One, Two, Three… Fault? CJEU Rules on Civil Liability Requirements under the GDPR

Marco Buzzoni, Doctoral Researcher at the Luxembourg Centre for European Law (LCEL) and PhD candidate at the Sorbonne Law School, offers a critical analysis of some recent rulings by the Court of Justice of the European Union in matters of data protection.

In a series of three preliminary rulings issued on 14th December and 21st December 2023, the Court of Justice of the European Union ('CJEU') was called upon again to rule on the interpretation of Article 82 of the General Data Protection Regulation ('GDPR'). While these rulings provide some welcome clarifications regarding the civil liability of data controllers, their slightly inconsistent reasoning will most likely raise difficulties in future cases, especially those involving cross-border processing of personal data.

On the one hand, the judgments handed down in Cases C-456/22, *Gemeinde Ummendorf*, and C-340/21, *Natsionalna agentsia za prihodite*, explicitly held that three elements are sufficient to establish liability under Article 82 GDPR. In so doing, the Court built upon its previous case law by confirming that the right to compensation only requires proof of an infringement of the Regulation, some material or non-material damage, and a causal link between the two. On the other hand, however, the Court seemingly swayed away from this analysis in Case C-667/21, *Krankenversicherung Nordrhein*, by holding that a data controller can avoid liability if they prove that the damage occurred through no fault of their own.

In reaching this conclusion, the Court reasoned that imposing a strict liability regime upon data controllers would be incompatible with the goal of fostering legal certainty laid out in Recital 7 GDPR. By introducing a subjective element that finds no mention in the Regulation, the Court's latest decision is nonetheless likely to raise difficulties in cross-border cases by introducing some degree of unpredictability with respect to the law applicable to data controllers' duty of care. In time, this approach might lead to a departure from the autonomous and

uniform reading of Article 82 that seemed to have prevailed in earlier cases.

The Court's Rejection of Strict Liability for Data Controllers

According to the conceptual framework laid out by the CJEU in its own case law, compensation under Article 82 GDPR is subject to three cumulative conditions. These include an infringement of the Regulation, the presence of some material or non-material damage, and a causal link between the two (see Case C-300/21, *UI v Österreichische Post AG*, para 32). In the cases decided in December 2023, the Court was asked to delve deeper into each of these elements and offer some additional guidance on how data protection litigation should play out before national courts.

In case C-456/22, the CJEU was presented with a claim for compensation for non-material damage filed by an individual against a local government body. The plaintiff alleged that their data protection rights had been breached when the defendant intentionally published documents on the internet that displayed their unredacted full name and address without their consent. Noting that this information was only accessible on the local government's website for a short time, the referring court asked the CJEU to clarify whether, in addition to the data subject's mere short-term loss of control over their personal data, the concept of 'non-material damage' referred to in Article 82(1) of the GDPR required a significant disadvantage and an objectively comprehensible impairment of personal interests in order to qualify for compensation. Rather unsurprisingly, the Court (proceeding to judgment without an Opinion) answered this question in the negative and held that, while Article 82(1) GDPR requires proof of actual damage, it also precludes any national legislation or practice that would subject it to a "*de minimis* threshold" for compensation purposes.

In doing so, the Court followed the road map outlined in *UI v Österreichische Post AG*, which had already held that the concept of damage should receive an autonomous and uniform definition under the GDPR (Case C-456/22, para 15, quoting Case C-300/21, paras 30 and 44) and should not be limited to harm reaching a certain degree of seriousness. Arguably, however, the Court also went beyond its previous decision by stating that the presence of an infringement, material or non-material damage, and a link between the two were not only "cumulative" or "necessary" but also "sufficient" conditions for the application of Article 82(1) (Case C-456/22, para 14). Remarkably, the Court did not mention

any other condition that could have excluded or limited the data subject's right to compensation. Taken literally, this decision could thus have been understood as an implicit endorsement of a strict liability regime under the GDPR.

This impression was further strengthened by the judgment handed down in Case C-340/21, where the Court was asked to weigh in on the extent of a data controller's liability in case of unauthorised access to and disclosure of personal data due to a "hacking attack". In particular, one of the questions referred to the CJEU touched upon whether the data controller could be exempted from civil liability in the event of a personal data breach by a third party. Contrary to the Opinion delivered by AG Pitruzzella, who argued that the data controller might be exonerated by providing evidence that the damage occurred without negligence on their part (see Opinion, paras 62-66), the CJEU ignored once more the question of the data controller's fault and rather ruled that the latter should establish "that there [was] no causal link between its possible breach of the data protection obligation and the damage suffered by the natural person" (Case C-340/21, para 72).

A few days later, however, the CJEU explicitly endorsed AG Pitruzzella's reading of Article 82 GDPR in Case C-667/21. In a subtle yet significant shift from its previous reasoning, the Court there held that the liability of the data controller is subject to the existence of fault on their part, which is presumed unless the data controller can prove that they are in no way responsible for the event that caused the damage (Case C-667/21, holding). To reach this conclusion, The Court relied on certain linguistic discrepancies in Article 82 of the GDPR and held, contrary to the Opinion by AG Campos Sánchez-Bordona, that a contextual and teleological interpretation of the Regulation supported a liability regime based on presumed fault rather than a strict liability rule (Case C-667/21, paras 95-100). Formulated in very general terms, the holding in Case C-667/21 thus suggests that a controller could be released from liability not only if they prove that their conduct played no part in the causal chain leading to the damage but also — alternatively — that the breach of the data subject's rights did not result from an intentional or negligent act on their part.

Lingering Issues Surrounding the Right to Compensation in Cross-Border Settings

According to the CJEU, only a liability regime based on a rebuttable presumption

of fault is capable of guaranteeing a sufficient degree of legal certainty and a proper balance between the parties' interests. Ironically, however, the Court's approach in Case C-340/21 raises some significant methodological and procedural questions which might lead to unpredictable results and end up upsetting the parties' expectations about their respective rights and obligations, especially in cases involving cross-border processing of personal data.

From a methodological perspective, the CJEU's latest ruling does not fit squarely within the uniform reading of the GDPR that the Court had previously adopted with respect to the interpretation of Article 82 GDPR. In the earlier cases, in fact, the CJEU had consistently held that the civil liability requirements laid out in the Regulation, such as the notion of damage or the presence of an actual infringement of data protection laws, should be appreciated autonomously and without any reference to national law (on the latter, see in particular Case C-340/21, para 23). On the other hand, however, the Court has also made clear that if the GDPR remains silent on a specific issue, Member States should remain free to set their own rules, so long that they do not conflict with the principles of equivalence and effectiveness of EU law (on this point, see *eg* Case C-340/21, para 59).

Against this backdrop, the Court's conclusion that the civil liability regime set up by the legislature implicitly includes the presence of some fault on the defendant's part begs the question of whether this requirement should also receive a uniform interpretation throughout the European Union. In favour of this interpretation, one could argue that this condition should be subject to the same methodological approach applicable to the other substantive requirements laid out in Article 82 GDPR. Against this position, it could nonetheless be pointed out that in the absence of explicit indications in this Article, the defendant's fault should be assessed by reference to national law unless another specific provision of the Regulation (such as Articles 24 or 32 of the GDPR) specifies the degree of care required of the data controller or processor. In the context of cross-border cases, the latter interpretation would thus allow each Member State to determine, based on their own conflict-of-laws rules, the law applicable to the defendant's duty of care in cases of violations of data protection laws. If generalised, this approach might in time lead to considerable fragmentation across the Member States.

In addition to these methodological difficulties, the Court's decision in Case

C-340/21 also raises some doubts from a procedural point of view. In holding that the data controllers' liability is subject to the existence of fault on their part, the CJEU calls into question the possible interaction between national court proceedings aimed at establishing civil liability under Article 82 GDPR and administrative decisions adopted by data protection authorities. With respect to the latter, the CJEU had in fact ruled in Case C-683/21, *Nacionalinis visuomenės sveikatos centras*, that Article 83 GDPR must be interpreted so that an administrative fine may be imposed pursuant to that provision "only where it is established that the controller has intentionally or negligently committed an infringement referred to in paragraphs 4 to 6 of that article" (Case C-683/21, holding). In other words, national supervisory authorities are also called upon to assess the existence of fault on the part of the data controller or processor before issuing fines for the violation of data protection laws.

At first glance, the CJEU's decision in Case C-340/21 fosters some convergence between the private and public remedies set out in the GDPR. In reality, however, this interpretation might potentially create more hurdles than it solves. Indeed, future litigants will likely wonder what deference, if any, should be given to a supervisory authority's determinations under Article 83 GDPR within the context of parallel court proceedings unfolding under Article 82. In a similar context, the Court has already held that the administrative remedies provided for in Article 77(1) and Article 78(1) GDPR may be exercised independently and concurrently with the right to an effective judicial remedy enshrined in Article 79 GDPR, provided that national procedural rules are able to ensure the effective, consistent and homogeneous application of the rights guaranteed by the Regulation (see Case C-132/21, *Nemzeti Adatvédelmi és Információszabadság Hatóság v BE*). Should the same principles apply to actions brought under Article 82 GDPR? If so, should the same rule also extend to conflicts between national court proceedings and decisions issued by foreign supervisory authorities (and vice-versa), even though each of them might have a different understanding of the degree of protection afforded by the Regulation?

Despite the CJEU's laudable attempt to strike a balance between the interests of personal data controllers and those of the individuals whose data is processed, it is not certain that the Court has fully assessed all the consequences of its decision. Ultimately, in fact, the choice to reject a strict liability rule could lead not only to unequal protection of individual rights within the EU but also to major

uncertainties for economic operators regarding the extent of their own liability under the GDPR.

Colonialism and German PIL (4) – Exploiting Asymmetries Between Global North and South

This post is part of a series regarding Colonialism and the general structure of (German) Private International Law, based on a presentation I gave in spring 2023. See the introduction here.

As mentioned in the introduction, this series does **not** intent to automatically pass judgment on a norm or method influenced by colonialism **as inherently negative**. Instead, the aim is to reveal these influences and to initiate a first engagement with and awareness of this topic and to stimulate a discussion and reflection.

The first post (after the introduction) dealt with classic PIL and colonialism. This second considered structures and values inherent in German or European law, implicitly resonating within the PIL and, thus, expanding those values to people and cases from other parts of the world. The third category discusses an imagined hierarchy between the Global North and Global South that is sometimes inherent in private international law thinking. The **fourth and for the moment last (but not least) category** deals with PIL rules that allow or at least contribute to the exploitation of a power asymmetry between parties from the Global North and the Global South. For example, this power and negotiation asymmetry, in conjunction with generous rules on party autonomy, can lead to arbitration and choice of law clauses being (ab)used to effectively undermine rights of land use under traditional tribal law.

After the first post, in the comment section a discussion evolved regarding the (non-)application of tribal law. One question asked for an example. This post can

also (hopefully) serve as such an example.

1. Party Autonomy in German and EU PIL

One value inherent to the German and EU legal systems is that of private and party autonomy. It reflects and expresses the individualism of the Enlightenment and a neo-liberal social order and is recognised today, at least in part, as one of the "universal values" of PIL. However, the choice of law and, thus, party autonomy as a core connecting factor or method of PIL can lead to the exploitation of negotiation asymmetries in the relationship between companies in the Global North and states or companies in the Global South, particularly to the detriment of the population in the Global South, by avoiding state control and socially protective regulations.

2. "Land Grabbing" as an Example

"Land grabbing" refers to, among other things, the procedure used by foreign investors to acquire ownership to or rights to exploit territories in former colonies. The contract is concluded with the landowner, often the state, and includes an arbitration and choice of law clause, often within the framework of bilateral investment protection agreements. The use of the land can conflict with the collective, traditional use by certain local groups, which is based on customary and tribal law. Such rights of land use were often only fought for politically after the former colony gained independence, while the original colonial legal system overrode indigenous rights of use (see also former posts **here** and see the discussion in the comment section of the post). These land use rights of indigenous groups often stem from public law and are conceived as protection rights of the indigenous population, who are thus authorised to live on their traditional land.

The arbitration agreement and the choice of law clause make it possible for legal disputes to be settled before a private arbitration tribunal. The tribes concerned, as they are not part of the treaty on the land and its use, can only become parties to the legal dispute with difficulty. Furthermore, they may not have knowledge of the treaty and the arbitration clause or the possibility to start a proceeding at the tribunal. In addition, a law applicable to the contract and its consequences may be chosen that does not recognise the right of land use based on tribal law. If the arbitrator, not knowing about the not applicable tribal law or the existence of the

tribe, makes a decision based on the chosen law, the decision can subsequently become final and enforceable. This may force the tribes using the land having to vacate it as property disturbers without being able to take legal action against it.

3. Party Autonomy and Colonialism

This possibility of "land grabbing" is made possible by the fact that a state – often a former colony – has a high interest in attracting foreign investment. She, therefore, tries to organise its own legal system, and therefore also her conflict of laws, in an investment-friendly manner and accommodate the investor in the contract. The generous granting of party autonomy and individual negotiating power plays a key role here. A domino effect can be observed in former colonies, where a legal system follows that of neighbouring states once they have attracted foreign investment in order to be able to conclude corresponding agreements. The endeavours of states to introduce a liberal economy form, which is reflected in party autonomy in PIL, can therefore also express a structural hierarchy and form of neo-colonialism. It also indirectly revives the original behaviour of the colonial rulers towards the indigenous peoples with the support of the central state (see former post).

4. Assessment of "Land Grabbing"

If the aforementioned power asymmetry is not counter weighted, arbitration and choice of law clauses can lead to an avoidance of unwanted laws, such as those granting traditional land use rights to local tribes. From a German domestic perspective, the problem arises that the enforcement of (one's own) local law is a matter for the foreign state. A case where local law will be addressed before German courts will be scarce, esp. in the case of an arbitration proceeding. German courts only come into contact with the legal dispute if an arbitration proceeding has already resulted in a legally binding award and this award is now to be enforced in Germany. In my opinion, this case has to be handled in the same procedure proposed in a former post for the integration of local, non-applicable law. If foreign tribal law is mandatory in the state in question, for example, because there is an obligation under international and domestic law, the arbitral tribunal should be presumed to also observe this obligation as an internationally mandatory norm, irrespective of which *lex causae* applies. When enforcing the arbitral award domestically, the declaration of enforceability should be prohibited on the grounds of a violation of public policy if the arbitral tribunal has not

complied with this obligation.

Furthermore, the use of party autonomy could be more strictly controlled and restrictively authorised when special domestic values and interests of third parties are at stake, as can be the case in particular with the use of land. The *lex rei sitae* might be more appropriate without allowing for a choice of law.

Finally, restrictions on party autonomy in cases in which negotiation asymmetries are assumed are not unknown to German and European PIL. So, ideas from these rules could be taken up and consideration could be given to which negotiation asymmetries could arise in relation to non-European states. For example, certain types of contract that are particularly typical of power asymmetries could be provided with special protection mechanisms similar to consumer contracts under Art. 6 Rome I Regulation. But that is an international problem that should be discussed on the international level. Therefore, the international community could work towards an international consensus in arbitration proceedings that, for example, property law issues are subject to the *lex rei sitae* and are not open to a choice of law. Similarly, there could be a discussion whether safeguards should ensure that no choice of law can be made to the detriment of third parties and that, where applicable, participation rights must be examined in arbitration proceedings. Many legal systems already provide those saveguards, so this would not come as a huge novelty.

However, it would also be paternalistic and neo-colonialist if such considerations originated in the Global North without involving the countries to which they refer. It would therefore be desirable to have a stronger and more enhanced dialogue with countries from the Global South that also allows representatives of the local population and local communities to have their say, so that these interests and possibilities for exploiting negotiation asymmetries can be better taken into account.

5. Epilogue

This series has tried to start a debate about Colonialism and Private International Law from the point of view of German PIL. Posts from other jurisdictions might follow. It is a very complex topic and this series only scratched on its surface. As writen in the introduction, I welcome any comments, experiences and ideas from other countries and particularly from countries that are former colonies.

Colonialism and German PIL (3) – Imagined Hierachies

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The first post (after the introduction) dealt with classic PIL and colonialism and already sparked a vivid discussion in the comments section. This second considered structures and values inherent in German or European law, implicitly resonating within the PIL and, thus, expanding those values to people and cases from other parts of the world. The **third category** discusses an imagined hierarchy between the Global North and Global South that is sometimes inherent in private international law thinking, for instances where courts or legislators abstractly or paternalistically apply the public policy to "protect" individuals from foreign legal norms. This is especially evident in areas like underage marriages and unilateral divorce practices found *inter alia* in Islamic law.

1. The public policy exception – abstract or concrete control?

The public policy exception is intended to prevent the application of foreign law by way of exception if the result of this application of law conflicts with fundamental domestic values. Such control is necessary for a legal system that is open to the application of foreign law and, in particular, foreign law of a completely different character. German law is typically very restrictive in its approach: The public policy control refers to a concrete control of the results of applying the provisions in question. In addition, the violation of fundamental

domestic values must be obvious and there must be a sufficient domestic connection. In other countries, the approach is less restrictive. In particular, there are also courts that do not look at the result of the application of the law, but carry out an abstract review, i.e. assess the foreign legal system in the abstract. For a comparison of some EU Member States see this article.

2. Explicit paternalistic rules

Furthermore, there are some rules that exercise an abstract control of foreign law. Article 10 of the Rome III Regulation contains a provision that analyses foreign divorce law in the abstract to determine whether it contains gender inequality. According to this (prevailing, see e.g. conclusions of AG Saugmandsgaard Øe) interpretation, it is irrelevant whether the result of the application of the law actually leads to unequal treatment. This abstract assessment assumes – even more so than a review of the result – an over-under-ordering relationship between domestic and foreign law, as the former can assess the latter as "good" or "bad".

Even beyond the *ordre public* control, there has recently been a tendency towards "paternalistic rules", particularly triggered by the migration movements of the last decade. The legislator seems to assume that the persons concerned must be protected from the application of "their" foreign law, even if they may wish its application. In particular, the "Act to Combat Child Marriage" which was only partially deemed unconstitutional by the Federal Constitutional Court (see official press release and blog post), is one such example: the legislator considered the simple, restrictive *ordre public* provision to be insufficient. Therefore, it created additional, abstract regulations that block the application of foreign, "bad" law.

3. Assessment

In the described cases as a conceptual hierarchy can be identified: The impression arises that foreign legal systems, particularly from the "Global South", are categorised in the abstract as "worse" than the German/EU legal system and that persons affected by it must be protected from it ("paternalistic norms"). As far as I can see there is a high consensus in the vast majority of German literature (but there are other voices) and also the majority of case law that the abstract *ordre public* approach should be rejected and that the aforementioned norms, i.e. in particular Art. 13 III EGBGB (against underage marriages) and Art. 10 Rome

III-VO (different access to a divorce based on gender), should ideally be abolished. It would be desirable for the legislator to take greater account of the literature in this regard.

US Ninth Circuit rules in favor of Spain in a decades-long case concerning a painting looted by the Nazis



This interesting case comment has been kindly provided to the blog by ***Nicolás Zambrana-Tévar****, LLM, PhD, KIMEP University*

The United States Court of Appeals for the Ninth Circuit has found in favor of Spain as defendant in a property case spanning several decades. A panel of three judges has unanimously ruled that, applying California conflict of law rules, Spain has a stronger interest than the claimants in the application of its own domestic law, including its own rules on prescriptive acquisition of property and the statute of limitations, thus confirming the ownership of a stolen painting, now owned by a Spanish museum.

1. Background information

In 1939, Lilly Cassirer traded a Pissarro painting to the Nazis in exchange for her family´s safe passage out of Germany. In 1954, a tribunal set up by the Allied forces established that the Cassirer family were the rightful owners of the painting. However, believing that the painting had been lost during the war, the family accepted 13,000 US dollars in compensation from the German government, which would be the equivalent of 250,000 US dollars today.

After the painting was looted, it found its way into the United States and, in 1976, Baron Hans Heinrich Thyssen-Bornemisza bought it from the Hahn Gallery of New York, where the painting was publicly in display, allegedly ignoring its origin. The Museum Thyssen-Bornemisza purchased the painting from the Baron in 1993. Claude Cassirer – the grandson of Lilly Cassirer – found out that the painting was being exhibited in Madrid and commenced proceedings under the Foreign Sovereign Immunities Act (FSIA) in 2005. The Museum is the actual defendant in the suit but it is considered an instrumentality of the Kingdom of Spain.

2. Court decisions

In 2019, a US District Judge for the Central District of California, applying Spanish law, found that court filings did not demonstrate a "willful blindness" on the part of the Museum, when it added the painting to its collection. Moreover, the judge found that it could not force Spain or the Museum to comply with the "moral commitments" of international agreements concerning the return of works of art looted by the Nazis.

In 2020, the US Court of Appeals for the Ninth Circuit found in favor of Spain, again applying Spanish law. The court ruled that, regardless of the test applied by the district judge to determine the degree of care employed by the purchaser to determine the origin of the painting, both the Baron in 1976 and the Museum in 1993, lacked actual knowledge of the theft. It is important to note that both the district judge and the court of appeals determined the application of Spanish law because they were applying federal choice of law rules.

In 2022, the US Supreme Court ruled that this case did not involve any substantive federal law issues because it basically dealt with property law. Therefore, the choice of law rules that the district judge and the court of appeals should have applied were the conflict rules of the forum state, i.e. the conflict rules of California. The Supreme Court argued that Spanish law "made everything depend on whether, at the time of acquisition, the Foundation knew the painting was stolen". On the other hand, the claimants argued that California conflict rules led to the application of California property law, in accordance with which "even a good-faith purchaser of stolen property cannot prevail against the rightful pre-theft owner." Basically, the Supreme Court said that in an FSIA case, the foreign state defendant has to be treated like a private defendant and that if the Museum had been a purely private entity, it would have had to return the painting. The

case was returned to the Court of Appeals.

3. Conflict-of-law analysis

On 9 January 2024, the US Court of Appeals ruled that, even applying California choice of law rules, Spanish law was applicable. The court came to this conclusion applying the "governmental interest approach". In accordance with this approach, the court first had to ascertain that the two laws in conflict – Spain and California law – were different. They were because the Spanish law provision that the defendant was relying on was article 1955 of the Spanish Civil Code, which provides that "Ownership of movable goods prescribes by three years of uninterrupted *bona fide* possession. Ownership of movable goods also prescribes by six years of uninterrupted possession, without any other condition". Therefore, in accordance with Spanish law "three years of uninterrupted possession in good faith" are enough for the acquisition of title whereas California law has not expressly adopted a doctrine of adverse possession for personal property – such as works of art – and, moreover, "thieves cannot pass good title to anyone, including a good faith purchaser". Besides, California law extends to six years the statute of limitations for claims involving the return of stolen property and Cassirer brought the claim only five years after it discovered the painting hanging at the Museum in Madrid.

Having determined that the laws in conflict were different, the court of appeals then examined and agreed that both jurisdictions – Spain and California – "have a legitimate interest in applying their respective laws on ownership of stolen personal property". "Spanish law assures Spanish residents that their title to personal property is protected after they have possessed the property in good faith for a set period of time, whereas California law seeks to deter theft, facilitate recovery for victims of theft, and create an expectation that a bona fide purchaser for value of movable property under a 'chain of title traceable to the thief,' … does not have title to that property." Therefore, there was a true conflict of laws, as both jurisdictions had real and legitimate interests in applying their respective law. Additionally, the court had to determine which jurisdiction's interest "would be more impaired if its policy were subordinated to the policy of the other state." Otherwise said, "which jurisdiction should be allocated the predominating lawmaking power under the circumstances of the present case".

To do this, the interests of each jurisdiction were to be measured based on "the circumstances of the particular dispute, not the jurisdiction's general policy goals

expressed in the laws implicated". The factors to be taken into consideration in this analysis were the "current status of a statute… the location of the relevant transactions and conduct… and the extent to which one jurisdiction's laws either impose similar duties to the other jurisdiction's laws, or are accommodated by the other jurisdiction's laws, such that the application of the other jurisdiction's laws would only partially—rather than totally—impair the interests of the state whose law is not applied".

With respect to the first factor, the court said that it was inappropriate to judge which law is better. Also, in reply to the alleged archaism of the Spanish rule, that says that property is acquired after six years of possession, regardless of the stolen nature of the asset, the court replied that the defendant was relying on the possession with good faith during three years.

With respect to the second factor, the court of appeals reasoned that, in accordance with several precedents from the Supreme Court of California, a "jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders", i.e. on Spanish territory, whereas "where none of the relevant conduct occurs in California, a restrained view of California's interest in facilitating recovery for one of its residents is warranted." In the case at hand, "California's sole contact to the dispute was the happenstance of the plaintiff's residence there." Similarly, "California's governmental interest rests solely on the fortuity that Claude Cassirer moved to California in 1980, at a time when the Cassirer family believed the Painting had been lost or destroyed." Therefore, "California's interest in facilitating recovery for that resident was minimal and the extraterritorial reach of its laws was restrained." Since "no relevant conduct with respect of the Painting occurred in California, the impairment of California's interest that would result from applying Spanish law would be minimal."

The court went on to say that, in contrast, "applying California law would significantly impair Spain's interest in applying Article 1955 of the Spanish Civil Code. For one, because the relevant conduct [the purchase of the painting] occurred in Spain" so that "Spain has the "predominant interest in applying its laws to that conduct." Furthermore, "applying California law would mean that Spain's law would not apply to property possessed within Spain's borders, so long as the initial owner (1) happened to be a California resident (a fact over which… the defendant has no way of knowing or controlling…, and (2) the California resident did not know where the property is located and who possessed it. Applying California law based only on Claude Cassirer's decision to move to California would strike at the essence of a compelling Spanish law."

With respect to the third factor and also in accordance with past precedents of the California Supreme Court, “the court should look to whether one jurisdiction’s laws accommodate the other jurisdiction’s interests or imposes duties the other jurisdiction already imposes… A state’s laws can more readily be discarded if the failure to apply its laws would only partially—rather than totally—impair the policy interests of the jurisdiction whose law is not applied…. Here, the failure to apply California’s laws would only partially undermine California’s interests in deterring theft and returning stolen art to victims of theft, which provides further support for limiting the extraterritorial reach of California’s laws to this dispute.
On the other hand, “applying Spanish law would only partially undermine California’s interests in facilitating recovery of stolen art for California residents. California law already contemplates that a person whose art—or other personal property—is stolen may eventually lose the ability to reclaim possession: namely, if the person fails to bring a lawsuit within six years after he discovers the whereabouts of the art… Similarly, Article 1955 of the Spanish Civil Code accommodates California’s interest in deterring theft. As we have explained, Spanish law makes it more difficult for title to vest in an “encubridor,” which includes, “an accessory after the fact,” or someone who “knowingly receives and benefits from stolen property…. If the possessor is proven to be an encubridor, Spanish law extends the period in which the property must be possessed before new prescriptive title is created.”

4. Concluding remarks

This complex and interesting case seems to be coming to an end. In brief, and despite the complexity of the application of the theory of interest analysis, it seems that the US court has given the same solution which a civil court would have given, applying the usual rule that the law applicable to property rights is the law of the place where the property is located at the time of the transfer. So far, it appears that the increasing sensitivity towards cultural property and towards unraveling war crimes has not fully displaced this conflicts rule.

Colonialism and German PIL (2) – German and European Structures and Values

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The Convergence of Judicial Rules between Mainland China and Hong Kong has Reached a Higher Level

By Du Tao and Jingwei Qiu***

With the increasingly close personnel exchanges and deepening economic cooperation between Mainland China and Hong Kong, the number and types of legal disputes between the two regions have also increased. Against the backdrop of adhering to the "One Country, Two Systems" principle and the Basic Law of Hong Kong, the judicial and legal professions of the two regions have worked closely together and finally signed "the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (hereinafter referred to as "REJ Arrangement") in January 2019, which will come into effect in January 2024. REJ Arrangement aims to establish an institutional arrangement for the courts of the Mainland and the Hong Kong Special Administrative Region to recognize and enforce judgments in civil and commercial cases, achieve the "circulation" of judgments in civil and commercial cases, reduce the burden of repeated litigation, and save judicial resources in the two regions.

There are 31 articles in REJ Arrangement, which comprehensively and meticulously stipulate the scope and contents of mutual recognition and enforcement of judgments in civil and commercial cases, the procedures and methods for applying for recognition and enforcement, the circumstances under

which recognition and enforcement may not be recognized, and the remedies available. Articles 1, 2, and 4 are provisions that positively state the scope of recognition and enforcement of civil and commercial judgments in the two regions; Articles 3, 5, 12, and 13 are provisions that clearly recognize and enforce the scope of civil and commercial judgments of the courts of the two regions. Articles 7 to 11 and 20 to 27 are procedural provisions. The remaining provisions deal with the entry into force, interpretation, and modification of REJ Arrangement.

Compared with "the recognition and enforcement of judgments in civil and commercial matters pursuant to choice of court agreements made between the parties concerned" (the first agreement reached between the two places on mutual recognition and enforcement of judgments in civil and commercial matters, hereinafter referred to as 'Mainland-Hong Kong Mainland-Hong Kong Choice of Court Arrangement')", REJ Arrangement has significantly increased the types of cases to which it can be applied. Mainland-Hong Kong Choice of Court Arrangement is very limited in terms of the types of cases to be applied and only applies to civil and commercial cases where the parties have a written jurisdiction agreement, and there is a final monetary judgment. For example, in 2018, Zhongji Company filed an application with the Hangzhou Intermediate People's Court of Zhejiang Province for recognition and enforcement of a civil judgment of a Hong Kong court[[1]], because a winding-up order made by a Hong Kong court is not a civil and commercial case according to parties' agreement, and it cannot directly apply to the mainland court for recognition in accordance with the provisions of Mainland-Hong Kong Choice of Court Arrangement. In the 2010 case in which Chengxin Real Estate Company applied to the Xiamen Intermediate Court for confirmation of an effective judgment issued by the Hong Kong High Court[[2]], although the parties had signed a contract with a jurisdiction clause in writing since Mainland-Hong Kong Choice of Court Arrangement was only limited to the recognition of monetary judgments, the judgment of conveying the ownership of immovable property in the judgment could not be recognized and enforced because it was a non-monetary judgment. These two cases clearly illustrate the narrow scope of the Mainland-Hong Kong Choice of Court Arrangement. REJ Arrangement not only applies to monetary judgments but also includes non-monetary judgments. It also lists the types of cases that are not subject to REJ Arrangement for the time being. This method clarifies the types of cases to be

applied, which is conducive to unifying judges' understanding of the scope of application of REJ Arrangement in judicial practice and protecting the legitimate rights and interests of the people in the two places to the greatest extent.

REJ Arrangement removes the restriction on the level of the court of first instance. Mainland-Hong Kong Choice of Court Arrangement restricts the level of judgment rendered by the Mainland courts, which is limited to judgments rendered by courts at the level of the Mainland Intermediate Court and above, as well as some basic courts with foreign-related jurisdiction. However, REJ Arrangement does not restrict the level of courts in the Mainland where judgments are rendered, i.e. effective judgments issued by courts at all levels in various regions of the Mainland can be applied. For Hong Kong, the REJ Arrangement extends the scope to the effective judgments of the Labour Tribunal, the Small Claims Tribunal, and the Lands Tribunal. After REJ Arrangement comes into effect, together with the matrimonial and family arrangements that have been signed before, about 90% of civil and commercial judgments in the two places will be reciprocal recognition and the scope of application of enforcement will be expanded, [3]so that the cases involving each other can be recognized and enforced to the greatest extent, and to ensure that creditors in the two places can obtain the greatest judicial relief.

With regard to the revision of jurisdiction, on the one hand, new jurisdictional connection points have been added to the REJ Arrangement, filling the gap in the provisions of the Mainland-Hong Kong Choice of Court Arrangement in this regard. The new jurisdictional connection point of "the applicant's domicile" is connected with the expansion of the scope of the application of REJ Arrangement. Since REJ Arrangement also includes the confirmation of legal relationships or legal facts in the scope of application, there is no enforceable content in such judgments themselves. The applicant only needs to apply to the Mainland court for recognition of this part of the legal relationship or facts. If REJ Arrangement does not add a new jurisdictional connection point of "the applicant's domicile", when the respondent has neither property nor domicile in the Mainland, a jurisdictional connection point cannot be established, resulting in no Mainland court accepting the application. Therefore, the addition of "the applicant's domicile" as a jurisdictional connection point in this arrangement is of great practical significance, which greatly enhances the feasibility of the recognition of judgments.

On the other hand, REJ Arrangement clarifies the criteria for the review of the jurisdiction of the court of first instance. Mainland-Hong Kong Choice of Court Arrangement stipulates that, according to the law of the requested party, if the requested court has exclusive jurisdiction over the case, it shall not recognize and enforce it, that is, adopt the "exclusive jurisdiction exclusion" model. For the first time, REJ Arrangement clearly stipulates the criteria for the review of the jurisdiction of the court in which the judgment is rendered. Article 11 sets out the jurisdictional criteria for different types of cases by way of enumeration. The provisions on jurisdiction in REJ Arrangement are in fact based on the HCCH 2019 Judgments Convention, and adopt the review model of "exclusive jurisdiction exclusion" plus "enumeration". Under REJ Arrangement, if a Mainland judgment applies to the Hong Kong court for recognition and enforcement, the Hong Kong court can not only greatly reduce the workload of reviewing jurisdiction, but also reduce the number of defenses to jurisdictional issues, thereby increasing the success rate of recognition and enforcement of the judgment. Moreover, REJ Arrangement clearly unifies the criteria for determining the jurisdiction of the court of first instance, which can effectively reduce the occurrence of parallel litigation and enhance the predictability and stability of litigation. In addition, the wording of the provisions on jurisdiction in different circumstances in Article 11 of REJ Arrangement indicates that when examining whether the court of first instance has jurisdiction, it is only necessary to examine the jurisdiction of the jurisdiction of the jurisdiction in which the judgment was rendered.

In terms of content, REJ Arrangement takes a more open stance than the HCCH 2019 Judgments Convention, strengthens the judicial protection of intellectual property rights, and clearly stipulates the jurisdictional standards for intellectual property cases. With the in-depth interaction of professional services related to intellectual property rights in the mainland and Hong Kong, the two regions have gradually reached a consensus on issues such as the determination of the validity of certain intellectual property rights and the protection system, which provides the possibility of adding new protection clauses related to intellectual property rights in the REJ Arrangement. The scope of intellectual property rights protected by REJ Arrangement mainly refers to the Agreement on Trade-Related Aspects of Intellectual Property Rights, the General Provisions of the Civil Law of the People's Republic of China, and the Regulations on the Protection of Plant Varieties. For the first time, REJ Arrangement adds provisions on punitive

damages for infringement of intellectual property rights and clarifies the punitive damages part of the monetary judgments in the four types of cases recognized and enforced by the requested court. In addition, based on the particularity of trade secret infringement disputes, non-monetary liability for infringement of trade secrets is stipulated.

In terms of the finality of the recognition and enforcement of judgments, REJ Arrangement has made a major breakthrough. Hong Kong is a common law country and has a habit of following precedent when it comes to finality. In 1996, in the case of Chiyu Banking Corporation Limited's application for recognition and enforcement of a Mainland judgment (hereinafter referred to as the Chiyu case)[[4]], Judge Cheung Chak Yau of the Hong Kong Court made the following judgment on the issue of the finality of the judgment: The judgment of a foreign court must be final and irrevocable, and because of the existence of a retrial system in Chinese mainland, the original trial court has the right to change the original judgment in the retrial, because the judgment made by the original trial court can be changed, and this system makes the mainland judgment not final. As a result, the Mainland judgment was ruled by the Hong Kong court not to be recognized and enforced. The criterion of finality established by this case had a profound and long-lasting impact on the recognition and enforcement of mainland judgments by Hong Kong courts, and the Chiyu case has been repeatedly cited as a precedent by the Hong Kong side. Even later, in the 2001 TayCuanv. NgChi case[[5]], the issue of finality was raised again, and the Hong Kong side rejected the application on the same grounds, resulting in a further strengthening of the criterion of finality of judgment. However, Mainland-Hong Kong Choice of Court Arrangement only avoids the use of the word "finality" and does not explicitly stipulate "enforceable judgments", which cannot really solve the problem. Subsequently, the Mainland Judgments (Reciprocal Enforcement) Ordinance enacted by Hong Kong under Mainland-Hong Kong Choice of Court Arrangement deviated from the original intention of Mainland-Hong Kong Choice of Court Arrangement and still adopted the expression "final and conclusive" on the issue of finality. As such, the Mainland-Hong Kong Choice of Court Arrangement has a very limited role in coordinating the finality of judgments between the two places.

Under REJ Arrangement, "the judgment is final and inconclusive" no longer needs to be "final and conclusive" for mainland civil and commercial judgments to be recognized and enforced in Hong Kong. The phrase "final judgment with

enforceable effect" has been changed to "effective judgment", and the meaning of "effective judgment" has been clarified, referring to "first-instance judgments and second-instance judgments that are not allowed to be appealed in accordance with the law or have not been appealed within the statutory time limit, as well as the above-mentioned judgments made through retrial procedures". REJ Arrangement has undergone substantial changes in the legislative provisions on the issue of finality of judgments, and Hong Kong has abandoned its long-standing insistence on the criteria of "certainty" and "inconclusiveness". Moreover, the clear elaboration of the "effective judgment" enables the subsequent judicial practice to apply the law more accurately. When hearing a case of recognition and enforcement of a Mainland judgment, the Hong Kong court only needs to conduct a formal review to determine whether the type of judgment is in accordance with REJ Arrangement.

However, the breakthrough of REJ Arrangement on the issue of finality of judgments does not represent a fundamental change in Hong Kong's attitude towards the recognition and enforcement of extraterritorial judgments, which can only be confirmed after the transformation of Hong Kong's local legislation and subsequent judicial practice. At least on the surface, this provision resolves the historic obstacle that has been preventing the recognition and enforcement of Mainland judgments in Hong Kong courts. From a more in-depth perspective, Hong Kong will treat mainland judgments differently from foreign judgments, so that judgments from the two places can truly be circulated.

At present, the development of the Guangdong-Hong Kong-Macao Greater Bay Area is in the ascendant, and the signing of REJ Arrangement has provided new opportunities for the future development of the two places. This is not only the endpoint of the basic and comprehensive coverage of the judicial assistance arrangements for civil and commercial matters between the two places, but also the starting point for colleagues in the legal circles of the two places to move towards a higher and farther goal[[6]]. This means that Mainland China and Hong Kong will have a broader space for development and better prospects in the field of mutual recognition and enforcement of civil and commercial judgments. In the new era and new context of continuing to adhere to the principle of "one country, two systems" in the future, the legal culture and legal system of Mainland China and Hong Kong will be gradually integrated, and an integrated system of civil and commercial judicial assistance will be successfully established.

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[1] See (2018) Zhe 01 Zhigang No. 2. On 12 November 2018, the applicant, Zhongji Company, filed an application with the Hangzhou Intermediate People's Court for recognition of the High Court's winding-up order No. 132 of 2018 in the High Court of the Hong Kong Special Administrative Region. https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=JseWE2JCpafgJrx5lyT46GkmFgQc7VGra0V1/ugltMMOZ2S3LUQMq7fWnudOoarTTYdhHuJEwBempXeLhxTPMm90fL3cvEPOqfJQ2Xb051xu6I6RfcuEPyM36peDZ1lY

[2] See (2009) Xiamin Zhizi No. 124. In 2009, Chengxin Real Estate sued Hong Kong Guoyuan Investment Co., Ltd. in Hong Kong, demanding that it deliver the housing involved in the lawsuit and repay the money.

legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=67107&QS=%24%28HCA2231%2F2007%2C?%29&TP=JU

[3] The Mainland and Hong Kong signed an arrangement on mutual recognition of judgments in civil and commercial matters, and continuously improved the inter-regional judicial assistance system with Chinese characteristics: An interview with the person in charge of the Research Office of the Supreme People's Court[EB/OL].?2019-01-18?.https://www.chinacourt.org/article/detail/2017/06/id/2903940.shtml.

[4] Chiyu Banking Corp Ltd v. Chan Tin Kwun?1996?HKCFI 418; (1996)2 HKLRD 395;HCA 11186/1995.legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=30726&QS=%2B%7C%28HCA%2C11186%2F1995%29&TP=JU

[5] Tan Tay Cuan v.Ng Chi Hung,HCA 5477/2000.5/2/2001.legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=21647&QS=%2B%7C%28HCA%2C5477%2F2000%29&TP=JU

[6] The Mainland and Hong Kong signed an arrangement on mutual recognition of judgments in civil and commercial matters, and continuously improved the inter-regional judicial assistance system with Chinese characteristics: An interview with the person in charge of the Research Office of the Supreme People's Court[EB/OL].?2019-01-18?.https://www.chinacourt.org/article/detail/2017/06/id/2903940.shtml.

Colonialism and German PIL (1) – Colonial Structures in Traditional PIL

This post is the first of a series regarding Colonialism and the general structure of (German) Private International Law, based on a presentation I gave in spring 2023. See the introduction here.

As mentioned in the introduction, this series **does not intent to automatically pass judgment** on a norm or method influenced by colonialism **as inherently negative** (I emphasise this because my experience shows that the impression quickly arises). Instead, the aim is to reveal these influences and to initiate a first engagement with and awareness of this topic and to stimulate a discussion and reflection.

The first category, to be discussed today, relates to the (sometimes unconscious) implementation and later continuation of the colonial structure in PIL – now and then.

1. The Origins

a) Savigny's approach

One if not the core value of Private International Law is its neutrality and equality among legal systems. The main goal of German conflict of laws rules is to achieve "international justice" by associating legal matters with the most fitting law, independent of substantive legal values. These foundational principles are commonly attributed to Savigny, who shaped the basic structure of German conflict of laws rules by associating legal matters with their "seat". Savigny supposedly treated all legal systems as equal and of the same value. The supposed neutrality of PIL might suggest that it is devoid of, or at least shows minimal traces of, colonialism due to its fundamental structures and values.

However, examining Savigny's "neutrality" towards potential applicable laws reveals that it is only respected from the perspective of "law" as defined by Savigny. This definition includes only legal systems that share the same "Christian" values. This, in essence, results in a devaluation of other legal systems deemed less valuable. Typically, these legal systems today would be those classified as "Western," sharing the same value system as German law.

b) Conflict of laws and internal conflicts in relation to colonial states

In determining the applicable law between colonial states and colonies, usually the rules on conflict of laws did not apply but a conflict was regarded as an internal one. German colonies, for instance, were not considered part of the German Reich, yet not treated as a separate state, but as "protectorates." Similar ambiguity existed for other colonies. This unclear legal status allowed different treatment of the colonies under conflict of laws rules, separating local laws in the colonies from the "mother system" and placing them in a hierarchical inferiority. The indigenous population was "allowed" to handle internal, especially family-related disputes through their pre-colonial customs. However, they were not allowed to determine on their own what constituted part of this legal framework or in which cases which rule applied. Colonial authorities decided which cultural elements of various groups seemed fitting as applicable. Furthermore, inter-local conflict of laws rules often only applied local laws when they did not conflict with the colonial legal system or its core values and did not involve members of the "mother system". Thus, the legal system of the colonizers took precedence in cases of doubt, and the affected individuals from these local legal orders were not involved in the decisions. Consequently, the colonial authorities decided what was

classified as “local law,” its scope and application, favoring their own legal system in cases of uncertainty. The decision regarding which law should prevail was unilaterally made by the colonial authorities.

c) The concept of “state“

Furthemore, an indirect colonial influence on the concept of state within conflict laws is notable. Non-state law, particularly religious or tribal law, was not considered law, neglecting the various communities or identities of individuals in the colonies. Norms within the framework of Savigny’s conflict laws referred exclusively to state law, assuming a state based on Western understanding. This reference indirectly affirmed the concept of the state attributed to Jellinek and the often arbitrarily drawn colonial state boundaries through these conflict norms. Simultaneously, by referring exclusively to state law, it marginalized or ignored other forms of legal orders since they did not represent “law” according to the references. Again, this particularly affected religious or indigenous law.

d) Citizenship as connecting factor

Citizenship serves as a core connecting point, especially for personal matters in Continental European PIL, including Germany (even though it is not based in Savigny’s PIL thinking but is usually attributed to Mancini or the reception of his doctrines). This connection to citizenship has roots in colonial thinking: Granting citizenship has historically expressed and continues to express exclusive affiliations that consciously exclude others. In cross-border private law relations, PIL perpetuates this citizenship policy, reserving certain rules of German law for German citizens.

This method of connecting legal matters to citizenship had implications in the determination of applicable law in colonial contexts. For instance, in the German Reich colonies, distinctions were made between *Reichsdeutsche* (Germans from the Reich), European foreigners (foreigners but non-natives), and natives. The latter had no citizenship, thus could not fall under a conflict of laws rule referring to citizenship. Similar categorizations and unequal treatment between French citizens, indigenous colony residents, and European foreigners living in colonies were present in French colonial law concerning inter-local private law and naturalization law. The differentiation’s backdrop was the idea that natives were not entitled to French citizen rights. The (non-)granting of citizenship was

generally associated with the notion of preventing equal treatment with supposedly inferior cultures or denying the legal guarantees of the colonial state to natives. Comparable exclusionary thoughts existed in "white" British colonies (Canada, New Zealand, etc.) that introduced their own citizenship, consciously isolating themselves from other (non-white) British colonies (e.g., India). The connecting factor citizenship was therefore also intented to exclude.

Additionally, in common law, domicile serves as a connection point with similar intent: The establishment of a domicile was intentionally tied to the requirement of the intent to remain and not to want to return to the original domicile (*animus manendi et non revertendi*). This was to prevent individuals of English descent, residing in colonial territories for long periods, from solely accessing English law while also enabling others to access this law.

2. Current German PIL Rules

Wondering whether the outlined principles under traditional PIL persist until today, it's now generally accepted that there's fundamental neutrality towards all legal systems without formal differentiation based on Christian or "Western" values. Therefore, Savigny's approach of solely recognizing Christian or "Western" legal systems is outdated. Although, in court rhetoric, some expressions hint that certain legal systems are considered unequal or "alien" to German law, particularly in cases involving non-Christian religious law, like Islamic legal institutes. Moreover, in migration law cases where PIL relates to preliminary issues, a stricter standard seems to be applied to individuals from "Global South" countries compared to those from the "Global North". These are trends and nuances that luckily occasionally, not systematically, appear.

In modern German PIL, traces of colonialism persist methodologically in the insistence on referring to a state legal order while deciding when such an order exists. This presents challenges concerning the law of states not recognized under international law. While the prevailing opinion emphasizes that recognition by international law is not decisive, certain parts of legal practice and literature still assume this recognition as a prerequisite. Moreover, the status of non-state law, especially religious or tribal law, remains weak. Whether such laws qualify as "law" according to conflict of laws rules generally relies on territorially bounded jurisdictions and the corresponding state according to a European-Western understanding of state law. Non-state law becomes relevant within German PIL

only when referred to by the state legal order, e.g. by interlocal or interpersonal conflict laws. Similarly, the acknowledgment of foreign decisions and the recognition of foreign institutions as "courts" under German International Procedural Law depend on their incorporation within the (foreign) state's legal framework.

Additionally, the use of citizenship as a basis in PIL has shifted away from the exclusion of individuals from German rights. Nevertheless, the question of who can obtain citizenship remains politically contentious. Citizenship continues to serve as a core basis for many classical conflict of laws rules (such as capacity, names, celebration of a marriage) and is gradually being replaced by habitual residence.

3. Room for Improvement or Decolonialisation – the Treatment of Local Law

The reference to state law, which excludes other non-state law unless there is interlocal or interpersonal referral, unconsciously continues colonial thinking. It can be seen in the tradition of colonial rulers and post-colonialism, overriding indigenous law in favor of one's own legal order. However, abandoning the basic structure of conflict law that refers to a state legal system seems impractical. One could consider introducing a separate (German) conflict norm for tribal or religious law, thus bypassing the reference to the state legal order. However, if interlocal or interpersonal referral is abandoned within a state legal system, and local law is applied based on domestic principles, German PIL ignores the foreign state's decision to which legal order reference is made, applying local law only under specific circumstances or not at all. This approach would also be colonialist, as German conflict law would then presume to know better than the state how to apply its internal law.

An exception may apply if the state deciding against a referral to local law is domestically or internationally obligated to apply this law and fails to fulfill this obligation adequately.

Some national constitutions recognize and protect indiginous rights, e.g. Canada, as a North American country, South Africa and Kenya, as African countries, just to name a few. In Nigeria, the inheritance rights of the firstborn son of the Igiogbe tradition are qualified as internationally mandatory norms and are

therefore always applied (critically assessed here).

An international legal basis could be the ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries from 1989. The convention includes provisions to consider and respect the customary rights of indigenous peoples (Article 8). E.g. the Inter-American Court of Human Rights, in her evolutionary interpretation of the Inter-American Human Rights Convention, elevated tribal and customary law partly to human rights within the scope of the Inter-American Human Rights Convention (e.g. Yakye Axa vs. Paraguay, 17.6.2005; Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 31.8.2001; Sawhoyamaxa Indigenous Community v. Paraguay, 29.3.2006; Xucuru Indigenous People and its members v. Brasil, 5.2.2018; Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, 24.11.2020; Moiwana Community v. Suriname, 15.6.2005). See also this article by Ochoa.

Also, the African Commission on Human and Peoples' Rights, interpreting the African Charter on Human and Peoples' Rights, has protected indigenous law through the charter (Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya (Endorois), 4.2.2014 – 276 / 2003). However, it is disputed whether the commission's interpretation results are binding (see a discussion here).

Thus, although there may be a state obligation to respect local rights, there may have been a failure on the national side to refer to this right. For example, in judgments of the Inter-American Court of Human Rights, it can be observed that implementation into national law is only partially carried out. Also, regarding the interpretation results by the African Commission on Human and Peoples' Rights, it has been shown that states are not always willing to implement recommendations despite official commitment to it. In these cases, while the state has the obligation to apply non-state law, the referral needed by conflict law is missing. In this case, indigenous law should not be ignored by a German court.

As a result, the basic technique of PIL, referring to state law, should remain untouched. Nevertheless, courts might include foreign local law at least when the state in whose territory the affected community lives is internationally or constitutionally obligated to respect indigenous or religious law, or has obligated itself to do so. Methodologically, recourse can be made to giving "effect" or "consideration" to foreign law in substantive legal application, known particularly

in institutes such as foreign mandatory law (Art. 9 para 3 Rome I or Art. 17 Rome II) but also in substitution, transposition, or adaptation. German courts usually give foreign non-applicable law effect within the application of substantive law, such as the interpretation of norms, especially general clauses (good faithc, bonos mores etc.).

A court typically has discretion on whether to "consider" non applicable foreign law, as it is not a classic application of law. Therefore, the discretion to give effect to non-state foreign law should only be used exceptionally when the state law to which it belongs does not apply it, although there is a state obligation to apply it.

Guiding the discretion should be (in my opinion):

- whether the application of non-state law is in the party's interest (1),
- whether there is a foreign state obligation to give effect to this non-state law (2),
- the role of non-state law in the home state (3),
- and whether there is an international obligation on the German side to integrate or not integrate the law, perhaps because it may violate fundamental values of German law (4).

Particularly in the third point, it would be desirable for more anthropological-legal comparative work to be done so that integration into legal practice can work without leading to ruptures with the state from whose territory the law originally comes.

This has been a long post, the next three will be shorter. As writen in the introduction, these are some initial thoughts and I welcome (constructive) feedback from the whole international community!

Colonialism and German Private International Law – Introduction to a Post Series

In March 2023 I gave a talk at the conference of the German Society of International Law. The conference had the title "Colonial Continuities in International Law" and my presentation focused on "Continuation of colonialism in contemporary international law? – Foundations, structures, methods from the perspective of PIL". Thus, I was exploring those foundations, basic structures, and fundamental methods of mainly German Private International Law (PIL) and whether and how they have been influenced by colonialism.

Even though the perspective is mainly one of German PIL one, some of my thoughts might be of interest for a more global community. Therefore, in some upcoming posts I will share some of my findings that will also be published in the book to the conference (in German).

My general – not surprising – finding ist that the existing PIL, much like the broader German legal system, has been impacted by colonialism. T**he aim is to reveal these influences without automatically pass judgment on a norm or method influenced by colonialism as inherently negative**. The primary goal is to initiate an first engagement with and awareness of this topic and to stimulate a discussion and reflection.

1. State of the Discussion

"Colonialism" I will understand broadly, referring not only to colonialism in a strict sense, but also including postcolonialism and forms of neocolonialism. Until now, the discussion regarding colonialism, coloniality, or decolonialism within German PIL remains limited. Initial discussions tend to arise within specific areas of PIL, such as migration law, cultural heritage protection law, investment protection law, occasional considerations of supply chain responsibility/human rights protection, and climate change litigation. The broader discussion around fundamental questions and structures within German PIL remains relatively sparse. Initiatives such as the project by the Max Planck Institute for Comparative and International Private Law in Hamburg drive the discourse on "decolonial

comparative law" which is not the same but in practise overlapping with the PIL discourse.

2. Categories of Colonialism in the Upcoming Posts

The attempts to systematize the colonial imprints lead to different categories.

- The **first** relates to the (sometimes unconscious) implementation and later continuation of the colonial structure in PIL – now and then.
- Another **second** category deals with structures and values inherent in German or European law, implicitly resonating within the PIL and, thus, expanding those values to people and cases from other parts of the world.
- The **third** category reveals an imagined hierarchy between the laws of the Global North and Global South.
- Finally, **fourth,** conflict of laws rules may lead to or at least contribute to exploiting actual North-South power asymmetries.

3. Intention of the Series

In the next four posts, I would like to present some thoughts on colonial imprints I found in German PIL and sometimes EU PIL. I will not focus on other country's PIL rules, but I am happy to learn about other systems and similar or very different approaches.

As aforementioned, I only want to **start a discussion** and reveal some forms of colonialism in German PIL. I do not want to abolish all norms that are influenced by colonialism or judge them as inherently "bad". Colonialism might only be one of many influences that shape the rule. Furthermore, I believe we are still at the very very beginning of the debate. Therefore, I **welcome any (objective and substantive) discussion** about the topic. I especially welcome comments, experiences and ideas from other countries and **particularly from countries that are former colonies.**

French Cour de cassation rules (again) on duty of domestic courts to apply European rules of conflict on their own motion

Written by Hadrien Pauchard (assistant researcher at Sciences Po Law School)

In the *Airmeex* case (Civ. 1re 27 septembre 2023, n°22-15.146, available here), the French Cour de cassation (première chambre civile) had the opportunity to rule on the duty of domestic courts to apply European rules of conflict on their own motion. The decision is a great opportunity to discuss the French approach to the authority of conflict-of-laws rules.

The case concerns allegations of anticompetitive behaviour following a transfer of corporate control. The dispute broke out after two shareholders of the French corporation *Airmeex* transferred the sole control of the company to the Claimant. The latter, joined by *Airmeex*, alleged several anti-competitive behaviors on the part of his ex-business partners and seized French courts against the two former shareholders and their related corporations in Turkey. The claim was based on general tort law and on French rules regarding "unfair competition". The claim covered the Defendants' acts in Turkey as well as possible infractions in Algeria.

As it happened, none of the parties ever put the question of the applicable law in the debates and neither the trial nor the appeal judges did raise the potential conflict of laws. Indeed, both were content with the straightforward application of the *lex fori*, *i.e.* French law on "unfair competition". The lower court hence dismissed the claim by application of French law. The Claimants then petitioned to the Cour de cassation arguing a violation of the applicable rule of conflict, namely article 6 of the Rome II regulation.

By its decision of September 27, 2023, the French Cour de cassation (première chambre civile) ruled in favour of the petitioners. Upholding its previous *Mienta* decision (available here in English), it decided that Article 6 of the Rome II regulation was of mandatory application and was applicable to the alleged

anticompetitive behaviours. Under these circumstances, the Cour de cassation held that the lower court should have enforced the mandatory rule of conflict of Article 6 Rome II on its own motion. As a consequence it censored the appeal decision insofar as it had applied the *lex fori* without going through the relevant conflictual reasoning.

Following the *Mienta* precedent, the *Airmeex* decision illustrates the renewal of the issue of the authority of conflict-of-laws rules.

The authority of the rule of conflict in French law

The key question in *Airmeex* concerned the obligation of domestic judges to apply, if necessary on their own motion, European conflict-of-laws rules.

The *ex officio* powers of national judges belong to the sphere of Member States' procedural autonomy. However, uncertainty remains as to the scope of this autonomy in relation to European rules of conflict, particularly when the said rules leave no room to parties' autonomy.

Tackling this issue in *Airmeex*, the French Court of Cassation upheld *in extenso* its previous *Mienta* ruling and stated that "if the Court is not obliged, except in the case of specific rules, to change the legal basis of the claims, it is obliged, when the facts before it so justify, to apply the rules of public order resulting from European Union law, such as a rule of conflict of laws when it is forbidden to derogate from it, even if the parties have not invoked them".

The *Airmeex* ruling confirms the existence of French judge's double hat in relation to conflict-of-laws rules, depending on the source of it.

On the one hand, for European rules of conflict, judges' obligation is subject to the criterion of imperativeness laid out in *Mienta* and *Airmeex*. If the European rule is not mandatory, an *a contrario* reading of the decision leads to conclude that the French judge does not have an obligation to apply it on its own motion. In the present case, the Cour de cassation deduced the imperative character of the rule of conflict of Article 6 Rome II from the prohibition of derogatory agreements set out in the 4th paragraph of the text (according to which "[t]he law applicable under this Article may not be derogated from by an agreement pursuant to Article 14"). Then, noticing the existence of a conflict in that the disputed facts were

notably committed in Algeria and Turkey, the Cour de cassation sanctioned the cour d'appel for not having applied the relevant mandatory provisions of Article 6 of the Rome II regulation.

On the other hand, for French rules of conflict, the classical *Belaid–Mutuelle du Mans* system (established by case law) remains positive law, distinguishing between the rights which the parties can freely dispose of (*droits disponibles*, in which case judges are not obliged to apply French conflict-of-laws rules) and the rights which the parties cannot freely dispose of (*droits indisponibles*, in which case judges are obliged to apply French conflict-of-laws rules, on their own motion if necessary). In any case, courts retain the power to raise the conflict *ex officio* where the foreign element is flagrant, but their obligation to do so varies according to the nature of the rights disputed – a criterion often criticized for its imprecision.

In both *Mienta* and *Airmeex* cases, the derogatory regime of European rules of conflict is justified by a direct reference to the principles of primacy and effectiveness of EU law. Thus, for the Cour de cassation, the European conflict-of-laws rule does not enjoy a special status because it is a conflict-of-laws rule but rather because it is a (mandatory) European rule. Moreover, the criterion of the free disposability of rights was enforced on several occasions after *Mienta*, confirming that, in the eyes of the Cour de cassation, French judges have two quite distinct "offices".

While the *Airmeex* ruling does not innovate in relation to the authority of the European rules of conflict, compared to Mienta, the Cour de cassation has nevertheless slightly modified its motivation. By adding a reference to Article 3 of the French Code civil to those to Article 12 of French Code de procédure civile and the principles of primacy and effectiveness of EU law, the court connects its solution with the general theory of French private international law. It also allows convergence of regimes between the authority of the rule of conflict and the status of foreign law, contemporary case law in the latter domain developing on the ground of the same Article 3.

Despite being two distinct issues, strengthening the status of foreign law is the corollary of reinforcing the authority of conflict-of-laws rules. In France, foreign law is formally considered as a "rule of law" and the establishment of its content is still regulated by the *Aubin–Itraco* system (also established on case law). This

case law imposes a “duty of investigation” according to which the judge who recognizes the applicability of foreign law must “investigate its content, either on its own motion or at the request of the party who invokes it, with the assistance of the parties and personally if necessary, and give the disputed question a solution consistent with positive foreign law”. However, this apparent automaticity in applying foreign law shall not obscure the fundamental difficulties raised by the encounter with “otherness” in its legal form. Critical approaches to comparative law teach that there is an irreducible space separating *foreign-law-as-it-is-lived-in-its-country-of-origin* and *foreign-law-as-it-is-apprehended-by-the-national-judge*. This literature could fortunately inspire private international law in developing a procedural framework of hospitality for applying foreign law in its own terms.

Conclusion

The *Airmeex* and *Mienta* decisions will only partially content those who advocate for the general obligation of domestic judges to systematically enforce every single European rule of conflict. It will satisfy even less French’ majority scholarship, which considers that any rule of conflict should be obligatory for the judge. Nevertheless, it is in line with the traditional approach of the Cour de cassation that elaborates the authority of conflict-of-laws rules on the basis of substantive considerations.

The draft French Code de droit international privé runs counter to this current trend of the case law. Its Article 9 would impose the mandatory application of every rule of conflict, whatever their source or the nature of the rights in dispute. This question of the “office du juge” in the draft Code renders the pitfalls inherent in the codification process all the more apparent. Despite the generic principle enshrined in Article 9, the project multiplies special norms and exceptions in a quite scattered manner. We can express some reservations as to the interest of rigidifying a matter in which case law has, in spite of repeated resistance from the scholarship, chosen a pragmatic position grounded on substantial considerations, especially when such ossification is based on the hypertrophy of special regimes. Similar flaws appear to jeopardize the draft Code’s provisions on the proof of foreign law (namely Articles 13 and 14).

Although the attempt at codification is commendable and the actual result much honourable, the complex status of conflict-of-laws rules and foreign law seem intrinsically irreconcilable with the simplification and systematization approach

inherent in the exercise. It might be fortunate to recognize that, when it comes to foreign law, "*l'essentiel est là entre les mains du juge*".

Postmodernism in Singapore private international law: foreign judgments in the common law

Guest post by Professor Yeo Tiong Min, SC (honoris causa), Yong Pung How Chair Professor of Law, Yong Pung How School of Law, Singapore Management University

Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck) [2021] 1 SLR 1102, [2021] SGCA 14 ("*Merck*"), noted previously, is a landmark case in Singapore private international law, being a decision of a full bench of the Court of Appeal setting out for the first time in Singapore law the limits of transnational issue estoppel. It was also the beginning of the deconstruction of the common law on the legal effect to be given to foreign judgments. Without ruling on the issue, the court was not convinced by the obligation theory as the rationale for the recognition of foreign *in personam* judgments under the common law, preferring instead to rest the law on the rationales of transnational comity and reciprocal respect among courts of independent jurisdictions. There was no occasion to depart from the traditional rules of recognition of *in personam* judgments in that case, and the court did not do so. However, the shift in the rationale suggested that changes could be forthcoming. While this sort of underlying movements have generally led to more expansive recognition of foreign judgments (eg, in Canada's recognition of foreign judgments from courts with real and substantial connection to the underlying dispute), the indications in the case appeared to signal a restrictive direction, with the contemplation of a possible reciprocity requirement as a necessary condition for recognition of a foreign judgment, and a possible defence where the foreign court had made an error of Singapore domestic law.

The Republic of India v Deutsche Telekom AG [2023] SGCA(I) 10, another decision of a full bench of the Court of Appeal, provides strong hints of possible future reconstruction of the common law in this important area. While in some respects it signals a possibly slightly more restrictive common law approach towards the recognition of foreign judgments, in another respect, it portends a potentially radical expansion to the common law on foreign judgments.

Shorn of the details, the key issue in the case was a simple one. The appellant had lost the challenge in a Swiss court to the validity of an award against it made by an arbitral tribunal seated in Switzerland. The respondent then sought to enforce the award in Singapore. The question before the Singapore Court of Appeal was whether the appellant could raise substantially the same arguments that had been made before, and dismissed by, the Swiss court. The Court of Appeal formulated the key issue in two parts: (1) whether the appellant was precluded by transnational issue estoppel from raising the arguments; and (2) if not, then whether, apart from law of transnational issue estoppel, legal effect should be given to the judgment from the court of the seat of the arbitration. The second question, in the words of the majority, was:

> *"whether the decision of a seat court enjoys a special status within the framework for the judicial supervision and support of international arbitration, that is established by the body of law including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards …, legislation based on the UNCITRAL Model Law on International Commercial Arbitration …, and case law."*

On the first issue, the court considered that the principles of transnational issue estoppel were applicable in the case. The majority (Sundaresh Menon CJ, Judith Prakash JCA, Steven Chong JCA, and Robert French IJ) summarised the principles in *Merck* as follow:

> *"(a) the foreign judgment must be capable of being recognised in this jurisdiction, where issue estoppel is being invoked. Under the common law, this means that the foreign judgment must:*
>
> *(i) be a final and conclusive decision on the merits;*
>
> *(ii) originate from a court of competent jurisdiction that has transnational*

jurisdiction over the party sought to be bound; and

(iii) not be subject to any defences to recognition;

(b) there must be commonality of the parties to the prior proceedings and to the proceedings in which the estoppel is raised; and

(c) the subject matter of the estoppel must be the same as what has been decided in the prior judgment."

The court found on the facts that all the elements were satisfied in the case, and thus the appellant was precluded by the Swiss judgment from raising the challenges to the validity of the award in the enforcement proceedings in Singapore.

Mance IJ in a concurring judgment agreed that transnational issue estoppel applied to preclude the appellant from raising the challenges in this case. The application of issue estoppel principles to the international arbitration context is relatively uncontroversial from the perspective of private international law. There was one important distinction, however, between the majority and the concurring judgment on this point. The majority confined its ruling on transnational issue estoppel to a foreign judgment from the seat court, whereas Mance IJ considered transnational issue estoppel to be generally applicable to all foreign judgments in the international commercial arbitration context. Thus, in the view of the majority, the seat court may also enjoy special status for the purpose of transnational issue estoppel. It is not clear what this special status is in this context. At the highest level, it may be that transnational issue estoppel does NOT apply to foreign judgments that are not from the seat court, so that the only foreign judicial opinions that matter are those from the seat court. This will be a serious limitation to the existing common law. At another level, it may be that the rule that the prior foreign judgment prevails in the case of conflicting foreign judgments must give way when the later decision is from the seat court. This would modify the rule dealing with conflicting foreign judgments by giving a special status to judgments from the seat court.

Another notable observation of the majority judgment on the first issue lies in its formulation of the grounds of transnational jurisdiction, or international jurisdiction, ie, the connection between the party sought to be bound and the

foreign court that justifies the recognition of the foreign judgment under Singapore private international law. Traditionally, it has been assumed that the common law of Singapore recognises four bases of international jurisdiction: the presence, or residence of the party in the foreign territory at the commencement of the foreign proceedings; or where the party had voluntarily submitted, or had agreed, to the jurisdiction of the foreign court. The majority in this case recognised four possible grounds: (a) presence in the foreign territory; (b) filing of a claim or counterclaim; (c) voluntary submission; and (d) agreement to submit to the foreign jurisdiction. Filing of claims and counterclaims amount to voluntary submission anyway. The restatement of the grounds omit residence as a ground of international jurisdiction. This is reminiscent of a similar omission in the restatement by the UK Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236, [2012] UKSC 46, which has since been taken as authoritative for the proposition that residence is not a basis of international jurisdiction under English common law. Notwithstanding that the Court of Appeal did not consider the Singapore case law supporting residence as a common law ground, it may be a sign that common law grounds for recognising foreign judgments may be shrinking. This may not be a retrogression, as international instruments and legislation may provide more finely tuned tools to deal with the effect of foreign judgments.

The key point being resolved on the first issue, there was technically no need to rule on the second issue. Nevertheless, the court, having heard submissions on the second issue from counsel (as directed by the court), decided to state its views on the matter. The most controversial aspect of the judgment lies in the opinion of the majority that, beyond the law of recognition of foreign judgments and transnational issue estoppel, there should be a "Primacy Principle" under which judgments from the seat of the arbitration have a special status in the law, as a result of the common law of Singapore developing in a direction that advances Singapore's international obligations under the transnational arbitration framework. The majority summarised its provisional view of the proposed Primacy Principle in this way:

> *"By way of summary the Primacy Principle may be understood as follows, subject to further elaboration as the law develops:*
>
> *(a) An enforcement court will act upon a presumption that it should regard a prior decision of the seat court on matters pertaining to the validity of an*

arbitral award as determinative of those matters.

(b) The presumption may be displaced (subject to further development):

(i) by public policy considerations applicable in the jurisdiction of the enforcement court;

(ii) by demonstration:

(A) of procedural deficiencies in the decision making of the seat court; or

(B) that to uphold the seat court's decision would be repugnant to fundamental notions of what the enforcement court considers to be just;

(iii) where it appears to the enforcement court that the decision of the seat court was plainly wrong. The latter criterion is not satisfied by mere disagreement with a decision on which reasonable minds may differ. (As to where in the range between those two extremes, an enforcement court may land on, is something we leave open for development.) "

The Primacy Principle may be invoked if the case falls outside transnational estoppel principles. It may also be invoked even if the case falls within the transnational estoppel principles, if the party relying on it prefers to avoid the technical arguments relating to the application of transnational issue estoppel. However, the principle is only applicable if there is a prior judgment from the court of the seat; parties are not expected proactively to seek declarations from that court.

The Primacy Principle is said to build on the international comity in the specific context of international arbitration, by requiring an enforcement court to treat a prior judgment of a seat court as presumptively determinative of matters decided therein relating to the validity of the award, thus ensuring finality and avoiding inconsistency in judicial decisions, and promoting the effectiveness of international commercial arbitration. The majority also pointed out that the principle is aligned with the principle of party autonomy because the seat is generally expressly or impliedly selected by the parties themselves.

Mance IJ pointed out that the exceptions to the proposed Primacy Principle are very similar to the defences to issue estoppel, except that the exception based on

the foreign decision being plainly wrong appears to go beyond the law on issue estoppel. In the elaboration of the majority, this refers to perversity (in the sense of the foreign court disregarding a clearly applicable law, and not merely applying a different choice of law) or a sufficiently serious and material error. In *Merck*, the Court of Appeal had suggested that a material error of Singapore law may be a ground for refusing to apply issue estoppel, but in principle it is difficult to differentiate between errors of Singapore law and errors generally, insofar as the principle is based on the constitutional role of the Singapore court to administer justice and the rule of law. So, this limitation in the Singapore law of transnational issue estoppel may well be in a state of flux.

Mance IJ disagreed with the majority on the need for, or desirability of, the proposed Primacy Principle. In his view, the case law supporting the principle are at best ambiguous, and there was no need to give any special status to the court of the seat of the arbitration under the law. In Mance IJ's view, transnational issue estoppel, in the broader sense to include abuse of process (sometimes called *Henderson* estoppel (*Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313), under which generally a party should not be allowed to raise a point that in all the circumstances it should have raised in prior litigation), is an adequate tool to deal with foreign judgments, even in the context of international arbitration. The rules of transnational issue estoppel are already designed to deal with the problem of injustice caused by repeated arguments and allegations in the context of international litigation. There is force in this view. Barring defences, the transnational jurisdiction requirement for the recognition of judgments from the seat court under the common law does not usually raise practical issues because generally the seat would have been expressly or impliedly chosen by the parties and they are generally taken to have impliedly submitted to the jurisdiction of the court of the seat for matters relating to the supervision of the arbitration. Mance IJ also expressed concern about the uncertainty of a presumptive rule subject to defences where the contents of both the rule and defences are still unclear.

The contrasting views in the majority and the concurring judgments on the proposed Primacy Principle are likely to generate much debate and controversy. The Primacy Principle is said to be aligned with the territorialist view of international arbitration found in many common law countries and derived from the primary role that the court in the seat of the arbitration plays in the transnational arbitration framework. Thus, this view is highly unlikely to find

sympathy with proponents of the delocalised theory. It will probably be controversial even in common law countries, where reactions similar to that of Mance IJ may not be unexpected.

Under the obligation theory, *in personam* judgments from a foreign court are recognised because the party sought to be bound has conducted himself in a certain manner in relation to the foreign proceedings leading to the judgment. On this basis, it is difficult to justify the special status of a judgment from the seat court within the principles of recognition or outside it. However, it would appear that, after *Merck*, while the obligation theory may not have been rejected *in toto*, it has not been accepted as the exclusive explanation for the recognition of *in personam* judgments under the common law. On the basis of transnational comity and reciprocal judicial respect, there is much that exists in the current common law that may be questioned, and much more unexplored terrain as far as the legal effect of foreign judgments not falling within the traditional common law rules of recognition is concerned. For example, the UK Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236, [2012] UKSC 46 had rejected that there were any special rules that apply to *in personam* judgments arising out of the insolvency context. This line of thinking has already been rejected in Singapore in the light of its adoption of the UNCITRAL Model Law on Cross-Border Insolvency (*Re Tantleff, Alan* [2022] SGHC 147; [2023] 3 SLR 250), but it remains to be seen what new rules or principles of recognition will be developed.

The idea that the judgment of the court of the seat (expressly or impliedly) chosen by the parties should have some special status in the law on foreign judgments has some intuitive allure. There is a superficial analogy with the position of the chosen court under the Hague Convention on Choice of Court Agreements. As a general rule (though not exclusively), the existence and validity of an exclusive choice of court agreement would be determined by the law applied by the chosen court, and a decision of the chosen court on the validity of the choice of court agreement cannot be questioned by the courts of other Contracting States. The Convention has no application to the arbitration context. However, at least under the common law, the seat of arbitration is invariably expressly or impliedly chosen by the parties, and it will usually carry the implication that the parties have submitted to the jurisdiction of the supervisory court for matters relating to the regulation of the arbitration process. It is also not far-fetched to infer that reasonable contracting parties would intend that court to have exclusive

jurisdiction over such matters (*C v D* [2007] EWCA Civ 1282; [2008] 1 Lloyd's Rep 239), *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56). But this agreement cannot extend to issues being litigated at the enforcement stage, because naturally, contracting parties would want the freedom to enforce putative awards wherever assets may be found, and the enforcement stage issues frequently involve issues relating to the validity of the arbitration agreement and the award. This duality is the system contemplated under the New York Convention. Whatever other justification there may be for the special status of judgments of the court of the seat, it is hard to find it within the principle of party autonomy.