The impact of the ECHR on private international law: An analysis of Strasbourg and selected national case law
Kiestra, L.R.

Citation for published version (APA):
Kiestra, L. R. (2013). The impact of the ECHR on private international law: An analysis of Strasbourg and selected national case law

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
II. Introduction to Private International Law

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.

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.45 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 2). Next, some of the goals of private international law will be examined (3). Thereafter, the sources of private international law will be discussed (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 (5).

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 Chapter I, it is this simple fact that is the raison d’être of private international law. Private international law is the area of law which 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 Chapter I 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 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. 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. In Switzerland one may, for example, find rules on (international) arbitration in the private international law statute. However these topics will not be included in this research.

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 is 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. 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. 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 research, the impact of the Court’s case law on issues of private international law will be examined in the first place. As has been noted in Chapter I, 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

48 See infra n. 82.
49 See supra ch. I.
51 See, e.g., Bogdan supra n. 50, at p. 85.
52 See supra ch. I.1.
international law rules. The peculiar nature of private international law rules is thus of little consequence for this research.

### 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.\(^{53}\) 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.\(^{54}\)

Another important objective of private international law is the international harmony of decisions.\(^{55}\) This classic goal of private international law was first introduced by Von Savigny.\(^{56}\) 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 which 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.\(^{57}\)

### 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

---

\(^{53}\) See, e.g., Dicey, Morris and Collins *supra* n. 45, at p. 4-5; Clarkson and Hill *supra* n. 45, at p. 9-12.

\(^{54}\) See, e.g., Dicey, Morris and Collins *supra* n. 45, at p. 5.

\(^{55}\) See, e.g., Clarkson and Hill *supra* n. 45, at p. 18-19.


\(^{57}\) Bogdan *supra* n. 50, at p. 49-70.
of private international law is becoming increasingly more important for this area of law.\textsuperscript{58} 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 (4.1). Many rules of private international law have traditionally also been concluded between different States and laid down in international or bilateral treaties (4.2). Finally, every State also has national legislation on private international law (4.3).

\textbf{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,\textsuperscript{59} 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.\textsuperscript{60} 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\textsuperscript{61} and the Rome Convention concerning applicable law.\textsuperscript{62} The Brussels Convention has, incidentally, been copied by the Lugano

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{58} See, e.g., H. Gaudemet-Tallon, ‘Le pluralisme en droit international privé: richesses et faiblesses,’ 312 \textit{Recueil des cours} (2005), p. 47.
  \item\textsuperscript{60} \textit{Treaty of Amsterdam}, \textit{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.
  \item\textsuperscript{61} The Brussels Convention on jurisdiction and the enforcement of foreign judgments in civil and commercial matters, 27 September 1968, \textit{OJ} 1998, C 27/1 (consolidated version following the accession of Austria, Finland, and Sweden).
  \item\textsuperscript{62} The Rome Convention on the law applicable to contractual obligations, \textit{OJ} 1998, C27/34 (consolidated version following the accession of Austria, Finland, and Sweden).
\end{itemize}
\end{footnotesize}
Convention, thus enlarging the number of States party to the Convention with some non EU-Member States. The disadvantage of merely co-operating 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.

With the entry into force of the afore-mentioned 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, both been transformed into EU instruments, and are now known respectively as the Brussels I Regulation and the Rome I Regulation. A number of complementary instruments to the Brussels I Regulation have been introduced, which basically deal with smaller, simple claims. The so-called Rome II Regulation has been introduced with regard to the law applicable to non-contractual obligations. The EU legislator has also delved into the area of family law with the Brussels II bis Regulation and the Rome III Regulation.

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

---

64 These States are the Member States to the European Free Trade Association: Iceland, Norway, and Switzerland. The Commission became so concerned that it even openly discussed sanctions for states which did not approve amendments. See the answer of Commissioner Monti to the European Parliament, OJ 1997, C83/85.
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.\textsuperscript{72} 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.\textsuperscript{73} 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.\textsuperscript{74}

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 co-operation and litigation, and international commercial law.\textsuperscript{75} It should be noted that the European Community decided to accede to the Hague Conference of Private International Law in 2006.\textsuperscript{76} In the field of international trade law and arbitration the United Nations (UN) is an important player.\textsuperscript{77}

\footnotesize
\textsuperscript{75} See for an overview of the conventions the website of the Hague Conference [www.hcch.net].
\textsuperscript{77} 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.
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.\(^{78}\)

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,\(^{79}\) while for the EU Member States, EU legislation is of particular importance. Nevertheless this has not stopped European countries from developing new codifications of private international law. This development started in Switzerland and many European countries have since followed suit.\(^{80}\)

In Switzerland, for example, private international law is governed by the Federal Law on Private International Law of 18 December 1987.\(^{81}\) This law regulates virtually all aspects of private international law in Switzerland.\(^{82}\) 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 Law.

---

78 See, e.g., art. 69-72 of the Brussels I Regulation (\textit{supra} n. 66). See with regard to the concurrence of international and bilateral treaties on private international law, e.g., Th.M. de Boer, ‘Samenloop van verdragen en verordeningen op het terrein van het internationaal familierecht’ [Concurrence of treaties and regulations in the area of international family law], 32 \textit{Familie en jeugdrecht} (2010), p. 308-315.


80 Switzerland’s codification came into force in 1987. See on the development of this law, e.g., F. Vischer, ‘Drafting National Legislation on the Conflict of Laws: the Swiss Experience’, 41 \textit{Law and Contemporary Problems} (1977), p. 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 \textit{supra} n. 47, at p. 19-21. The Netherlands has recently also codified a number of rules of private international law. See \textit{infra} n. 83. See generally on the codification of private international law K. Siehr, ‘General Problems of Private International Law in Modern Codifications – \textit{De Lege Lata and De Lege Europea Ferenda –}’, 7 \textit{Yearbook of Private International Law} (2005), p. 17-61.


82 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 (Ch. 2), marriage (3), children and adoption (4), guardianship (5), succession (6), property (7), intellectual property (8), obligations (9), corporations (10), international bankruptcy (11), and international arbitration (12).
Code. 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.

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. 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. Therefore, it deserves separate discussion here in this introduction to private international law. In the subsequent chapters the precise role of this instrument with regard to the impact of the rights guaranteed in the ECHR will also be further discussed.

When the application of a foreign law or the recognition or enforcement of a foreign judgment would result in a violation of the fundamental values of the forum, the public policy exception or ordre public will be invoked in order to set aside such a repugnant result. The public policy exception is present in virtually all systems of private international law and can be found in statutes, codes, and international conventions. It has even been referred to as a general principle

84 See, e.g., Dicey, Morris and Collins supra n. 45, at p. 10-11.
85 See infra ch. III-VIII.
87 See particularly infra ch. IV.4; IV.4.3.2; VI.3; VIII.2.3.
of international law by Judge Lauterpacht in his separate opinion in the *Boll* case.\(^{89}\) He opined that:

‘[I]n the sphere of private international law the exception of *ordre public*, of public policy, as a reason for the exclusion of foreign law in a particular case is generally – or, rather, universally – recognized. (...) On the whole, the result is the same in most countries – so much that the recognition of the part of *ordre public* must be regarded as a general principle of law in the field of private international law.’\(^{90}\)

This would indicate that the public policy exception may even be invoked in cases in which an international treaty is silent on the matter.\(^{91}\) However, this is not to say that the public policy exception cannot be consciously left out of a treaty. If a public policy exception has been deliberately omitted in an international treaty, it cannot be invoked.\(^{92}\) This, incidentally, leaves unanswered the question of whether it is possible to invoke one of the rights guaranteed in the ECHR in such a situation. This is essentially a question of the hierarchy between international instruments and will be discussed in relation to the ECHR in the next chapter.\(^{93}\)

The public policy exception is clearly the safety valve, or the escape hatch, of private international law. As was discussed above, private international law by its nature leaves room for judicial solutions which are alien to the forum. Such flexibility is necessary in order to regulate cross-border affairs efficiently and reasonably. However, this flexibility finds it limits in the public policy exception. The exact composition of the public policy exception – its content – is necessarily vague, as it comprises the fundamental values of the forum. This inevitable vagueness is exactly what some regard as a fundamental problem of public policy.\(^{94}\)

It should also be understood that public policy differs from country to country, as values differ from country to country. At the start of the 20\(^{th}\) century public policy was already being referred

\(^{89}\) International Court of Justice, Netherlands v. Sweden (Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants, Judgment of 28 November 1958), ICJ Rep. 55.

\(^{90}\) Separate Opinion of Judge Sir Hersch Lauterpacht in the *Boll* case, p. 92 (41) (*supra* n. 89).

\(^{91}\) Cf. Mills *supra* n. 88, at p. 201. See also HR 10 September 1999, *NJ* 2001, 41.

\(^{92}\) An (in)famous historical example of an international convention without a public policy exception is the 1902 Hague Convention relating to the settlement of the conflict of the laws concerning marriage. Instead of a general public policy exception, this convention contained a list of outlawed marriage impediments. However, racial impediments were not on the list, which became a problem in many countries party to this convention during the years leading up to World War II. Cf. Strikwerda *supra* n. 45. See also Bogdan *supra* n. 50, at p. 169-170.

\(^{93}\) See *infra* ch. III.3.

to as ‘the most evident principle of our science and at the same time the one which is the most difficult to define and to analyse.’\textsuperscript{95} In addition to national fundamental values, it has generally been accepted in most countries that human rights are part of the public policy exception. This means that in the Member States of the Council of Europe, the ECHR may be considered part of public policy, as will be further discussed in the subsequent chapters of this research.\textsuperscript{96}

Compared to the inherent vagueness of the content of public policy, the invocation and working of the exception is relatively clear. The public policy exception will be invoked if the result of the application of a foreign law or the recognition or enforcement of a foreign judgment would lead to an untenable result. It should be noted that the exception is thus invoked against the actual result of the application of the foreign law; it is not the foreign law in general that is tested, but rather the result of the application of that law. Public policy should be used only under exceptional circumstances, hence the frequent use of the expression of the public policy exception.\textsuperscript{97} It has generally been accepted that it should not be used every time that the application of a foreign law would lead to an undesirable result, but only in cases in which such application would lead to a truly unacceptable result. This cautious use of the public policy exception is, in international conventions, often emphasised by the insertion of the expression ‘manifestly incompatible’.\textsuperscript{98}

An important characteristic of the public policy exception is its relative character.\textsuperscript{99} This naturally stems from the goals of private international law, which include the respect for other legal cultures. This relative character is manifested by the fact that it is generally observed that the operation of the public policy exception is related to the proximity between the issue and the forum. If a case has little or no connection to the forum, the public policy exception cannot be invoked – with the exception of certain extreme cases, in which the applicable law is so


\textsuperscript{96} See further infra ch. VI.3.3.3.

\textsuperscript{97} Although some debate over this issue remains. See Dolinger \textit{supra} n. 95, at p. 289ff.

\textsuperscript{98} See, e.g., Article 16 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, \textit{OJ} 1998, C27/34. This is also a condition for the application of the public policy exceptions found in national legislation. See, e.g. Article 15 and 27 of the Swiss Private International Law Act.

\textsuperscript{99} See, e.g., Lagarde \textit{supra} n. 88, at p. 21ff.
fundamentally against the values of the forum that the application of that law would never be permitted in the forum. If a case has more connections or links with the forum, the threshold for the application of the public policy exception is lower. This thus entails that if a case has a closer connection to the forum, because, for example, the parties reside in the forum, then the public policy exception is more likely to be successfully invoked than in the event of the parties residing abroad. There are some differences of opinion as to the exact functioning of this relative character of the public policy exception – compare, for example, the German theory of *Binnenbeziehung* or *Inlandsbeziehung* and the French theory of the *effet atténué* of *ordre public* – but the general principle is widely accepted and its operation is not that different in practice.  

The afore-mentioned fundamental values of the forum, which would ensure that the public policy exception could be invoked regardless of the proximity of the case to the forum, are part of what has been dubbed the ‘iron core’ of public policy. 101 This idea has also found acceptance in other countries. 102 What this iron core exactly entails, though, is a matter for discussion. It has been argued that international, universal norms are being protected in this manner; this public policy has therefore also been referred to as ‘truly international public policy’. 103 This raises the question of whether human rights, and particularly the rights guaranteed in the ECHR, are also protected in this way, or, perhaps, whether only a number of rights guaranteed in the ECHR may be so protected. 104 Another important question, specifically with regard to how the relative character of the public policy exception relates to the protection of human rights and particularly

---


102 A. Bucher, Le couple en droit international privé (Bâle, Helbing & Lichtenhahn 2004), p. 18. See further also infra ch. VI.3.3.3.


104 See on the idea that not all the rights guaranteed in the ECHR may belong to a core that always needs protection also further infra ch. IV.4.2.
the basic obligation of the Contracting Parties under Article 1 ECHR, will be discussed in Chapter IV. Other aspects of the role of the public policy exception and the role of the rights guaranteed in the ECHR in this regard will naturally also be further discussed in this research.\textsuperscript{105}

\textsuperscript{105} See further ch. VI.3.3.3.