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The Impact of the European Convention on Human Rights on Private International Law

Louwrens R. Kiestra

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Preface

In this book interaction between the rights guaranteed in the European Convention on Human Rights (ECHR) and private international law has been analysed by examining the case law of the European Court of Human Rights (the Court) in Strasbourg and selected national courts. In doing so the book has focused on the impact of the ECHR on all three of the main questions of private international law: jurisdiction, the applicable law and the recognition and enforcement of foreign judgments. First, a concise introduction to both private international law and the ECHR has been provided. Next, an important preliminary question has been answered: what is the meaning of Article 1 ECHR for private international law? Thereafter, the impact of the ECHR on the three main issues of private international law has been examined in depth. It has been demonstrated in this book that the impact of the ECHR on private international law is indeed considerable, and that its impact in some areas of private international law is still somewhat underestimated.

This book is based on the research which I mostly carried out at Amsterdam University's Amsterdam Center for International Law (ACIL) during the period 2008–2013. A small part of the research was carried out at the Swiss Institute for Comparative Law. I would like to thank the staff of the Institute for their hospitality.

This research was made possible by the Netherlands Organization for Scientific Research (NWO). It was part of the VICI project on 'The emerging international constitutional order—the implications of hierarchy in international law for coherence and legitimacy of international decision making.' I am grateful to Erika de Wet for giving me the opportunity to be a part of this research project, which allowed me to combine two of my favourite subjects of law.

An older—and abbreviated—version of chapter 4 of this book is based on a presentation delivered at the Colloquium 'The Impact of the European Convention on Human Rights on Private International Law', organized by the University of Amsterdam on 12 November 2010. This presentation was first published in the journal *Nederlands Internationaal Privaatrecht (NIPR)*. My thanks are extended to all the participants at the conference, who provided me with useful commentary.

Many other people have contributed—either directly or indirectly—to this book. I would like to thank, first of all, Jannet Pontier, and Marieke Oderkerk, who helped to guide my research together with Erika de Wet. I would also like to thank Prof. Gerards, Prof. Van Hoek, Prof. Kinsch, Dr. Mak, and Prof. Nollkaemper for their comments on an earlier version of the manuscript.

This book has certainly also benefited from my many discussions on international law—and other miscellaneous subjects—with my former colleagues at the University of Amsterdam, and particularly my colleagues at the Amsterdam Center for International Law. My thanks go out to all of them. I would like to single out my long-time room-mates Lisa Clarke and Stephan Hollenberg, as well as the next-door neighbours Christina Eckes and Jure Vidmar. In no small part thanks to you, it was always a pleasure to work in Amsterdam. Special thanks are also extended to José Visser and Eric Breuker, who were always there for our VICI group.

I would also like to thank my family and friends who have demonstrated so much patience. I would like to specifically thank David van Bemmel and Peep Schaepman for being there during my hour of need. And, of course, special thanks to my parents, who have always supported all my endeavours. Lastly, my thanks go out to the one whose patience and understanding I have tested to the full during the past few years: my loved one, Eeke. The book is finally complete, my dear.

The research in this book was largely completed in the spring of 2013. However, since then new literature has been added and the case law of the Court in Strasbourg has been updated until the end of 2013.

Maastricht, June 2014 Louwrens R. Kiestra

Contents

1 Introduction 1
1.1 Background and Purpose 1
1.2 Structure of the Book and Further Delineation of the Subject 5
1.3 Overview 8
References 9

2 Introduction to Private International Law 13
2.1 Introduction 13
2.2 The Notion of Private International Law 14
2.3 Objectives of Private International Law 16
2.4 Sources of Private International Law 16
2.4.1 The Europeanization of Private International Law 17
2.4.2 International Treaties 19
2.4.3 National Legislation 19
2.5 The Impact of Fundamental Rights on Private International Law 20
References 24

3 Introduction to the European Convention on Human Rights 27
3.1 Introduction 27
3.2 The Enforcement Machinery 29
3.3 The Status of the ECHR in the Domestic and International Legal Orders 31
3.3.1 The ECHR and Other Private International Law Treaties 33
3.4 The Most Relevant Articles of the ECHR with Regard to Private International Law 36

3.5 The Nature of the Contracting Parties' Obligations and of the Rights in the ECHR 36
3.5.1 The Nature of the Rights Guaranteed in the ECHR 38
3.5.2 The Margin of Appreciation 42
3.6 The Future of the System of Protection Offered by the ECHR 44
References 46

4 Article 1 ECHR and Private International Law 49
4.1 Introduction 49
4.2 The Meaning of Article 1 ECHR and the Notion of Jurisdiction 52
4.2.1 The Notion of Jurisdiction 52
4.2.2 The Notion of Jurisdiction in Public International Law 53
4.2.3 The Notion of Jurisdiction in Article 1 ECHR 55
4.2.4 Article 1 ECHR and the Extra-Territorial Application of the ECHR 57
4.3 The Meaning of Article 1 ECHR for Private International Law 64
4.4 The Consequences of the Applicability of Article 1 ECHR to Private International Law 69
4.4.1 Article 1 ECHR and the Debate on the 'Imperialism' of the ECHR 71
4.4.2 The Dangers of the Proliferation of Rights Guaranteed in the ECHR for Private International Law 73
4.4.3 Jurisprudence of the National Courts of the Contracting Parties 74
4.5 Conclusion 81
References 82

5 Jurisdiction in Private International Law 85
5.1 Introduction 86
5.2 The Notion of Jurisdiction in Private International Law 87
5.2.1 Jurisdictional Rules and Grounds of Jurisdiction 88
5.2.2 The Impact of Public International Law on Jurisdiction in Private International Law 90
5.3 The Applicability of the ECHR to Disputes Concerning Jurisdiction in Private International Law 94
5.4 The Right of Access to a Court in Private International Law . . . 95
5.4.1 General Overview of the Right of Access to a Court in the Case Law of the Strasbourg Institutions 96
5.4.2 The Right of Access in Private International Law in the Strasbourg Case Law 100

5.4.3 The Scope of the Right of Access to a Court and Jurisdiction in Private International Law 103
5.4.4 Restrictions to the Right of Access to a Court: Procedural Bars 121
5.4.5 The Effectiveness of the Right of Access to a Court: Legal Aid. 125
5.4.6 Preliminary Conclusions 126
5.5 The Invocation of Article 6(1) ECHR against the Assertion of Jurisdiction 127
5.5.1 The Invocation of Article 6(1) ECHR against Jurisdiction in the Strasbourg Case Law 127
5.5.2 Article 6(1) ECHR and the Due Process Clause 130
5.5.3 The Consequences of the Divergent Roles of Article 6(1) ECHR 133
5.5.4 Some Preliminary Conclusions 133
5.6 Article 6(1) ECHR as a Brake on Strategic Litigation 134
5.6.1 The State of the Law: Gasser 136
5.6.2 Strategic Litigation and the Role of Article 6(1) ECHR 137
5.7 Conclusion 140
References 143

6 Applicable Law 149
6.1 Introduction 149
6.2 The Applicability of the ECHR to the Issue of Applicable Law. 151
6.2.1 Responsibility When a Foreign Law Is Applied 152
6.2.2 Co-responsibility When the Law of Another Contracting Party Is Applied?. 153
6.3 The Impact of the ECHR on the Applicable (Foreign) Law in a Private International Law Dispute 154
6.3.1 The Case Law of the Strasbourg Institutions 156
6.3.2 The Impact of the ECHR on the Applicable Foreign Law: Further Analysis 161
6.3.3 Jurisprudence of National Courts of the Contracting Parties. 168
6.4 The Application of the ECHR *Promoting* the Application of Foreign Law 180
6.4.1 The Case Law of the Strasbourg Institutions 181
6.4.2 Jurisprudence of the EU and the National Courts of the Contracting Parties. 183
6.4.3 The Application of the ECHR Promoting the Application of Foreign Law: Debate in the Literature 185

6.5 The Impact of the ECHR on the Act of Applying Foreign Law 187
6.5.1 The Case Law of the Strasbourg Institutions 188
6.5.2 Jurisprudence of the National Courts of the Contracting Parties 189
6.5.3 The Practice in National Legal Orders and the Impact of Article 6(1) ECHR 191
6.6 Conclusion 193
References 196

7 The Recognition and Enforcement of Foreign Judgments: The Obligation to Recognize and Enforce Foreign Judgments 199
7.1 Introduction 199
7.2 Article 6(1) ECHR and the Obligation to Recognize and Enforce 202
7.2.1 The Obligation to Recognize and Enforce Following from Article 6(1) ECHR 210
7.2.2 Jurisprudence of National Courts of the Contracting Parties 212
7.2.3 Preliminary Conclusions 215
7.3 Article 1 of Protocol No. 1 ECHR and the Obligation to Recognize and Enforce 216
7.3.1 The Obligation Following from Article 1 of Protocol No. 1 ECHR 218
7.3.2 Preliminary Conclusions 219
7.4 Article 8 ECHR and the Obligation to Recognize Foreign Judgments 219
7.4.1 The Obligation to Recognize and Enforce Following from Article 8 ECHR 235
7.4.2 Jurisprudence of the National Courts of the Contracting Parties 236
7.4.3 Preliminary Conclusions 241
7.5 Conclusion 241
References 244

8 The Recognition and Enforcement of Foreign Judgments: The Invocation of the ECHR *Against* Recognition and Enforcement 247
8.1 Introduction 247
8.2 The Invocation of Article 6(1) ECHR *Against* Recognition and Enforcement 248
8.2.1 The Standard of Control Following from Article 6(1) ECHR with Regard to the Recognition and Enforcement of Foreign Judgments 254
8.2.2 The Invocation of Article 6(1) ECHR Against Recognition and Enforcement: EU and National Jurisprudence 259
8.2.3 The Manner of Invocation of Article 6(1) ECHR Regarding Recognition and Enforcement 271
8.2.4 The Abolition of the Exequatur Procedure 271
8.2.5 Preliminary Conclusions 274
8.3 The Invocation of the Substantive Rights Guaranteed in the ECHR Against the Recognition and Enforcement of Foreign Judgments 275
8.3.1 The Invocation of Substantive Rights Guaranteed in the ECHR Against a Judgment of Another Contracting Party 275
8.3.2 The Invocation of Substantive Rights Guaranteed in the ECHR Against a Judgment of a Third Country 278
8.3.3 The Invocation of Substantive Rights Guaranteed in the ECHR: National Jurisprudence 281
8.4 Conclusion 283
References 285

9 Conclusions 289
9.1 Introduction 289
9.2 The Impact of the ECHR on the Issue of Jurisdiction in Private International Law 291
9.3 The Impact of the ECHR on the Issue of Applicable Law 294
9.4 The Impact of the ECHR on the Recognition and Enforcement of Foreign Judgments 298
9.5 Concluding Remarks 302

Table of Cases 305

Bibliography 315

Chapter 1
Introduction

Contents

1.1 Background and Purpose 1
1.2 Structure of the Book and Further Delineation of the Subject 5
1.3 Overview 8
References 9

1.1 Background and Purpose

This book analyzes the impact of the rights guaranteed in the European Convention of Human Rights and Fundamental Freedoms (hereafter ECHR) on private international law by examining the case law of the European Court of Human Rights (hereafter the Court) in Strasbourg and selected national courts. Private international law is traditionally concerned with the fair and efficient regulation of issues of private law stemming from the concurrence of legal systems of different countries.[1] The diversity of the world's legal systems concerning private law is the *raison d'être* of private international law. This area of the law is thus only concerned with cases that contain a foreign element. In handling this diversity of legal systems, private international law deals primarily with three main issues.[2] The first of these is the issue of jurisdiction—in an international case, the court of which country is competent to hear a case? The second issue is that of the applicable law—the law of which country shall be applied to this international case? The third and last main issue is that of the recognition and enforcement of foreign judgments—under what circumstances may a foreign judgment either be recognized and/or enforced in the forum? Clearly, private international law requires a willingness to accept foreign solutions to legal

[1] See, e.g., Cheshire et al. 2010, pp. 3–5; Dicey et al. 2012, pp. 3–5; Strikwerda 2012, p. 2.
[2] See for a further elaboration of the notion of private international law infra Chap. 2.

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issues with foreign elements in order to facilitate cross-border legal relationships of a private law nature.[3]

Private international law is also an area of law which is currently undergoing a transformation, as its role and traditional foundations may be changing.[4] Several factors lie at the root of this. The continuing increase in interaction between people from different countries, because of advances in transportation and telecommunication—a phenomenon commonly referred to as globalization—has, for example, emphasized the importance of private international law, while it has, simultaneously, increased the demands on this area of law.[5] Moreover, while private international law and public international law appeared to have grown apart and were consequently treated as separate areas of law, there are indications suggesting a reversal of this trend.[6] It has, for example, also been contended that private international law could play a more prominent role in the 'global governance debate'.[7]

Another important development concerning private international law is that the European Union has gradually discovered this area of law. This has made its role more important, and has also had an impact on national rules of private international law, as more and more areas covered by national private international law have been and are being replaced by European private international law.[8] This may be a common refrain: these developments in public international law and European law have brought changes to the traditional paradigm of private international law, as concepts of these systems of law have put pressure on private international law.[9] Private international law can no longer claim an isolated role, as it is being influenced by other areas of law. The rights guaranteed in the ECHR may similarly have an impact on private international law. This necessitates an analysis of that impact.

The ECHR is an international treaty containing a catalogue of rights that the States which are parties to this instrument undertake to respect and guarantee to everyone within their jurisdiction. These rights may—if this is at all possible—only be limited insofar as the possibility thereto is contained within the instrument itself.[10] The ECHR thus establishes certain minimum requirements concerning the rights contained in the Convention which the Contracting Parties are bound to guarantee. These minimum requirements also apply to private international law cases. It is not difficult to see how private international law and the rights guaranteed in the ECHR could clash, as, for example, the application of a foreign law

[3] See, e.g., Struycken 2009, p. 55ff.

[4] See, e.g., Mills 2012, pp. 371–375.

[5] See with regard to the impact of globalization on private international law, e.g., Basedow 2000, pp. 1–10; Wai 2002, pp. 209–274.

[6] See on this subject, e.g., Mills 2009. See for a more critical approach to this trend, e.g., de Boer 2010, pp. 183–207. See also Reed 2005, pp. 177–410.

[7] Muir Watt 2011, pp. 347–428.

[8] See with regard to the Europeanization of private international law further Infra Sect. 2.4.1.

[9] See, e.g., Kuipers 2012, p. 2ff.

[10] See with regard to the ECHR further infra Chap. 3.

or the recognition and enforcement of foreign judgments may result in a violation of one of the rights guaranteed in the ECHR, particularly where the foreign law or the foreign judgments originate from non-Contracting Parties.

Although private international law is certainly not deaf to the rights and obligations of individuals, the most important function of private international law is to coordinate the differences between legal systems. The ECHR, however, as a human rights instrument, offers a number of fundamental rights to individuals which the Contracting Parties are obligated to respect and guarantee. It is clear that the creation of an efficient regulatory system can collide with the rights of an individual. If too much emphasis is put on the rights of the individual within such a system, the system will ultimately suffer. However, too much emphasis on the functioning of the system of private international law at the expense of the rights of individuals, which can be derived from the ECHR, could trigger state responsibility for the Contracting Parties under this instrument. For example, it may, from the point of view of co-operation between different States, be worthwhile to recognize and enforce each other's (foreign) judgments readily without too many formalities. However, if omitting such formalities were to mean that a judge could no longer check whether a fair trial has preceded the foreign judgment to be enforced, the individual may be wronged.[11]

The relationship between private international law and human rights has, incidentally, also come up in a slightly different context. It has recently been attempted to hold multi-national corporations accountable for human rights violations allegedly committed in distant parts of the world. An example is a case before the United States Supreme Court, *Kiobel,* et al.*, v. Royal Dutch Petroleum,* et al.,[12] in which 12 individuals are seeking to hold major oil corporations accountable in the United States for alleged human rights violations perpetrated in Nigeria. Rules of private international law will in such cases determine if a court has jurisdiction, and which law should be applied. However, this aspect of the relationship between private international law and human rights will not be further considered here, as this book will be confined to the question of what the impact of the ECHR is on the three main issues of private international law. Whether private international law can be used with regard to human rights violations, and if so, how that may be achieved, are related, but separate, questions.[13]

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[11] See further infra Chaps. 7–8.

[12] *Kiobel,* et al.*, v. Royal Dutch Petroleum,* et al., 132 S.Ct. 472 (US 2011). See with regard to this case, e.g., Enneking 2012a, pp. 396–400. See generally on the related discussion of liability of multinational corporations under international law, e.g., Kamminga and Zia-Zarifi 2000. See also Enneking 2012b.

[13] See with regard to the question of whether private international law may function in such a way within the EU, e.g., van den Eeckhout 2008, pp. 105–127. Another discussion concerned with whether private international law can play a role with regard to human rights violations is the discussion on universal civil jurisdiction. See in this regard, e.g., Donovan and Roberts 2006, pp. 142–163; Mora 2010, pp. 367–403. See also the contributions in 99 *Annual Proceedings of the American Society of International Law* (2005), pp. 120–128.

The impact of human rights, or fundamental rights, on private international law is, of course, not an entirely new phenomenon. The German *Bundesverfassungsgericht* held for the first time back in 1971[14] that the German rules of private international law had to comply with the fundamental rights enshrined in the German *Grundgesetz*.[15] This decision resulted in a discussion of whether the connecting factors used in choice-of-law rules were discriminatory in using the national law of the man as the connecting factor, which eventually led to a legislative reform of German private international law in the area of family law.[16] Similar developments have taken place in other Western European countries.[17]

Yet besides this impact on the connecting factor in choice-of-law rules, the impact on private international law of fundamental rights, and particularly those rights guaranteed in the ECHR, has been rather limited for a long time. The subject was seldom broached by courts and similarly was not frequently discussed in the literature.[18] That has, however, gradually changed. The number of publications on the subject, for example, has steadily increased since the turn of this century. The most interesting development has been, however, the increase in the number of court decisions dealing with the impact of the ECHR. In particular, the fact that the European Court of Human Rights (the Court) has since decided a number of cases specifically dealing with issues of private international law is of great interest, and the issue also appears to have been taken up more by national courts of the Contracting Parties.

In light of this increased attention by the Court, a new book on the impact of the rights guaranteed in the ECHR on issues of private international law is necessary in order to further assess what the ECHR's impact on private international law is, and how the Contracting Parties (or their courts) can fulfill their obligations under the Convention in issues of private international law. While a fair number of interesting studies on the impact of the ECHR in cases dealing with issues of private international law have appeared, not many of them deal with all three main questions of private international law, but instead restrict themselves to one or two of them. There are two important studies that are exceptions to this.[19] However since the publication of these studies there have been significant further

[14] *Bundesverfassungsgericht* 31 May 1971, 31 BVerfGE 58; *NJW* 1971, p. 1508.

[15] This case has been much discussed. See further infra Sect. 6.3.

[16] See, e.g., Hofmann 1994, p. 148ff.

[17] A judgment of the Italian Constitutional Court on 26 February 1987 started a similar discussion in Italy. See *Rev.crit.dr.int* 1987, p. 563 (note Ancel). See also van Loon 1993, pp. 141–142 with regard to the developments in the Netherlands.

[18] See, e.g., Docquir 1999, p. 473, who noted—in 1999—that the impact of the ECHR on private international law has (still) not received a lot of attention, notably not by the courts, although he did point out that there are a number of interesting studies on the subject. See for some interesting earlier studies on the subject, e.g., Cohen 1989, pp. 451–483; Engel 1989, pp. 3–51; Goldman 1969, pp. 449–466; Matscher 1985, pp. 459–478; Mayer 1991, pp. 651–665. See also generally on the impact of human rights Lerebours-Pigeonnière 1950, pp. 255–270.

[19] See Kinsch 2007, pp. 9–332 and Marchadier 2007.

developments with regard to private international law in the Court's case law. Moreover, this book will add a further focus on the meaning of Article 1 of the ECHR for private international law. Finally, what this book will add to the debate on the impact of the ECHR on private international is a further examination of case law originating from three legal orders: England, the Netherlands, and Switzerland, where the issue of the impact of the ECHR on private international law has not been very frequently discussed.[20]

1.2 Structure of the Book and Further Delineation of the Subject

As stated above, this book analyzes the impact of the rights guaranteed in the ECHR on private international law by examining the Court's case law as well as national case law. The over-arching question is: what is the impact of the ECHR on private international law? This book departs from the assertion that the case law of the Strasbourg Institutions (the Court and the Commission)[21] best illustrates the manner in which the ECHR may have an impact on private international law and how possible violations of the ECHR in issues of private international law may be prevented. The Court is particularly well positioned to offer binding guidance, as it has final jurisdiction over the interpretation of the rights guaranteed in the ECHR and the compliance of the Contracting Parties with the ECHR.[22]

To answer this broad question, it must be divided into three sub questions which correspond with the three main issues of private international law. In other words: the impact of the ECHR on private international law will be studied separately with regard to jurisdiction, applicable law, and the recognition and enforcement of foreign judgments. Prior to this, though, it is necessary to examine how the basic obligation undertaken by the Contracting Parties in Article 1 ECHR relates to their responsibilities in issues of private international law.

At an early stage the choice was made to include all three main questions of private international law, as this would provide a full overview of the issues. However, the subject became rather broad as a result. In order to ensure that the book could be completed within a reasonable time some difficult choices had to be made. Private international law has therefore been limited in this research to the afore-mentioned three main issues. As a result, other topics, some of which are considered to be part of private international law in at least some legal orders and which may also raise interesting questions with regard to the impact of the rights guaranteed in the ECHR, are not included in this book.[23] Examples of such topics

[20] See with regard to the selection of the legal orders further infra Sect. 1.2.

[21] See further infra Sect. 3.2.

[22] Stone Sweet and Keller 2008, p. 4.

[23] See further with regard to the notion of private international law infra Chap. 2.

falling outside the scope of this study would be international arbitration,[24] taking evidence abroad, and the service of documents in international cases, which will be treated only marginally as a topic relevant to the recognition and enforcement of foreign judgments.[25]

Some topics that do arguably fall within the three main issues of private international law, which have been examined by the Court, also had to be left out of this study because they are largely not truly concerned with a topic of private international law. In some legal orders immunities, for example, are considered to be part of the issue of jurisdiction in private international law and as such are discussed in treatises on private international law.[26] The Court has also developed important case law on the relationship between the right of access to a court *ex* Article 6(1) ECHR and immunities.[27] However, as immunities are more of a restriction derived from public international law, this topic has not been included in this study.[28]

International child abduction is another topic that is considered to be part of private international law, but which does not fit perfectly in this book. Although the Court has discussed this issue extensively in its case law and the reasoning used may be interesting for topics which are part of this book, it has been decided not to include international child abduction as this would result in so much more material that deserves and requires a separate study.[29] Moreover, even though international child abduction is considered to be an issue of private international law, one should realize that the return orders in such cases are actually national decisions, albeit in an international context, which distinguishes them from the decisions discussed in Chaps. 7 and 8, in which the recognition and enforcement of foreign judgments are discussed.

As stated above, the starting point in the search for the impact of the ECHR is mainly confined to case law, particularly that of the Court. This means, for example, that the impact of the ECHR on choice-of-law rules, and particularly on connecting factors, is a topic that is only treated marginally, as the Court usually limits its assessment of a case to whether the actual application of such rules (e.g., the applicable law in question) is in conformity with the ECHR. The Court, in principle, does not review legislation *in abstracto*.[30] The principle of

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[24] See in this regard, e.g., De Ly 2011, pp. 181–205.

[25] See infra Chap. 7.

[26] See, e.g., Cheshire et al. 2010, p. 491ff; Dicey et al. 2012, p. 273ff.

[27] See with regard to immunities and the right of access to a court *ex* Article 6(1) ECHR, e.g., Kloth 2010; Voyiakis 2002, pp. 297–332.

[28] See in this regard the fairly recent decision of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, judgment of 3 February 2012. See generally with regard to immunities in (public) international law, e.g., van Alebeek 2008; Pavoni 2012, pp. 133–207. See also van Hoek et al. 2011.

[29] There have, incidentally, already been studies into the impact of the Court's case law on international child abduction. See, e.g., Beaumont 2009, pp. 9–103.

[30] See, e.g., *Klass and Others v. Germany,* 6 September 1978, para 33, Series A no. 28; *Marckx v. Belgium*, 13 June 1979, para 27, Series A no. 31.

discrimination in relation to the connecting factors used in choice-of-law rules will therefore not be fully examined.[31] The book will thus assess the impact of the ECHR by examining the relevant case law of the Strasbourg Institutions as well as case law from selected national legal orders in Europe, but, where relevant to the discussion, the doctrine in issues of private international law will also be included.

The book is concerned with the impact of the ECHR on private international law, and while many rules of private international law are of international origin,[32] every country does have its own rules of private international law. Therefore the number of legal systems which could, theoretically, be drawn upon for case law is, of course, the same number of Member States of the Council of Europe: forty-seven.[33] However, including all systems is neither desirable nor necessary. It is not necessary, as the case law and practice of the national courts of the Contracting Parties are primarily used as illustrations of the handling of the ECHR in issues of private international law. It is not desirable, since including all systems would mean a sacrifice of thoroughness. Consequently, this book will focus in its assessment on the case law of the national courts and practice of England,[34] the Netherlands, and Switzerland.[35] Occasionally, reference will also be made to developments in other Contracting Parties—particularly Germany and France—that illustrate important findings. In addition to case law, the doctrine and legislation, in the broadest sense of the word,[36] will be touched upon in this research.

Why the focus on England, the Netherlands, and Switzerland? As the national case law is used in this research to unearth the solutions found in national legal orders to possible conflicts between the rights guaranteed in the ECHR and private international law, it is necessary and most interesting to choose legal systems which are not only influential, but also diverse. Furthermore, it is in this context most interesting to choose legal orders where the impact has been examined, but where this issue has not yet fully been assessed. All these factors have been accounted for in the choice of these three jurisdictions.[37]

Above, it was indicated that Germany is, in a way, the birthplace of the discussion of the impact of fundamental rights on private international law. It is not

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[31] See with regard to discrimination and choice-of-law rules Kinsch 2011, pp. 19–24.

[32] See further infra Sect. 2.4.

[33] See for a little background regarding the origins of the ECHR infra Chap. 3.

[34] In this research I will focus on English cases of private international law and practice. One should note in this regard, though, that England, Scotland, and Northern Ireland share the Supreme Court. Moreover, many statutes, particularly those based on international treaties, apply to all three parts of the United Kingdom. Finally, one should note that in relation to the case law of the Court in Strasbourg, the United Kingdom is the respondent Contracting Party.

[35] See with regard to these legal systems also infra Sects. 2.4.3 and 3.3.

[36] This would include, in addition to national legislation, internationalized sources, such as EU law and international treaties. See with regard to the sources of private international law infra Sect. 2.4.

[37] See generally with regard to the selection of legal systems in comparative legal research Oderkerk 2001, pp. 293–318.

surprising to find that this subject has been discussed often in the German literature.[38] There is also a lively debate on the subject in France.[39] However, in the selected legal systems—England, the Netherlands, and Switzerland—the issue of the impact of the ECHR on private international law has been less frequently and not so elaborately discussed,[40] and it is therefore of interest to examine the case law from these jurisdictions. Moreover, for a researcher trained in Dutch law and based at a Dutch university, the Netherlands is an obvious choice as one of the three jurisdictions.

While the Netherlands is a civil law country, England has a common law tradition and consequently takes quite a different approach to issues of private international law. Furthermore, the position of the ECHR in the English legal order is quite different from its position in the Dutch legal system. While the Netherlands—and Switzerland—have a 'monist' tradition with regard to the relationship between national and international law, the United Kingdom follows the dualist approach.[41] In monist countries the ECHR is automatically part of the national law. In dualist countries, however, further legislative action is required following the ratification of an instrument in order for the ECHR to be enforceable in national courts. The precise way in which it is enforceable depends on the terms of the national legislation. In the United Kingdom the Human Rights Act 1998 has indirectly incorporated the rights flowing from the ECHR into national law.

The choice of Switzerland adds another dimension to the discussion. While both the Netherlands and the United Kingdom are members of both the Council of Europe and the European Union, Switzerland is only a member of the Council of Europe. In the interest of completeness it should be noted that Switzerland—like the Netherlands—follows a monist approach and the ECHR provisions are applied as self-executing in the national courts.[42]

1.3 Overview

After having set out the scope of this book in the introduction, the study will continue in Chaps. 2 and 3 with a concise introduction to both private international law and the ECHR. These two introductory chapters are included for readers, who

[38] See, e.g., Thoma 2007; Voltz 2002.

[39] See, e.g., supra n. 19. See also the contributions in the *European Journal of Human Rights* 2013/3.

[40] There are, of course, exceptions to this general statement. See in addition to works cited above, e.g., Fawcett 2007, pp. 1–47; Juratowitch 2007, pp. 173–199 (England); Bitter 1979, pp. 440–447; Rutten 1998, pp. 797–811; Vonken 1993, pp. 153–185 (The Netherlands); and Bucher 2011; Othenin-Girard 1999 (Switzerland).

[41] See with regard to the differences between the monist and dualist approaches, e.g., Brownlie 2008, p. 31ff.

[42] See generally on the position of the ECHR in the domestic law of the respective Contracting Parties, e.g., Blackburn and Polakiewicz 2001; Keller and Stone Sweet 2008.

are less familiar with either of these two areas of the law. In Chap. 2 the particularities of private international law will be dealt with, including the importance of the different sources of this area of law. This chapter will also provide a first foray into an important part of this research by examining the public policy exception, which is the traditional instrument used in private international law to deal with fundamental rights. Chapter 3 provides a general introduction to the rights guaranteed in the ECHR. Here, one will find a review of the structure of the Convention as well as its most important characteristics. In Chap. 4 an important preliminary question to the research in this book will be answered: is the ECHR at all applicable to issues of private international law? In this chapter the relationship between Article 1 of the ECHR, which defines the scope of the Convention, and private international law will be further discussed. Hereafter, the impact of the ECHR on the three main issues of private international law will be elaborated upon. In Chap. 5 the issue of jurisdiction in private international law will be dealt with. The issue of applicable law is the subject of Chap. 6. The discussion of the issue of the recognition and enforcement of foreign judgments will be divided into two parts, as the Court has delivered far more case law on this subject compared to jurisdiction and applicable law. In Chap. 7 the obligation to recognize and enforce foreign judgments, which may follow from the ECHR, will be examined. Chapter 8 will discuss the possibility to invoke one of the rights guaranteed in the ECHR against the recognition and enforcement of foreign judgments. Chapter 9 sets out the conclusions of the book.

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Chapter 2
Introduction to Private International Law

Contents

2.1 Introduction 13
2.2 The Notion of Private International Law 14
2.3 Objectives of Private International Law 16
2.4 Sources of Private International Law 16
  2.4.1 The Europeanization of Private International Law 17
  2.4.2 International Treaties 19
  2.4.3 National Legislation 19
2.5 The Impact of Fundamental Rights on Private International Law 20
References 24

2.1 Introduction

This research has as its subject the impact of the rights guaranteed in the ECHR on private international law. A necessary first step in such a discussion is an introduction to private international law. It should be understood from the outset that every country has its own system of private international law. This also applies to the Contracting Parties to the ECHR. Moreover, what is exactly understood as private international law even differs from country to country. While every State has its own national rules on private international law, many States are also party to international or bilateral treaties regarding issues of private international law. Furthermore, the EU Member States, which are all also Contracting Parties to the ECHR, are bound by EU rules on private international law.

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It is, of course, impossible to discuss all the different rules of private international law in this chapter, or to do justice fully to all the intricacies of private international law.[1] The aim of this chapter is merely to introduce the general notion of private international law and some of its particularities to the reader who may be less familiar with issues of private international law. Additionally, a first foray into the discussion of the impact of the ECHR on private international law will be offered, by discussing how private international law has traditionally dealt with fundamental rights.

In order to do so, first the notion of private international law will be further introduced (in Sect. 2.2). Next, some of the goals of private international law will be examined (Sect. 2.3). Thereafter, the sources of private international law will be discussed (Sect. 2.4). Finally, a first foray into the subject of this research will be made by an examination of the role of the public policy exception in private international law, particularly with regard to fundamental rights. The notion of mandatory rules will also come up here (Sect. 2.5).

2.2 The Notion of Private International Law

As stated above, every legal order in the world has its own rules relating to matters of private law. Private law is concerned with all legal relationships between private entities and thus includes, for example, family law and the law of contracts and obligations. These laws differ from country to country. However this does not stop interaction between people in different countries. People may, for example, marry someone from another country or find a job in a different country. As has been remarked in Chap. 1, it is this simple fact that is the *raison d'être* of private international law. Private international law is the area of law that comes into play whenever a court is faced with a question that contains a foreign element, or a foreign connection. The mere presence of such a foreign element in a legal matter raises a number of questions and it is the function of private international law to provide an answer to these questions and to ensure just solutions.

It has been established in Chap. 1 that private international law is concerned with three main issues. The first issue with which one may be faced in a case with a foreign element is the issue of jurisdiction: which court is competent to hear such an international case? If, for example, a conflict arises concerning a contract between an English company and a Dutch company, should this issue be brought before a court in England or the Netherlands? The second issue that could arise after a decision on the competent court has been made is whether, for example, English or Dutch law would be applied to this case. Or, perhaps, the parties have

[1] See for a general overview with regard to private international law, e.g., Bucher 2011; Cheshire et al. 2010; Clarkson and Hill 2011; Dicey et al. 2012; Dutoit 2005; Niboyet and De Geouffre de la Pradelle 2011; Siehr 2002; Strikwerda 2012.

chosen the law of a third country, or a uniform international law may even apply to their dispute. Finally, after the case has been decided, it is necessary to determine if, and under what circumstances, this decision can be recognized and enforced in another country.

These three issues could be considered to be the nucleus of private international law, as it is generally accepted in most countries that these issues are part of private international law.[2] As noted above, the rules of private international law are not understood to include exactly the same topics in every country. For example, in France and Belgium the rules on nationality are considered part of private international law.[3] In Switzerland one may, for example, find rules on (international) arbitration in the private international law statute.[4] However these topics will not be included in this book.[5]

One of the particularities of private international law rules is that they merely refer to either a competent court, the applicable law, or whether recognition and enforcement are possible. One could therefore think of private international law rules as procedural rules, or perhaps rather as technical or formal rules, which are not concerned with the substance of a dispute.[6] One should, incidentally, also note that the nature of private international law rules relating to the applicable law (conflict rules) is generally considered to be different from the rules relating to jurisdiction and recognition and enforcement, if solely because only conflict rules may lead to the application of foreign law.[7] The latter rules are thus considered to be of a more substantive nature, while rules regarding jurisdiction and the recognition and enforcement have a procedural character.

It is important to note that in this book, the impact of the Court's case law on issues of private international law will be examined in the first place.[8] As has been noted in Chap. 1, the Court, in principle, does not review measures taken by the Contracting Parties *in abstracto* and will consequently only assess the result of the application of private international law rules. Therefore, the impact of the ECHR on the three main issues of private international law should be understood as the impact of this instrument on the result of the application of private international law rules. The peculiar nature of private international law rules is thus of little consequence for this book.

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[2] Cf. Kegel 1994, Chap. 1, pp. 1–2.

[3] See with regard to France, e.g., Audit 2008, p. 767ff; see with regard to Belgium, e.g., Erauw 2006, pp. 7–8.

[4] See infra n. 38.

[5] See also supra Chap. 1.

[6] See, e.g., Bogdan 2011, p. 71ff.

[7] See, e.g., Bogdan 2011, p. 85.

[8] See supra Sect. 1.1.

2.3 Objectives of Private International Law

One of the main reasons for States to have a system of private international law—which will occasionally lead to the assertion of jurisdiction in a case with international connections, the application of a foreign law, or the recognition and enforcement of foreign judgments—is the reasonable and legitimate expectations of the parties.[9] Completely disregarding foreign laws and decisions, or even the willingness to entertain international cases, would lead to injustices for the parties involved in such international proceedings.[10]

Another important objective of private international law is the international harmony of decisions.[11] This classic goal of private international law was first introduced by von Savigny.[12] It entails that countries should strive to reach the same decisions in problems of private international law. This latter objective, however, is difficult to achieve, as every country is, in principle, free to decide how to deal with issues of private international law. This does not take anything away from the importance of this notion. The international harmony of decisions is not an empty vessel. The taking into account of foreign laws and decisions by States helps avoid 'limping' legal relationships, i.e., legal relationships that are recognized in one country but not in another. One should not lose sight of the fact that rules of private international law are also in the interest of the (forum) State, as it benefits from stability with regard to cross-border legal relationships.[13]

2.4 Sources of Private International Law

Another particularity of private international law is the variety of its sources. Rules of private international law can be found not only in the national legislation of States, but also in international treaties and European law. The internationalization (and Europeanization) of rules of private international law is becoming increasingly more important for this area of law.[14] For Member States of the EU, for example, the European legislator is by now the most important legislator in the area of private international law. This is due to what has been called the 'Europeanization' of private international law (Sect. 2.4.1). Many rules of private international law have traditionally also been concluded between different States and laid down in international or bilateral treaties (Sect. 2.4.2). Finally, every State also has national legislation on private international law (Sect. 2.4.3).

[9] See, e.g., Dicey et al. 2012, pp. 4–5; Clarkson and Hill 2011, pp. 9–12.

[10] See, e.g., Dicey et al. 2012, p. 5.

[11] See, e.g., Clarkson and Hill 2011, pp. 18–19.

[12] Von Savigny 1880, p. 64ff.

[13] Bogdan 2011, pp. 49–70.

[14] See, e.g., Gaudemet-Tallon 2005, p. 47.

2.4.1 The Europeanization of Private International Law

The most important recent development for private international law in Europe is the so-called Europeanization or—at the time—'Communitarization' of private international law,[15] which essentially entails the continued involvement of the European Union legislator in the field of private international law. It was not truly possible for the European Community (now Union) legislator to introduce legislation in the area of private international law until the Treaty of Amsterdam.[16] It should not be forgotten that before this development there were also private international law instruments created in a European context, but these had the form of international conventions, which had to be signed and ratified by all participating countries. Examples of such initiatives are the Brussels Convention concerning jurisdiction and the recognition and enforcement of foreign judgments[17] and the Rome Convention concerning applicable law.[18] The Brussels Convention has, incidentally, been copied by the Lugano Convention,[19] thus enlarging the number of States party to the Convention with some non EU-Member States.[20] The disadvantage of merely cooperating by way of international conventions in the field of private international law is evident. Upon every accession of a new member State, the convention had to be updated and ratified again by all the members. This has happened several times with regard to both the Brussels and the Rome Convention, but this ultimately proved to be too slow and difficult a process and it became more burdensome with the increasing number of Member States.[21]

With the entry into force of the aforementioned Treaty of Amsterdam on 1 May 1999, the Community legislator entered the field of private international law, and one could say that it has not held back. Numerous new initiatives have been taken on the European level. The Brussels and Rome Conventions have, for example,

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[15] See, e.g., Basedow 2000, pp. 687–708; Kuipers 2012, pp. 6–27; Stone 2010. The (increasing) importance of European law has also been the subject of study at the Hague Academy a number of the times during the past years: see, e.g., Borrás 2005, pp. 313–536; Fallon 1995, pp. 8–282; Struycken 1992, pp. 256–383.

[16] *Treaty of Amsterdam*, *OJ* 1997, C 310. With this Treaty the responsibility for creating legislation with regard to international judicial co-operation in civil matters was shifted from the third pillar to the first pillar, i.e. the Community legislator.

[17] The Brussels Convention on jurisdiction and the enforcement of foreign judgments in civil and commercial matters, 27 September 1968, *OJ* 1998, C 27/1 (consolidated version following the accession of Austria, Finland, and Sweden).

[18] The Rome Convention on the law applicable to contractual obligations, *OJ* 1998, C27/34 (consolidated version following the accession of Austria, Finland, and Sweden).

[19] Lugano Convention, 24 October 1988, *OJ* 1988, L 319/9. The Lugano Convention has since been replaced by a new Lugano Convention. See *OJ* 2007, L 399/1.

[20] These States are the Member States to the European Free Trade Association: Iceland, Norway, and Switzerland.

[21] The Commission became so concerned that it even openly discussed sanctions for states that did not approve amendments. See the answer by Commissioner Monti to the European Parliament, *OJ* 1997, C83/85.

both been transformed into EU instruments, and are now known respectively as the Brussels I Regulation[22] and the Rome I Regulation.[23] A number of complementary instruments to the Brussels I Regulation have been introduced, which basically deal with smaller, simple claims.[24] The so-called Rome II Regulation has been introduced with regard to the law applicable to non-contractual obligations. [25] The EU legislator has also delved into the area of family law with the Brussels II *bis* Regulation[26] and the Rome III Regulation.[27]

It is clear that the ongoing harmonization of the rules of private international law of the EU Member States is here to stay and that the further Europeanization of the rules of private international law will undeniably have major consequences for the respective systems of private international law of the Member States. An important factor therein is the fact that the Europeanization of private international law not only brings further harmonization, but concomitantly adds objectives following from European law which are unfamiliar to private international law, to the conflict of laws methodology in Europe. Important elements of European law thus suddenly enter the realm of private international law and in this way an 'instrumentalisation' of private international law in Europe has been introduced.[28] Rules of private international law are thus permeated by the four fundamental freedoms of the EU Treaty, by a focus of the principle of non-discrimination, the impact of fundamental rights, and the rule of mutual recognition.[29] Since the entry into force of the Lisbon Treaty the harmonization of the rules of private international law is now governed by Title V, which will bring further changes to private international law within the EU.[30]

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[22] Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I). This instrument has already a successor: Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), *OJ* 2012, L 351/1. The Recast will apply from 10 January 2015 (see Article 81 of the Recast).

[23] Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I).

[24] See, e.g., Regulation (EC) No. 805/2004 creating European Enforcement Order for Uncontested Claims, *OJ* 2004, L 143 (Amending Act Regulation (EC) 1869/2005, *OJ* 2005, L 300) and the Regulation EC 861/2007 establishing a European Small Claims Procedure, *OJ* 2007, L 199.

[25] Regulation (EC) 864/2007 on the law applicable to non-contractual obligations, *OJ* 2007, L199/40 (Rome II Regulation).

[26] Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement in matrimonial matters and the matters of parental responsibility, *OJ* 2003, L 338/1 (Brussels II*bis* Regulation).

[27] Council Regulation (EU) No. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ* 2010, L 343/10 (Rome III Regulation).

[28] Meeusen 2007, pp. 287–305.

[29] von Hein 2008, p. 1676ff; Meeusen 2007, p. 291ff.

[30] See further, e.g., de Groot and Kuipers 2008, pp. 109–114.

2.4.2 International Treaties

The Hague Conference of Private International Law, an international organization established in 1893, is the most prominent organization the field of private international law and as such is responsible for many conventions concerning issues of private international law. Over the years the Hague Conference has developed conventions in the areas of international family law, international legal cooperation and litigation, and international commercial law.[31] It should be noted that the European Community decided to accede to the Hague Conference of Private International Law in 2006.[32] In the field of international trade law and arbitration the United Nations (UN) is an important player.[33]

In addition to multilateral treaties, there are also many bilateral treaties between countries in the area of private international law. Such bilateral treaties only operate between two countries and the precise content of such agreements varies. One could say with regard to European countries that such bilateral treaties are generally being replaced by multilateral conventions, but the varying contents of bilateral agreements preclude them from becoming totally meaningless, as some aspects of private international law issues between the two countries may fall outside the scope of the multilateral conventions.[34]

2.4.3 National Legislation

The importance of national legislation on private international law has declined within Europe. Many of the relevant rules of private international law have an international origin,[35] while for the EU Member States, EU legislation is of particular importance. Nevertheless, this has not stopped European countries from

[31] See for an overview of the conventions the website of the Hague Conference [www.hcch.net].

[32] See Council Decision (EC) 2006/719 of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, *OJ* 2006 L 297/1.

[33] Particularly, the United Nations Commission on International Trade Law (UNCITRAL) has drafted some important conventions. The number of conventions concerning private international law concluded by the UN pales in comparison to the number concluded by Hague Conference. Nevertheless, some of them are very important. Examples are the Vienna Convention on the Law Applicable to the International Sale of Goods and the New York Convention on the Recognition and Enforcement of Arbitral Awards.

[34] See, e.g., Articles 69–72 of the Brussels I Regulation (supra n. 22). See with regard to the concurrence of international and bilateral treaties on private international law, e.g., de Boer 2010, pp. 308–315.

[35] See with regard to the impact of such treaties on national legislation Siehr 1996, pp. 405–413.

developing new codifications of private international law. This development started in Switzerland and many European countries have since followed suit.[36]

In Switzerland, for example, private international law is governed by the Federal Law on Private International Law of 18 December 1987.[37] This law regulates virtually all aspects of private international law in Switzerland.[38] The Netherlands has recently finally codified a number of rules of private international law (mostly choice of law rules) in Book 10 of the Dutch Civil Code.[39] In England, private international law rules consist of both statutes and case law. Historically, case law was the most important source of private international law, England being a common law country, but legislation now also has an important role.[40]

2.5 The Impact of Fundamental Rights on Private International Law

In the next chapter the rights guaranteed in the ECHR will be discussed, and thereafter the examination of the impact of this instrument on the three main issues of private international law will begin in earnest.[41] However, this would appear to be the proper place to further reflect on the fact that private international law has previously dealt with the impact of fundamental rights. The public policy exception has historically been the instrument of private international law used to deal with the impact of fundamental rights.[42] Therefore, it deserves separate discussion

[36] Switzerland's codification came into force in 1987. See on the development of this law, e.g., Vischer 1977, pp. 131–145; Belgium has, for example, introduced a codification of private international law rules in 2004. See with regard to the realization of this law, e.g., Erauw 2006, pp. 19–21. The Netherlands has recently also codified a number of rules of private international law. See infra n. 39. See generally on the codification of private international law Siehr 2005, pp. 17–61.

[37] Loi féderale du 18 décembre 1987 sur le droit international privé (LDIP), *RS* 291, *RO* 1988 1776.

[38] The Swiss Private International Law Act has 12 chapters and roughly 200 articles. In the first chapter of the Law general issues of jurisdiction, applicable law, and the recognition and enforcement of foreign judgments are dealt with, in addition to a definition of domicile and nationality. This general chapter is followed by chapters on natural persons (Chap. 2), marriage (Chap. 3), children and adoption (Chap. 4), guardianship (Chap. 5), succession (Chap. 6), property (Chap. 7), intellectual property (Chap. 8), obligations (Chap. 9), corporations (Chap. 10), international bankruptcy (Chap. 11), and international arbitration (Chap. 12).

[39] *Vaststellings- en Invoeringswet Boek 10 Burgerlijk Wetboek* [Determination and Implementation Book 10 of the Dutch Civil Code], 19 May 2011, *Stb.* 2011, 272. See on the realization of this codification, e.g., Vlas 2010, pp. 167–182.

[40] See, e.g., Dicey et al. 2012, pp. 10–11.

[41] See infra Chaps. 5–8.

[42] See Kinsch 2007, pp. 171–192 for an overview of the historical use of the public policy exception in this regard. See also Kinsch 2004, pp. 419–435.