reflection on mechanisms that had previously often been addressed piecemeal, and, above all, for their full integration into a private international law framework, on an equal footing, so to speak, with the conflict-of-laws rule. This innovation is made possible by the course's overarching perspective, since transnational judicial cooperation is fully part of the search for the global coherence of law.

L. d'Avout proposes a useful typology: administrative or judicial assistance or

mutual legal assistance (acts auxiliary to the main proceedings); cooperation at the periphery of the main proceedings (a category that includes the recognition of judgments and public acts—see the justification at p. 499 et seq.); and more innovative hypotheses of co-determination of legal solutions, whether within a conventional framework (the example given is the 1993 Hague Convention on the Protection of Children, p. 507) or through spontaneous coordination. It is in respect of this last category that the developments are the most interesting and innovative (see the examples given at p. 519 et seq.).

On this basis, the author constructs a genuine theory of the concerted resolution of international disputes (illustrated by a traffic-light metaphor, p. 530). Without being able to go into the details of this theory here, its starting point lies in the ideal unity of the proceedings on the merits, possibly supplemented abroad by collaborative ancillary measures and by a subsequent review of acceptability (namely, recognition of the judgment on the merits). Because this ideal is not always achievable—nor even always desirable—additional instruments exist to ensure reciprocal consideration of judicial activity: stays of proceedings (potentially conditional upon a prognosis as to the regularity of the forthcoming judgment), or even the forum's consideration of the likely outcome of the foreign proceedings. Instruments for managing procedural conflicts also occupy a prominent place (p. 536 et seq.).

The search for coherence does not, however, imply an idealized view of international litigation: frictions do exist, and they cannot always be avoided. What matters is to identify their causes and consequences clearly, rather than proceeding in isolation and disregarding their effects (whether for the parties, or one of them, or for the objectives pursued within a given branch of law). After examining several areas particularly conducive to transnational judicial concertation (family litigation, insolvency, and collective proceedings), the author proposes both existing and potential tools, advancing several stimulating proposals: the transnational procedural agreement and the transnational preliminary reference (*question préjudicielle transnationale*), to name a few. Should one then recognize an autonomous duty of cooperation incumbent upon judges or authorities in international cases? Characteristically, the author's answer is cautious: cooperation is not the primary mission of the judge or of an administrative authority; it remains secondary (p. 575).

Having thus explored the avenues of horizontal cooperation between legal

systems—demonstrating both their potential and their limits—and following a rich intermediate conclusion, the author turns to the phenomenon of partial verticalization, which represents their transcendence.

Verticalization

The second part, entitled “Verticalization – Institutional Responses to the Interpenetration of Legal Spheres”, may come as something of a surprise to readers. Indeed, as it goes beyond the horizontality examined thus far, it tends to move away from the classical perspective of private international law. For the author, however, this movement is a natural one, as only a supranational construction is capable of overcoming the residual oppositions between States’ viewpoints. The approach unfolds in two successive stages. The first form of verticality examined is that of federative organizations, such as the European Union, whose role in coordinating legal regimes is undeniable. The second (and more exploratory) form of verticality concerns international law itself: are there international institutions that can be leveraged in the service of the global coherence of law?

The role of federative organizations

The first chapter of this second part examines “the coherence of law through federative organizations”, that is to say, new modes of articulating legal regimes and of reducing the accumulation and conflict of international rules. The demonstration begins with European regimes of coordination in public law insofar as they affect individuals and companies. European measures facilitating administrative procedures have made it possible to remedy the overlap of national legislation or administrative procedures that necessarily results from individual mobility. European integration has also established articulations of State competences to the same end. Likewise, European Union law has fostered the polymorphous mobility of companies by organizing the normative and administrative interventions of the Member States. The chapter offers further, equally convincing examples: federative organizations effectively articulate sovereignties. The author further proposes a distinction between two aspects : the intensification of horizontal cooperation and institutional federalism.

The first aspect provides an opportunity to examine mutual recognition as a form

of articulation of competences, as well as its limits (p. 664 et seq.). While acknowledging the major achievements of European integration, the author rightly insists on the need to avoid imposing automatic recognition where the underlying control whose outcome is being recognized has not been fully harmonized. The second aspect developed concerns the action of supranational administrative bodies.

The author then turns to the "vertical discipline of conflicts of laws in the interest of private persons". The issue here is to assess the impact of federative organization on the configuration and resolution of conflicts of laws. Following a preliminary discussion addressing the matter from an institutional perspective (in the form of an illuminating EU–US comparison), the author devotes profound developments to the renewal of conflict-of-laws reasoning brought about by institutional verticality. At the heart of this reflection lies the figure of the supranational judge, an external third party to conflicts of laws between Member States, and a point of "triangulation" of these opposing viewpoints.

Without being able to reproduce the entirety of the argument here, it may be noted that it leads the author to issue the following warning: "an analysis of current law does not support the emergence, within regional spaces, of an unconditional right of individuals to the transnational coherence of law and to a resolution of conflicts of laws favorable to them" (p. 725). Supranational courts that were to lose sight of this would expose themselves to the risk of "judge-made legislation". The author nevertheless identifies "an intensified duty to take account of discordant viewpoints and, at times, to articulate them in novel ways, in application of the organization's law and in the absence of harmonization by it of the applicable law". Particular attention should be drawn to the author's precise reassessment of the figure of so-called "diagonal conflicts", based on a fruitful distinction between horizontal conflicts resolved along the vertical axis through fundamental rights, and frictions between a supranational regime and a State regime (see pp. 761 et seq.).

Verticality in public international law

The final chapter is both the natural culmination of the overall demonstration and one that will likely most surprise PIL scholars. Having examined the effects of the verticality of federative organizations of States on conflicts between legal regimes, the author considers it natural to search directly within international law

for instruments capable of coordinating legal regimes applicable to private persons. The surprise may stem from the fact that contemporary private international law doctrine—at least in France—has largely ceased to look to general international law as a remedy for deficits in legal coordination.

The author's perspective here is once again innovative. While there is no substantive subjective right of individuals or companies exposed to discordant legal treatment, the possibility of a procedural subjective right may be envisaged "insofar as such a faculty allows, either immediately or following unsuccessful recourse before State bodies, access to an impartial judge capable of stating the law or of reviewing the manner in which it has previously been applied" (p. 795). The author thus embarks on a quest for this emerging procedural right in its various modalities (individual claims against the State; claims mediated through another State or an international organization). This leads him to explore avenues as diverse as investment arbitration, the fascinating experience of binational courts (and their spontaneous production of private international law solutions, p. 819 et seq.), as well as the International Court of Justice, whose case law is scrutinized to detect the tentative emergence of substantive rights of individuals. The author perceives here a potential for a de-specialization of the Law of Nations through the expansion of its addressees (p. 874).

The author then turns to international institutional fragmentation, that is, the fragmentation of the various regimes (territorial State regimes, special international regimes). He concludes that techniques of horizontal interaction between these legal spheres should be developed, and possibly even hierarchical principles (p. 901). A solution might lie in seizing an authority capable of arbitrating conflicts of competences exercised by independent international bodies, by expanding the advisory procedure before the International Court of Justice, or even by entrusting it with a mission of resolving these conflicts of competence.

Finally, the author seeks to determine whether, in order to transcend the multiplicity of clashing legal regimes, it might be possible to invent and construct a new "*jus commune*" (*droit commun*). He advances three series of proposals or concluding observations in this regard. The first concerns the contemporary role of States and State sovereignty: the author calls for the consolidation of an "interface State between local communities and distant communities" (p. 920). In his view, "the durable persistence of State organization requires a minimum level

of inter-State cooperation". The second series of observations concern the possibility of the emergence of this universal *jus commune* and its defining qualities. The author focuses on points of convergence (principles, values, standards) that make it possible to discern a phenomenon of conjunction between norms of diverse origins. Finally, the author returns once more to the legal discordances affecting international relations to emphasize that, beyond disciplinary, conceptual, and terminological distinctions, a single problem emerges: the lack of coordination between autonomous legal spheres. Given contemporary developments in human societies, spatial mechanisms for resolving certain of these discordances may appear less relevant. What is therefore required is a genuinely substantive coordination, resting on the production of concerted solutions (in the various forms discussed above). For the most difficult cases, the subsidiary intervention of a supranational court could be envisaged.

Highlights

Within the limited space of this review, it is unfortunately not possible to engage in a detailed discussion of the analyses developed, other than by pointing to them in the summary above and advancing the following few remarks, necessarily too general.

The summary above perhaps gives a sense of the scope of the demonstration undertaken. It is particularly impressive and compelling in that it escapes the traditional boundaries of the discipline to embrace the globality of the phenomenon of normative fragmentation. Such an undertaking is remarkable. Global legal incoherences are numerous and addressing them solely through the lens of conflicts of laws or conflicts of jurisdiction would inevitably have been reductive. Moreover, as befits the ambition of a general course, the book offers a comprehensive and original framework for understanding the discipline. It is in a sense conceptualized anew (in object and methods) and endowed with a new vocabulary. This reconceptualization does not however entail revolutionary breaks with existing solutions. Nor is that its ambition: the author warns repeatedly against such ventures. Rather it provides a new perspective that enables regenerating analyses. The author never yields to the temptation of a purely hierarchical response to legal discordances, nor does he idealize horizontality as a sufficient answer to the conflicts generated by the

interpenetration of legal spheres. Instead, he patiently reconstructs the diversity of techniques available—horizontal, vertical, institutional, procedural—and evaluates their respective capacities to achieve coherence without sacrificing pluralism. Also worthy of note is the deliberate choice to avoid doctrinal factionalism (unilateralism vs. bilateralism; localizing vs. substantive approaches; monism vs. pluralism) by adopting a generally pragmatic stance. The demonstration is constantly guided by a concern for individuals and economic actors confronted with the accumulation of fragmented regimes. Without positing the existence of a general subjective right to legal coherence, the author identifies concrete expectations, procedural guarantees, and institutional mechanisms capable of mitigating the most difficult effects of normative fragmentation.

The author concludes with a quote from Savigny, inviting contemporaries to make full use of the doctrinal heritage accumulated in order to contribute to the advancement of scientific progress in the field. This quotation is doubly revealing of the author's approach. First, the call to exploit accumulated doctrinal wealth is followed here with impressive determination. On every page, the author is keen to draw from both older and more recent sources, and to give resonance to the diversity of viewpoints. Second, the demonstration appears to be guided by an idea of progress: not in the sense that contemporary doctrine or case law would be superior to that of the past, but, as Savigny suggests, in the sense that the conflict-of-laws discipline itself progresses—and thus the coherence of law progresses—through "the combined forces of past centuries." Without lapsing into naïveté, the argument reflects a form of optimism on the part of the author regarding the march toward global legal coherence. Such optimism is commendable. It may nevertheless be argued that belief in coherence as a cardinal value is not today universal, within and without the law. Thus, for example, the idea that irrational (incoherent) behavior by a State exposes it to sanctions (from within!, p. 920) unfortunately suffers daily contradiction. Moreover, multilateralism is undergoing a crisis so profound (for instance explored here by P. Franzina, from a private international law perspective) that some argue, not without reason, that it has never existed other than as a façade (as contended by the Prime Minister of Canada in a recent speech in Davos). Just over three years after this course was delivered at The Hague Academy, reasons for optimism are scarce. This does not imply that optimism is impossible, perhaps quite the opposite. The 2026 reader may wonder however what influence (if any)

the recent aggravation of the crisis of multilateralism (as well as the simultaneous rise of adversarial and transactional sovereignism) would have on the demonstration of the author.

As noted above, the perspective of the course is normative in the sense that the search for coherence is presented as both desirable and possible. The temptation of normative disorder is only briefly considered, and then rejected, essentially on the ground that law and normative disorder are incompatible. Some might find this position not entirely convincing. There are several ways of approaching this issue, but one of them is to try to see what risks being lost in the pursuit of coherence (and thus of order). Alternative, non-modern forms of legality may come to mind. There are alternative presentations of the discipline that assign a predominant role to a radical acceptance of otherness (see, for example, the recent book by H. Muir Watt, reviewed here), from a pluralistic perspective. One of the criticisms then directed at contemporary private international law (at least at bilateralism) is its tendency to make room for alternative normativity only at the cost of its intense reconfiguration through the legality of the forum (through the lens or the rationality of the forum). From this perspective, the search for coherence (the process of rendering coherent) risks appearing as an extension of this rationalizing program. In reality, the opposition should perhaps not be overstated. As noted, L. d'Avout demonstrates methodological flexibility, without *a priori* privileging either bilateralism or unilateralism (or monism over pluralism, for that matter). Moreover, the coherence at play here is decentered from the forum, rather than imposed from an overhanging forum. In a sense, it is procedural and dialogical between States (as well as other "legal spheres", i.e. alternative sources of normativity), rather than directly normative. Nevertheless, the demonstration rests on the idea that rationality is the inescapable horizon of law—an idea that maybe will face some pushback. Certain contemporary critiques of the international (legal) order (for instance, the decolonial scholarship, see this paper by S. Brachotte in a PIL perspective) tend instead to deeply deconstruct the very idea of legal coherence. These contemporary dynamics (the deep crisis of multilateralism and the teachings of the critical legal studies) obviously come from very different places and exist on different levels but they have in common a form of skepticism towards the concept of legal coherence. The reader may wonder to what extent they contradict the main thrust of the book, or if they can be reconciled with it, for instance through a reliance on, and reconfiguration of, horizontal (and intrinsically pluralist) modes of coordination.