The impact of the ECHR on private international law: An analysis of Strasbourg and selected national case law
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I. Introduction

1. Background and Purpose

This research aims to analyze 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 which 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 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

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² See for a further elaboration of the notion of private international law *infra* ch. II.
– has, for example, emphasized the importance of private international law, while it has, simultaneously, increased the demands on this area of law. 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. It has, for example, also been contended that private international law could play a more prominent role in the ‘global governance debate’.

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. 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. 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. The ECHR thus establishes certain minimum

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8 See with regard to the Europeanization of private international law further infra ch. II.4.1.


10 See with regard to the ECHR further infra ch. III.
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 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.\(^\text{11}\)

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.*,\(^\text{12}\) in which 12 individuals are seeking to hold major oil corporations

\(^{11}\) See further *infra* ch. VII-VIII.

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 study 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

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 197114 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 study 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 developments with regard to private international law in the Court’s case law. Moreover, this study will add a further focus on the meaning of Article 1 of the ECHR for private international law. Finally, what the research

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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.\textsuperscript{20}

2. The Research Question and Further Delineation of the Study

As stated above, the aim of the research is to analyze 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 research question is: what is the impact of the ECHR on private international law? This research departs from the assertion that the case law of the Strasbourg Institutions (the Court and the Commission)\textsuperscript{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.\textsuperscript{22}

To answer this broad question, it must be divided into three subquestions 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 of the research 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 research could be completed within a reasonable time some difficult choices had to be made. Private international law has

\textsuperscript{20} See with regard to the selection of the legal orders further \textit{infra} I.3.

\textsuperscript{21} See further \textit{infra} ch. III.2.

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 study. Examples of such topics falling outside the scope of this study would be international arbitration, 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.

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. The Court has also developed important case law on the relationship between the right of access to a court \textit{ex} Article 6 (1) ECHR and immunities. However, as immunities are more of a restriction derived from public international law, this topic has not been included in this study.

International child abduction is another topic that is considered to be part of private international law, but which does not fit perfectly in this research. 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 research, it has been decided not to include international child abduction as this would result

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23 See further with regard to the notion of private international law \textit{infra} ch. II.
25 See \textit{infra} ch. VII.
26 See, e.g., Cheshire, North and Fawcett \textit{supra} n. 1, at p. 491ff; Dicey, Morris and Collins \textit{supra} n. 1, at p. 273ff.
in so much more material that deserves and requires a separate study.\textsuperscript{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 Chapters VII and VIII, 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 \textit{in abstracto}.\textsuperscript{30} The principle of discrimination in relation to the connecting factors used in choice-of-law rules will thus not be fully examined.\textsuperscript{31}

\textbf{3. Methodology}

As indicated above, this research starts from the premise that the case law of the Strasbourg Institutions and courts at the national level best illustrates the possible tension between private international law and the rights guaranteed in the ECHR. This research will therefore 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 and, where relevant to the discussion, the doctrine in issues of private international law will also be included.

In order to analyze the impact of the ECHR on the three main issues of private international law, the directly relevant case law of the Court has been examined first. These are the cases in which the Court has explicitly discussed topics of private international law. Additionally, cases in

\textsuperscript{29} There have, incidentally, already been studies into the impact of the Court’s case law on international child abduction. See, e.g., P.R. Beaumont, ‘The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction’, 335 \textit{Recueil des Cours} (2009), p. 9-103.

\textsuperscript{30} See, e.g., \textit{Klass and Others v. Germany}, 6 September 1978, par. 33, Series A no. 28; \textit{Marcks v. Belgium}, 13 June 1979, par. 27, Series A no. 31.

which the Court has developed concepts which are directly relevant for issues of private international law have been included in this selection. An example is the Court’s case law concerning the right of access to a court. The research will thus use an inductive approach in the sense that the impact of the ECHR on the three main issues of private international law will be analyzed by examining the relatively few cases of the Court directly concerned with issues of private international law. These cases have been identified primarily by using the Hudoc database, which provides access to the case law of the Court. This selection has been verified by making use of the relevant doctrine.

This research will examine, in addition to the case law of the Strasbourg Institutions, the case law of the national courts of the Contracting Parties. The research is concerned with the impact of the ECHR on private international law, and while many rules of private international law are of international origin, 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. 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 research will focus in its assessment on the case law of the national courts and practice of England, the Netherlands, and Switzerland. Occasionally, reference will also be made to developments in other Contracting Parties – particularly Germany and France – that illustrate important findings. In addition to case

32 See further infra ch. V.
33 Hudoc can be found at <hudoc.echr.coe.int/sites/eng>. Here you can carry out searches. A user manual is available at the Court’s website www.echr.coe.int.
34 See further infra ch. II.4.
35 See infra n. 110.
36 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.
37 See further infra I.4.
law, the doctrine and legislation, in the broadest sense of the word, will be touched upon in this research.

Why the focus on England, the Netherlands, and Switzerland? The selection of legal systems naturally depends on several factors, such as the chosen subject and the aim of the research, but also on more practical criteria, such as the accessibility of the legal system to the researcher and the amount of work that has already been done in the particular field of research. 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.

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 surprising to find that this subject has been discussed often in the German literature. There is also a lively debate on the subject in France. 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, and it is therefore of interest to examine the case law from these

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38 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 ch. II.4.
40 See, e.g., I. Thoma, Die Europäisierung und die Vergemeinschaftung des nationalen ordre public (Tübingen, Mohr Siebeck 2007); M. Voltz, Menschenrechte und ordre public im Internationalen Privatrecht (Frankfurt am Main, Lang 2002).
41 See, e.g., supra n. 19.
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.43 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.44

4. Overview

After having set out the scope of this research in the introduction, the study will continue in Chapter II with a concise introduction to private international law. Its particularities will be dealt with here, including the importance of the different sources of private international law. This chapter will also provide a first foray into an important part of this research by examining the

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43 See with regard to the differences between the monist and dualist approaches, e.g., I. Brownlie, Principles of Public International Law (Oxford, Oxford University Press 2008), p. 31ff.
public policy exception, which is the traditional instrument used in private international law to deal with fundamental rights. Chapter III 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 Chapter IV an important preliminary question to this research 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 Chapter V the issue of jurisdiction in private international law will be dealt with. The issue of applicable law is the subject of Chapter VI. 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 Chapter VII the obligation to recognize and enforce foreign judgments, which may follow from the ECHR, will be examined. Chapter VIII will discuss the possibility to invoke one of the rights guaranteed in the ECHR against the recognition and enforcement of foreign judgments. Chapter VIII sets out the conclusions of the research.