The Dubai Supreme Court on the Enforcement of Canadian (Ontario) Enforcement Judgment

Can an enforcement judgment issued by a foreign court be recognized and enforced in another jurisdiction? This is a fundamental question concerning the recognition and enforcement of foreign judgments. The answer appears to be relatively straightforward: "No". Foreign enforcement judgments are not eligible to be recognized and enforced as they are not decisions on the merits (see in relation with the HCCH 2019 Convention, F Garcimartín and G Saumier, *Explanatory Report* (HCCH 2020) para. 95, p. 73; W Hau "Judgments, Recognition, Enforcement" *in* M Weller *et al.* (eds.), *The HCCH 2019 Judgments Convention: Cornerstones, Prospects, Outlooks* (Hart 2023) 25). This is usually referred to as the "prohibition of double exequatur" or, following the French adage: "*exequatur sur exequatur ne vaut*". This question was recently presented to the Dubai Supreme Court (DSC), and its decision in the *Appeal No. 1556 of 16 January 2024* offers some useful insights into the status foreign enforcement (*exequatur*) decisions in the UAE.

I – Facts

In 2012, X (appellee) obtained a judgment of rehabilitation from the United States District Court for the Eastern District of New York ordering Y (appellant, residing and working in Dubai) to pay a certain amount of money. X later sought to enforce the American judgment in Canada (Ontario) via summary judgment procedures. In 2020, the Ontario court ordered enforcement of the American judgment, in addition to the payment of other fees and interests. The judgment was later amended by a judgment entered in 2021. X then sought enforcement of the Canadian judgment in Dubai by filing an application with the Execution Court of the Dubai Court of First Instance. The Enforcement Court issued an order declaring the Canadian judgment enforceable in Dubai. The enforcement order was later upheld on appeal. Y appealed to the DSC.

Before the DSC, Y argued that (1) the American judgment was criminal in nature, not civil; (2) the Canadian judgment was merely a summary order declaring the

American judgment enforceable in Ontario; and (3) the Ontario judgment did not resolve any dispute between the parties, as it was a declaration that the American judgment was enforceable in Ontario.

II – Ruling

The DSC found merit in Y's arguments. In particular, the DSC held that the Court of Appeal erred in allowing the enforcement of the Canadian judgment in Dubai despite Y's arguments that the Canadian judgment was a summary judgment enforcing an American judgment. The Supreme Court reversed and remanded the appealed decision.

III – Comments

The case commented here is particularly interesting because, to the best of the author's knowledge, it is the first case in which a UAE Supreme Court (it should be remembered that, there are four independent Supreme Courts in the UAE. For an overview, see here) has been called to rule on the issue of double exequatur. In this regard, it is remarkable that the issue of double exequatur is rarely discussed in the literature, both in the UAE and in the other Arab Middle Eastern jurisdictions. Nevertheless, it is widely accepted that a judgment a foreign court declaring enforceable a foreign judgment cannot be eligible to recognition and enforcement in other jurisdictions. (For some recent applications of this principle by some European courts, see *eg.* the Luxembourg Court of Appeal decision of 13 January 2021; the Court of Milan in a case rendered in February 2023. *Comp.* with the CJEU judgment of 7 April 2022, C?568/20, *J v. H Limited*. For a brief discussion on this issue in this blog, see here). This is because a judgment declaring enforceable a foreign judgment "is, by its own terms, self-limited to the issuing state's territory, or: as a sovereign act it could not even purport to create effects in another sovereign's territory" (Peter Hay, "Recognition of a Recognition Judgment within the European Union: "Double *Exequatur*" and the Public Policy Barrier" *in* Peter Hay et al. (eds.), *Resolving International Conflicts – Liber Amicorum Tibor Várady* (CEU Press, 2009) 144).

The present case highlights a possible lack of familiarity with this principle within

the Dubai courts. Specifically, the lower courts overlooked the nature of the Canadian judgment and declare it enforceable in Dubai. In its appeal, the judgment debtor did not *explicitly* avail itself with the prohibition of double exequatur although it argued that that the Canadian judgment was "not a judgment on the merits". The judgment debtor merely stated the Ontario court's judgment was a summary judgment declaring a foreign judgment of criminal rather than civil nature enforceable in Canada and not abroad .

While the Supreme Court acknowledged the merits of the judgment debtor's arguments, its language might suggest some hesitation or unfamiliarity with the legal issue involved. Indeed, although the Court did not dispute the judgment debtor's assertions that the "Canadian judgment was a summary judgment declaring enforceable a rehabilitation order and an obligation to pay a sum of money rendered in the United States of America," it reversed the appealed decision and remanded the case, stating that the judgment debtor's arguments were likely – "if they appeared to be true" – to lead to different results.

In the author's view, such a remand may have been unnecessary. The court could have simply declared the Ontario enforcement order unenforceable in Dubai on the basis of the "*exequatur sur exequatur ne vaut*" principle.

One might question the rationale behind the judgment creditor's choice to seek the enforcement of the Canadian judgment rather than the original American judgment in this case. One might speculate that the judgment creditor sought to avoid enforcement of an order to pay a specific sum arising out of a criminal proceeding. However, it is recognized in the UAE that civil damages awarded in criminal proceedings are likely to be considered enforceable (see, eg., the *Federal Supreme Court's decision, Appeal No. 247 of November 6, 2012*, regarding the enforcement of civil damages awarded by an Uzbek criminal court).

Another possible consideration is that the judgment creditor sought to increase the likelihood that its application would be granted, as Dubai courts have shown reluctance to enforce American judgments in the past (see eg., *Dubai Court of Appeal, Appeal No. 717 of December 11, 2013*, concerning a Nevada Court judgment; *DSC, Appeal No. 517 of August 28, 2016*, concerning a California court judgment). In both cases, enforcement of the American judgments was refused due to the lack of reciprocity with the United States (however, in the first case, on a later stage of the proceeding, the DSC treated the Nevada judgment as

sufficient proof of the existence of the judgment creditor's debt in a new action on the foreign judgment (*DSC, Appeal No. 125/2017 of 27 April 2017*). The first case is briefly introduced here).

The positive outcomes at both the first and second instance levels may lend credence to this hypothesis. In general, however, there is no inherent reason why a Canadian judgment would be treated differently in the absence of a relevant treaty between the UAE and Canada (on the challenges of enforcing foreign judgments in the UAE, particularly in Dubai, in the absence of a treaty, please see our previous posts here and here).

Austrian Supreme Court Rules on the Validity of a Jurisdiction Clause Based on a General Reference to Terms of Purchase on a Website

By Biset Sena Günes, Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law, Hamburg

Recently, on 25 October 2023, the Austrian Supreme Court ('OGH') [2 Ob 179/23x, BeckRS 2023, 33709] ruled on whether a jurisdiction clause included in the terms of purchase ('ToP') was valid when a written contract made reference to the website containing the ToP but did not provide the corresponding internet link. The Court held that such a clause does not meet the formal requirements laid down under Article 25 of the Brussels I (recast) Regulation and, hence, is invalid. The judgment is undoubtedly of practical relevance for the conclusion of international commercial contracts that make reference to digitally available general terms and conditions ('GTCs'), and it is an important follow-up to the decisions by the Court of Justice of the European Union ('CJEU') in the cases of *El*

Majdoub (C-322/14, available here) and *Tilman* (C-358/21, available here).

Factual Background and Procedure

A German company and an Austrian company concluded a service agreement in which the German company ('the service provider') undertook to provide the engineering plans for a product to the Austrian party ('the client'). The Austrian party sent its order to the service provider on a written form which stated (in translation): 'we order in accordance with the terms of purchase known to you (available on our website) and expect your confirmation by email immediately'. The order specified the client's place of business as the place of delivery. The German party subsequently signed and returned the same document, ticking its relevant parts and naming it as the 'order confirmation'. This confirmation was also in written form. The ToP – which were not attached to the contract, but which were available on the client's website – contained a jurisdiction clause conferring jurisdiction on the Austrian courts for the resolution of disputes arising from the parties' contract. The clause also allowed the Austrian party to sue in another competent court and was thus asymmetric. The ToP additionally included a clause defining the place of performance for the delivery of goods or for the provision of services as the place specified by the client in the contract.

Upon a disagreement between the parties due to the allegedly defective performance of the service provider, the Austrian party brought proceedings against its contracting partner before the competent district court of Vienna, Austria, in reliance on the jurisdiction clause. The defendant successfully challenged the jurisdiction of the court by claiming that the clause did not meet the formal requirements of Article 25 of the Brussels I (recast) Regulation. Upon appeal, this issue was not addressed, but the judgment was nevertheless overturned as, in the court of appeals' view, the first instance court was competent based on the parties' agreement as to the place of performance. According to the court, the parties' numerous references to the place of business of the client should be understood as an agreement on the place of performance within the meaning of Article 7 of the Brussels I (recast) Regulation, even though the defendant argued that the engineering plans were actually drafted at their place of business and not that of the client. The defendant appealed against the judgment before the Austrian Supreme Court.

The Issue at Stake and the Judgment of the Court

As could be easily identified from the facts and the parties' dispute, the main question in this case is whether the formal requirements of the Brussels I (recast) Regulation, and in particular its demand of 'written form', could be satisfied by a simple reference to a website where the party's ToP – including the jurisdiction clause – could (allegedly) be retrieved, hence allowing the court to conclude that parties indeed reached an agreement as to jurisdiction.

The Court answered the first question in the negative and found the jurisdiction clause invalid. This is because the 'written form' requirement under Article 25(1)(a) of the Brussels I (recast) Regulation is met only if the contract expressly refers to the GTCs containing a jurisdiction clause and if it can be proved that the other party actually received them. According to the Court's reasoning, the mere reference to the website did not make the jurisdiction clause (or the ToP, in general) accessible to the other contracting party in a reproducible manner; this is unlike the case of a written contract providing a specific link (as in *Tilman*) or the case of 'click-wrapping' (as in *El Majdoub*), as those are contractual constellations sufficiently establishing that the parties had access to the terms of the agreement (paras 19–20 of the judgment).

General Assessment in Light of the Case Law of the CJEU

Choice-of-court agreements are undoubtedly an important part of today's highly digitalised business environment, and it is to be expected that they will be found in digitally available GTCs. Yet in practice their validity is often challenged by one of the parties. The Court of Justice has indeed had to deal with such issues in the past, and the present case gives us cause to briefly revisit those rulings.

In *El Majdoub* (commented before on blogs, here and here), the CJEU had to decide on the question of whether a 'click-wrap' choice-of-court clause included in the GTCs provided a durable record which was to be considered as equivalent to a 'writing' under the then current Article 23(2) of the Brussels Regulation. In the *El Majdoub* case, a sales contract was concluded electronically between the parties by means of 'click-wrapping', i.e. in order to conclude the agreement, the buyer had to click on a box indicating acceptance of the seller's GTCs. The GTCs – which containing the agreement as to jurisdiction – were available in that box via a separate hyperlink that stated 'click here to open the conditions of delivery and

payment in a new window'. Although this window did not open automatically upon registration to the website and upon every individual sale, the CJEU found that such a clause provided a durable record as required by Article 23(2) of the Brussels I Regulation since it gave the buyer the possibility of printing and saving the GTCs before conclusion of the contract. This holding should be welcomed as the CJEU gave its blessing to the already existing and much-used practice of 'click-wrapping' in the digital business environment, and the Court thus showed its support for the use of technology in contractual practices (in line with aims previously stated in the Commission Proposal (COM(1999) 348 Final)). The Court's conclusion is, of course, limited in the sense that it only confirms that the 'click-wrapping' method provides a durable record of the agreement; there is no analysis as to the requirement of a 'consensus' on jurisdiction between the parties in the case of digital contracts. Since the buyer had to accept the terms before the purchase, the Court took this as a consent and did not address the issue (see, similarly, van Calster and Dickinson and Ungerer, LMCLQ 2016, 15, 18–19). It should, in this regard, be observed that establishing the existence of such an agreement is the purpose of the form requirements, a fact confirmed by the case law of the Court, see, e.g. *Salotti*, para 7 (C-24/76, available here). Still, one should admit that questions as to the existence of consent would probably not be much of an issue in the 'click-wrapping' context, especially in B2B cases, as the 'click' concludes the agreement – unless, of course, there are other circumstances (e.g. mistake) that affect the quality of consent (see, similarly, van Calster on *Tilman*).

In the later case of *Tilman* (previously commented on PIL blogs on a couple of occasions, see the comments by Pacula, by Ho-Dac, and by Van Calster, here and here), the situation was more complex. There was a written agreement between the parties in which the GTCs – which for their part contained an agreement as to jurisdiction in favour of English courts – were referred to by provision of the link to the website where they could be accessed. In other words, there was no 'click-wrap' type of agreement; rather, it was a written agreement specifying the link (i.e. the internet address) of the website on which the GTCs could be retrieved. The CJEU then had to deal with the question of whether this manner of incorporating a jurisdiction clause satisfies the conditions of Article 23(1) and (2) of the Lugano II Convention, which are identical to Article 23(1) and (2) of the Brussels I Regulation. The Court answered this question in the affirmative and expanded the possibility of making reference to GTCs by inclusion of the link in

written contracts because, in the Court's view, making those terms accessible to the other party via a link before the conclusion of the contract is sufficient to satisfy formal requirements, especially when the transaction involves commercial parties who can be expected to act diligently. There is no further requirement of actual receipt of those terms. This, again, is a modern and pragmatic approach that simplifies commercial contractual practice, and it is a ruling that should be welcomed. However, it is unfortunate that the Court did not address the technical details in the facts of the case; namely, the link did not open the GTCs directly and instead opened a page on which the GTCs could be searched for and downloaded (see, Summary of the Request for Preliminary Ruling, para 14, available here). This is a point which may give rise to questions as to the proper incorporation of GTCs into a contract (in this regard, see also Finkelmeier, NJW 2023, 33, 37; Capaul, GPR 2023, 222, 225) or as to the existence of consent (on further thoughts as regards the question of consent in both of the CJEU cases, see van Calster). The facts of the case also leave room for a different interpretation in other circumstances, such as when the link refers to a homepage, the link is broken, or the website has been updated (see, in this regard, Finkelmeier, 37; Capaul, 225, and also Krümmel, IWRZ, 131, 134).

In the present case before the Austrian Supreme Court, we encounter yet a different scenario in which there is definitely room for different interpretations. Again, there is a written contract which makes reference to GTCs and which states that they are available on the client's website. But here, the client did not supply the service provider with the hyperlink address creating accessibility to the GTCs. And the Court rightly held that the CJEU's conclusion in *Tilman* should not be understood as saying that a general reference to GTCs in the contract will always be sufficient to prove they have been made available. In the Austrian Court's understanding, the mere reference to the existence of the GTCs was not sufficient so as to constitute their proper inclusion into the contract and to prove consensus between the parties in a clear and precise manner (paras 19–20 of the judgment). One could, of course, always argue in favour of a further relaxation of the form requirements, especially when the transaction involves commercial parties who should act diligently when entering into contracts. But it is obvious that in a case in which the written contract does not even provide the necessary link, it will be a burden for the counterparty to search the website and retrieve the actual version of the referenced GTCs before entering into the contract, whereas the other party would unduly benefit from being able to fulfil her/his

obligation by making a mere reference to the existence of the GTCs. Hence, it is good that the Austrian court did not further extend *Tilman*'s already broad interpretation.

Conclusion

Despite being an important part of cross-border commercial practice, choice-of-court agreements often become the source of an additional dispute between the parties in terms of their existence and validity. In the vast majority of cases, these disputes are complex. This is probably even more the case with the increasing use of technology in contracting. All these cases are indeed good examples of such disputes. But they can only be seen as new and different additions to the jigsaw puzzle rather than the final pieces. More cases with even more complex scenarios will likely follow, as contracting practices continue to develop along with technological advancements.

Postscript: The Place of Performance

Having found the jurisdiction clause invalid, the Court would have had to determine the place of performance of the contract as another basis for special jurisdiction under the Regulation. A decision on this latter issue was deferred, however, since the Court had already referred a similar question on the determination of the place of performance to the CJEU in a different proceeding (OGH, decision of 13 July 2023, 1 Ob 73/23a) concerning a service contract.

Who can bite the Apple? The CJEU can shape the future of online damages and collective actions

Written by Eduardo Silva de Freitas (Erasmus University Rotterdam), member of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO), www.euciviljustice.eu.

Introduction

In the final weeks leading up to Christmas in 2023, the District Court of Amsterdam referred a set of questions to the CJEU (DC Amsterdam, 20 December 2023, ECLI:NL:RBAMS:2023:8330; in Dutch). These questions, if comprehensively addressed, have the potential to bring clarity to longstanding debates regarding jurisdictional conflicts in collective actions. Despite being rooted in competition law with its unique intricacies, the issues surrounding the determination of online damage locations hold the promise of illuminating pertinent questions. Moreover, the forthcoming judgment is expected to provide insights into the centralization of jurisdiction in collective actions within a specific Member State, an aspect currently unclear. Recalling our previous discussion on the Dutch class action under the WAMCA in this blog, it is crucial to emphasize that, under the WAMCA, only one representative action can be allowed to proceed for the same event. In instances where multiple representative foundations seek to bring proceedings for the same event without reaching a settlement up to a certain point during the proceedings, the court will appoint an exclusive representative. This procedural detail adds an additional layer of complexity to the dynamics of collective actions under the WAMCA.

Following a brief overview of the case against Apple, we will delve into the rationale behind the court's decision to refer the questions.

The claim against Apple

The claim revolves around Apple's alleged anticompetitive behavior in the market for the distribution of apps and in-app products on iOS devices, such as iPhones, iPads, and iPod Touch. The foundations argue that Apple holds a monopoly in this market, as users are dependent on the App Store for downloading and using apps.

According to the foundations, Apple's anticompetitive actions include controlling which apps are included in the App Store and imposing conditions for their inclusion. Furthermore, Apple is accused of having a monopoly on payment processing services for apps and digital in-app products, with the App Store payment system being the sole method for transactions.

The foundations argue that Apple charges an excessive commission of 30% for paid apps and digital in-app products, creating an unfair advantage and disrupting competition. They assert that Apple's dominant position in the market and its behavior constitute an abuse of power. Users are said to be harmed by being forced to use the App Store and pay high commissions, leading to the claim that Apple has acted unlawfully. The legal bases of the claim are therefore abuse of economic dominance in the market (Article 102 TFEU) and prohibited vertical price fixing (Article 101 TFEU).

The jurisdictional conundrum

Apple Ireland functions as the subsidiary tasked with representing app suppliers within the EU. The international nature of the dispute stems from the users purportedly affected being located in the Netherlands, while the case is lodged against the subsidiary established in Ireland. The District Court of Amsterdam has opted to scrutinize the jurisdiction of Dutch courts under Article 7(2) Brussels I-bis Regulation. This provision grants jurisdiction to the courts of the place where the harmful event occurred or may occur, encompassing both prongs of the *Bier* paradigm. However, Apple contends that, within the Netherlands, the court would only possess jurisdiction under Article 7(2) Brussels I-bis Regulation with regard to users residing specifically in Amsterdam.

In the court's view, the ascertainment of the *Handlungsort* should pertain only to allegations under Article 102 TFEU. In relation to Article 101 TFEU, the Netherlands was not considered the *Handlungsort*. This is due to the necessity of identifying a specific incident causing harm to ascertain the *Handlungsort*, and the absence of concrete facts renders it challenging to pinpoint such an event.

The court's jurisdictional analysis commences with a reference to Case C?27/17 *flyLAL-Lithuanian Airlines* (ECLI:EU:C:2018:533), in which the CJEU established that the location of the harmful event in cases involving the abuse of a dominant position under Article 102 TFEU is closely linked to the actual implementation of such abuse. In the present case, the court observes that Apple's actions, conducted through the Dutch storefront of the App Store tailored for the Dutch market, involve facilitating app and in-app product purchases. Acting as the exclusive distributor for third-party apps, Apple Ireland exerts control over the offered content.

Applying the criteria from *flyLAL*, the court concludes that the *Handlungsort* is situated in the Netherlands. However, the court agreed that the specific court within the Netherlands responsible for adjudicating the matter remains unspecified.

The court initiated its analysis of the *Erfolgsort* based on the established premise in CJEU case law which posits that there is no distinction between individual and collective actions when determining the location of the damage. The court clarified that the concept of the place where the damage occurs does not encompass any location where the consequences of the event may be felt; rather, only the damage directly resulting from the committed harm should be considered. Moreover, the court emphasized that when determining the *Erfolgsort*, there is no distinction based on whether the legal basis for the accusation of anticompetitive practices is grounded in Article 101 or Article 102 TFEU.

The court reiterated that the App Store with Dutch storefront is a targeted online sales platform for the Dutch market. Functioning as an exclusive distributor, Apple Ireland handles third-party apps and in-app products, contributing to an alleged influence of anticompetitive behavior in the Dutch market. It's acknowledged that the majority of users making purchases reside in the Netherlands, paying through Dutch bank accounts, thus placing the *Erfolgsort* within the Netherlands for this user group. Nevertheless, the court reiterated that the particular court within the Netherlands tasked with adjudicating this case remains unspecified.

The questions referred

Despite the court having its perspective on establishing jurisdiction under Article 7(2) Brussels I-bis Regulation, it opted to seek clarification from the CJEU for the following reasons.

First, the court expresses reservations regarding the complete applicability of the *flyLAL* precedent to the current case. It emphasizes that the *flyLAL* case involved a precise location where the damage could be pinpointed. In contrast, the present case involves anticompetitive practices unfolding through an online platform accessible simultaneously in every location within a particular Member State and globally. The court is uncertain whether the nature of this online distribution

makes a significant difference in this context, especially when considering whether the case involves a collective action.

Second, as mentioned above, the WAMCA stipulates that only a single representative action can be allowed to proceed for a given event. In situations where multiple representative foundations aim to commence legal proceedings for the same event without reaching a settlement by a specific stage in the proceedings, the court will designate an exclusive representative. In addition to that, Article 220 Dutch Code of Civil Procedure offers the opportunity to consolidate cases awaiting resolution before judges in various districts and involving identical subject matter and parties, allowing for a unified hearing of these cases.

Nevertheless, the court has reservations about the compatibility of relocating from the *Erfolgsort* within a Member State under the consolidation of proceedings, as Article 7(2) Brussels I-bis Regulation impacts the establishment of jurisdiction within that Member State. In questioning whether such relocation would run contrary to EU law, the court highlights the Brussels I-bis Regulation's overarching objective of preventing parallel proceedings. This triggers a skepticism towards the interpretation that each District Court within the Netherlands would have competence to adjudicate a collective action pertaining to users situated in the specific *Erfolgsort* within their jurisdiction.

However, the court finds it necessary to refer these questions to the CJEU, considering that, in its assessment, the CJEU's rationale in Case C?30/20 *Volvo* (ECLI:EU:C:2021:604) is not easily transposable to the current case. In *Volvo*, the CJEU permitted the concentration of proceedings in antitrust matters within a specialized court. This is not applicable here, as the consolidation of proceedings under the described framework arises from the efficiency in conducting the proceedings, not from specialization.

These are, in a nutshell, the reasons why the District Court of Amsterdam decided to refer the following questions to the CJEU:

Question 1

1. *What should be considered as the place of the damaging action in a case like this, where the alleged abuse of a dominant position within the meaning of Article 102 TFEU has been implemented in a Member State*

through sales via an online platform managed by Apple that is aimed at the entire Member State, with Apple Ireland acting as the exclusive distributor and as the developer's commission agent and deducting commission on the purchase price, within the meaning of Article 7, point 2, Brussels I bis? Is it important that the online platform is in principle accessible worldwide?

2. *Does it matter that in this case it concerns claims that have been instituted on the basis of Article 3:305a of the Dutch Civil Code by a legal entity whose purpose is to represent the collective interests of multiple users who have their seat in different jurisdictions (in the Netherlands: districts) within a Member State under its own right?*
3. *If on the basis of question 1a (and/or 1b) not only one but several internally competent judges in the relevant Member State are designated, does Article 7, point 2, Brussels I bis then oppose the application of national (procedural) law that allows referral to one court within that Member State?*

Question 2

1. *Can in a case like this, where the alleged damage has occurred as a result of purchases of apps and digital in-app products via an online platform managed by Apple (the App Store) where Apple Ireland acts as the exclusive distributor and commission agent of the developers and deducts commission on the purchase price (and where both alleged abuse of a dominant position within the meaning of Article 102 TFEU has taken place and an alleged infringement of the cartel prohibition within the meaning of Article 101 TFEU), and where the place where these purchases have taken place cannot be determined, only the seat of the user serve as a reference point for the place where the damage has occurred within the meaning of Article 7, point 2, Brussels I bis? Or are there other points of connection in this situation to designate a competent judge?*
2. *Does it matter that in this case it concerns claims that have been instituted on the basis of Article 3:305a of the Dutch Civil Code by a legal entity whose purpose is to represent the collective interests of multiple users who have their seat in different jurisdictions (in the Netherlands: districts) within a Member State under its own right?*

3. *If on the basis of question 2a (and/or 2b) an internally competent judge in the relevant Member State is designated who is only competent for the claims on behalf of a part of the users in that Member State, while for the claims on behalf of another part of the users other judges in the same Member State are competent, does Article 7, point 2, Brussels I bis then oppose the application of national (procedural) law that allows referral to one court within that Member State?*

[Translation from Dutch by the author, with support of ChatGPT]

Discussion

The CJEU possesses case law that could be construed in a manner conducive to allowing the case to proceed in the Netherlands. Notably, Case C?251/20 *Gtflix Tv* (ECLI:EU:C:2021:1036) appears to be most closely aligned with this possibility, wherein the *eDate* rule was applied to a case involving French competition law, albeit the CJEU did not explicitly address this aspect (though AG Hogan did). Viewed from this angle, the Netherlands could be deemed the centre of interests for the affected users, making it a potential *Erfolgsort*.

Regarding the distinction between individual and collective proceedings, the CJEU, in Cases C-352/13 *CDC* (ECLI:EU:C:2015:335) and C-709/19 *VEB* v. *BP* (ECLI:EU:C:2021:377), declined to differentiate for the purpose of determining the locus of damage. We find no compelling reason for the CJEU to deviate from this precedent in the current case.

The truly intricate question centers on the feasibility of consolidating proceedings in a single court. In Case C-381/14 *Sales Sinués* (ECLI:EU:C:2016:252), the CJEU established that national law must not hinder consumers from pursuing individual claims under the Unfair Contract Terms Directive (UCTD – 93/13) by employing rules on the suspension of proceedings during the pendency of parallel collective actions. However, it is unclear whether this rationale can be extrapolated to parallel concurrent collective actions.

Conclusion

This referral arrives at a good time, coinciding with the recent coming into force of the Representative Actions Directive (RAD – 2020/1828) last summer. Seeking clarification on the feasibility of initiating collective actions within the

jurisdictions of affected users for damages incurred in the online sphere holds significant added value. Notably, the inclusion of both the Digital Services Act and the Digital Markets Act within the purview of the RAD amplifies the pertinence of these questions.

Moreover, this case may offer insights into potential avenues for collective actions grounded in the GDPR. Such actions, permitted to proceed under Article 7(2) Brussels I-bis Regulation, as exemplified in our earlier analysis of the TikTok case in Amsterdam, share a parallel rationale. The convergence of these legal frameworks could yield valuable precedents and solutions in navigating the complex landscape of online damages and collective redress.

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

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 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!