The impact of the ECHR on private international law: An analysis of Strasbourg and selected national case law
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V. Jurisdiction in Private International Law

1. Introduction

As was first noted in Chapter I, jurisdiction is one of the three main issues of private international law. It concerns the issue of which court has adjudicatory or judicial competence in a private law conflict between parties in international litigation. There are many different reasons for States to assert jurisdiction in international litigation. The starting point here is that States have ‘an inherent right and duty to dispense justice’. This is one of the basic functions of a State. However, it is not a given in international litigation that a State will assert jurisdiction. If the facts of a case have little or no connection to the forum, there is a good chance that a court will refuse to assert jurisdiction. The courts of any country would quickly become overwhelmed if they were to allow litigants from all over the world to initiate proceedings there, and costs would soar. Then again, States cannot become too economical in this regard, because of this ‘duty to dispense justice’.

There may also be more mundane reasons for a State to assert jurisdiction in international litigation. States may have an interest in attracting litigation in a particular field of law in order to develop legal rules and principles in that field of (international) law. A State might also want to open its courts to promote important policies, such as, for example, human rights. However, as mentioned above, opening up one’s courts to attract all sorts of litigation necessarily has its limits. In addition to practical issues, such as the capacity of courts and costs, there is also the danger in international litigation of concurrent litigation, which could ultimately lead to conflicting judgments in different countries. It is for the States to find some sort of balance with regard to the issue of jurisdiction in private international law.

Adjudication forms part of the exercise of State authority and States are bound by public international law in this exercise. However, as will be discussed further below, the standards

385 See also supra ch. II.
established in international law with regard to the issue of jurisdiction in private international law are somewhat vague and appear not to be very restrictive. The considerations concerning the assertion of jurisdiction in private international law mentioned so far are all given from the perspective of the State. Although these are important, they are not the only relevant considerations for the issue of jurisdiction in private international law. Private parties are, after all, still those seeking justice in matters of private international law and they have their own interests. This is where fundamental rights may come into play as a consideration in the exercise of jurisdiction in matters of private international law.

In this chapter the role of the ECHR with regard to the issue of jurisdiction in private international law will be examined. Before turning to the specific issue of the impact of the ECHR on jurisdiction in private international law, it is prudent to first elaborate on the notion of jurisdiction in private international law and the different rules of jurisdiction of States. The impact of public international law on the issue of jurisdiction in private international law will also be included here (in 2). The discussion of the notion of jurisdiction in private international law will be followed by a brief word on whether the ECHR can be applicable at all to the (non-) assertion of jurisdiction. If a court of one of the Contracting Parties finds that it does not have jurisdiction, is it even possible for a litigant to invoke the ECHR against such a decision (3)? Next, the heart of the matter will be discussed: what is the impact of the ECHR on the issue of jurisdiction in private international law? This broader question can be broken up into three separate parts (4 to 6). The first part concerns the impact of the right of access to a court, which can be derived from Article 6 (1) ECHR, on jurisdiction in private international law. This right can be invoked by a plaintiff in international litigation who would otherwise reasonably be left without a forum to seek justice. An important issue here is the extent of this right (4). However, Article 6 (1) ECHR can arguably also be invoked by a defendant. This could occur in the situation where a court exercises jurisdiction over a defendant on an exorbitant basis (5). A final area where Article 6 (1) ECHR may have an impact on jurisdiction in private international law is in strategic litigation, particularly to counter the abuse of procedural rights in international litigation (6).

388 See further infra V.2.2.
2. The Notion of Jurisdiction in Private International Law

In Chapter IV the various possible meanings of the notion of jurisdiction were discussed fairly extensively. Jurisdiction in private international law is concerned with the question of which court is competent to hear an international case. This is thus jurisdiction in the sense of adjudicatory jurisdiction. Adjudicatory, or judicial, jurisdiction in private international law deals with the conflict of jurisdictions. It should also be understood from the outset that jurisdiction in private international law is concerned with civil jurisdiction. Finally, it should be mentioned that adjudicatory jurisdiction is only concerned with the determination of which State may entertain an international case. Which court of the thus elected State subsequently claims jurisdiction is a matter of venue and is therefore an internal matter, and, in principle, not a concern of (private) international law.

The rules of adjudicatory jurisdiction in private international law are of a procedural nature. It is a preliminary issue that necessarily needs to be dealt with before a decision on the merits may be taken. This field of (private international) law is – taken together with the recognition and enforcement of foreign judgments – also referred to as international (civil) procedure or international procedural law. Although traditionally more attention has been paid to questions of choice of law in the literature on private international law, it should be pointed out that the outcome of international litigation often depends more on the choice of forum than on the choice of law.

2.1 Jurisdictional Rules and Grounds of Jurisdiction

Every country has its own rules on jurisdiction and is generally free to decide when to assert jurisdiction in issues of private international law. This simple fact has, as a result, that there can be both negative conflicts of jurisdiction, where no State is willing is to assert jurisdiction in international proceedings, and positive conflicts of jurisdiction, where more than one State is

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389 See supra ch. IV.
390 In some jurisdictions these two concepts are interwoven in the sense that the rules of venue also function as the rules of international jurisdiction.
willing to assert jurisdiction. States not only have national rules of jurisdiction,392 but can also be
party to international conventions in which jurisdictional rules are laid down.393 The EU Member
States are also bound by EU rules on jurisdiction in private international law, chief among them
the Brussels I Regulation394 on civil and commercial matters and the Brussels II bis Regulation
regarding family matters.395 The Brussels I Regulation is supplemented by the Lugano
Convention,396 which essentially extends the provisions of the former instrument to the European
Free Trade Association (EFTA) countries. I shall therefore refer below to the Brussels (/ Lugano)
regime. The Brussels I Regulation distributes jurisdiction between the different EU Member
States, which means that if the instrument is applicable, there will always be at least one Member
State with jurisdiction.397 However, as the Regulation is by and large only applicable to
defendants domiciled in the EU, this brings disadvantages to parties from outside the EU.398 In
the recast of the Regulation this will partly change.399 In the recast it is provided that national
rules of jurisdiction may no longer be applied by the Member States to consumers and
employees domiciled in third countries. Uniform rules of jurisdiction will also apply to parties
domiciled outside the EU, where the (courts of) Member States have exclusive jurisdiction based
on the new Regulation. This also applies in the event that the courts of Member States have
jurisdiction based on an agreement between the parties.

Various grounds of jurisdiction are employed by States all over the world to assert jurisdiction in
matters of private international law. This has to do with the fact that private international law is

392 See with regard to the sources of private international law generally supra ch. II.
393 An example would be the Hague Convention of 30 June 2005 on Choice of Court Agreements, which after long
negotiations has finally been agreed upon, although it has yet to enter into force. See [www.hcch.net]. See further,
e.g., P. Beaumont, ‘Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and
394 Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in
Civil and Commercial Matters, OJ 2001, L12/1. (Brussels I-Regulation). The Regulation replaces the 1968 Brussels
The consolidated version can be found in OJ 1998, C 27/1.
395 Council Regulation (EC) No. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of
396 Council Decision 2007/712/EC on the Signing on behalf of the Community, of the Convention on Jurisdiction
398 See in this regard infra V.5.2.
399 (2010) 0383 (COD) PE-CONS 56/12.
concerned with different underlying subjects of private law. What might be an appropriate connecting factor for the assumption of jurisdiction in a tort case is not necessarily reasonable in a family law matter. Bases of jurisdiction which are considered balanced with regard to one subject may be considered exorbitant as to another.

One could say that there are basically two bases of jurisdiction which are nearly always considered to be reasonable, regardless of the underlying subject matter. One is the head of jurisdiction based on the principle of *actor sequitor forum rei*. This is also the general rule of jurisdiction in the Brussels I Regulation. Even though this ground of jurisdiction is generally accepted, there are plenty of exceptions to this rule. The other almost universally accepted ground of jurisdiction is jurisdiction based on the consent of the parties. This consent may either be stated expressly by means of a jurisdiction agreement or implicitly by the parties by not questioning the jurisdiction of a court. The vast majority of legal systems in the world have recognized the autonomy of parties to agree on which court will decide their disputes. Other bases of jurisdiction are not generally accepted and would thus need to be assessed on a case by case basis in order to determine whether they are balanced.

### 2.1.1 Exorbitant bases of jurisdiction

There is also a category of bases of jurisdiction which have been deemed exorbitant. These have also been dubbed ‘jurisdictionally improper fora’. Exorbitant jurisdiction has been described as jurisdiction lacking ‘reasonableness’. In asserting jurisdiction, the interests of a State’s own nationals or residents are of paramount importance, while the interests of other parties appear to have received little consideration. A list of national rules of jurisdiction which are considered to be exorbitant can be found in the Brussels I Regulation. These shall not be applicable against

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401 See art. 2 of the Brussels I Regulation supra n. 394.


404 Fernández Arroyo supra n. 400, at p. 170.

persons domiciled in other EU Member States. The list includes – among other things – grounds of jurisdiction based on the nationality of the plaintiff and jurisdiction based on the temporary presence in the country (the English tag jurisdiction).

2.2 The Impact of Public International Law on Jurisdiction in Private International Law

It is useful to examine whether public international law provides rules which limit the adjudicatory jurisdiction of national courts in private international law. This is particularly so because there are some restrictions to the exercise of jurisdiction in private international law which may be derived from Article 6 (1) ECHR, which have, however, also been presented as being restrictions following from public international law. If these restrictions were indeed to follow from public international law, the possible meaning of Article 6 (1) ECHR would be reduced in this regard. It is clear that as States are supposed to act in accordance with international law, the exercise of adjudicatory jurisdiction should be consistent with the principles of public international law. However, what the possible limits of public international law to the exercise of adjudicatory jurisdiction in private international law then exactly entail is a separate issue.

It has been argued that there are no rules of customary international law that limit the exercise of adjudicatory jurisdiction in private international law, except for rules on sovereign, diplomatic, and other immunities, while States which deny foreigners the right of access to their courts may be guilty of denial of justice. One could thus state that there are two important strands of the possible impact of public international law on jurisdiction in private international law. There is, first, the question of whether there are rules of public international law (other than immunities) which limit the ability of States to assert jurisdiction in private international law.

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406 See art. 3(2) (and Annex I) of the Brussels I Regulation supra n. 394.
407 See Annex I to the Brussels I Regulation supra n. 394.
408 These restrictions, which may follow from Article 6 (1) ECHR, will be discussed infra V.4 and V.5.
409 The limitations following immunities are well established, and will henceforth not be further discussed. See with regard to immunities in public international law, e.g., the recent case of the ICJ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), 3 February 2012. See with regard to this case, e.g., B. Hess, ‘Staatenimmunität und ius cogens im geltenden Völkerrecht: der international Gerichtshof zeigt die Grenze auf’ [Immunities of the State and ius cogens in current public international law: the ICJ illustrates the boundaries], 32 IPRax (2012), p. 201-206.
The second strand entails the meaning of the doctrine of denial of justice. These two limitations will be discussed below.

2.2.1 The Impact of Public International Law on the Assertion of Jurisdiction in Private International Law

The main evidence for the limited impact of public international law on the exercise of adjudicatory jurisdiction in private international law is the fact that the bases of jurisdiction in civil matters are more wide-ranging compared to bases of criminal jurisdiction, but protests by other States against these bases are virtually non-existent.\footnote{See Akehurst\textit{ supra} n. 410, at p. 177. Cf. M.N. Shaw, \textit{International Law} (Cambridge, Cambridge University Press 2008), p. 651-652.} However, others have contended that ‘there is in principle no great difference between the problems created by the assertion of civil and criminal jurisdiction over aliens.’\footnote{I. Brownlie, \textit{Principles of public international law} (Oxford, Oxford University Press) 2008, p. 300.} It has been held that it is the function of international law to prescribe the limits within which a State may claim jurisdiction in private international law and the fundamental question that needs answering in a given case is whether, on the relevant facts, there is a sufficiently close connection between the facts and the legal system called upon to adjudicate the matter.\footnote{F.A. Mann, ‘The Doctrine of International Jurisdiction Revisited after Twenty Years,’ 186 \textit{Recueil des cours} (1984), p. 28. Cf. F.A. Mann, ‘The Doctrine of Jurisdiction in International Law,’ 111 \textit{Recueil des cours} (1964), p. 44-47 and (on civil jurisdiction) p. 73ff. But see F. Matscher, ‘Etude des règles de compétence judiciaire dans certaines conventions internationales,’ 161 \textit{Recueil des Cours} (1978-III), p. 157 (in reaction to Mann’s work of 1964.)} Many have argued that public international law prescribes that there should be a genuine link or close connection between the facts of a case and the court called upon to decide that case.\footnote{See, e.g., F.A. Mann 1984 \textit{supra} n. 413; K.M. Meessen, ‘International Law Limitations on State Jurisdiction,’ in: C.J. Olmstead, ed., \textit{Extra-Territorial Application of Laws and Responses Thereto} (Oxford, ESC Publishing 1984), p. 38-44.} This ‘rule’ has also been dubbed the ‘proximity’ rule or the ‘significant connection’ rule.\footnote{C. Kessedjian, ‘International Jurisdiction and Foreign Judgments in Civil and Commercial Matters,’ Preliminary Document No 7 of April 1997 for the attention of the Special Commission of June 1997 on the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters, p. 23, \<www.hcch.net/index_en.php?act=conventions.publications&did=35&cid=98>, visited November 2012.} In this regard it has also been held that ‘the suggestion that the exercise of jurisdiction in civil matters, however exorbitant, can never be contrary to customary international law is both implausible and unattractive.’\footnote{J. Hill, ‘The Exercise of Jurisdiction in Private International Law’, in P. Capps, et al., eds., \textit{Asserting Jurisdiction. International and European Legal Perspectives} (Portland, Hart Publishing 2003), p. 43.} Many have thus argued that public international law requires a significant connection between the facts of the case and the
court asserting jurisdiction. However, not much evidence is cited in favor of the existence of such a rule.

The only relevant case of the Permanent Court of International Justice (the predecessor of the International Court of Justice) with regard to the assertion of jurisdiction, the *Lotus* case,\(^{417}\) did not concern civil jurisdiction, but criminal jurisdiction. Nonetheless, it should be noted that this is quite a controversial case that has been much criticized for a variety of reasons.\(^{418}\) It is also difficult to find an *opinio iuris* and state practice with regard to this significant connection rule, as many States still have legislation – national rules on jurisdiction – allowing them to claim jurisdiction in civil cases in which the link between the facts and the court is at best flimsy. One only needs to refer to the afore-mentioned exorbitant bases of jurisdiction.\(^{419}\) State protests in this field are nevertheless rare.\(^{420}\) They are, in issues of private international law, mostly limited to the regulation of international economic activity by way of giving laws extra-territorial reach in response to foreign conduct producing effects within the forum.\(^{421}\) The exercise of extra-territorial jurisdiction has led to several disputes between the United States and the EU resulting in State protests and counter-measures.\(^{422}\) One should, however, note that jurisdiction exercised in this sense concerns mostly prescriptive or legislative jurisdiction, although admittedly the demarcation between adjudicatory and prescriptive jurisdiction is not always clear.

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\(^{417}\) See PCIJ, 7 September 1927, Series A No. 10 (*Lotus*).


\(^{419}\) See supra V.2.1.1.

\(^{420}\) Cf. N. Joubert, *La notion de liens suffisants avec l’ordre juridique* (Inlandsbeziehung) *en droit international privé* (Paris, LexisNexis Litem 2007), p. 23-27, who appears to acknowledge this and concludes that public international law has only a limited role with regard to private international law, but who also points out that the increased attention for the importance of significant links may call into question this limited role. See in this regard also P. de Vareilles-Sommières, *La compétence international de l’état en matière de droit privé: droit international public et droit international privé* (Paris, LGDJ 1997).


Another argument often made in favor of the existence of public international law limitations on adjudicatory jurisdiction in private international law is the fact that judgments based on an exorbitant ground of jurisdiction are often not recognized or enforced by other States.\textsuperscript{423} Thus one could argue that while States may not formally protest against judgments based on exorbitant grounds of jurisdiction, they do so implicitly by the refusal to recognize or enforce such judgments. It is questionable whether one may regard this as state practice in a public international law sense and that one could therefore consider this to be a public international law limitation to adjudicatory jurisdiction in private international law. Can one really equate the refusal to recognize and enforce foreign judgments based on exorbitant grounds of jurisdiction in private international law issues to state protest against the assertion of jurisdiction? This would entail a very indirect form of state protest.

However, in practice this question lacks urgency. Regardless of whether this is a limitation derived from public international law, it should be clear that this is, in fact, an important consideration for States and their courts in deciding whether it is prudent in a certain case to claim jurisdiction.\textsuperscript{424} It is usually of little use to any party in an international situation to obtain a judgment that cannot be enforced in another country. In fact, it could easily be argued that the assertion of international jurisdiction by a State can only be effective if other States are willing to co-operate or are at least willing to refrain from thwarting the adjudicatory action.\textsuperscript{425} Thus, it could be said that the internationally widespread practice of refusing to recognize or enforce foreign judgments based on a questionable ground for jurisdiction serves as a limitation for asserting adjudicatory jurisdiction in private international law.

In conclusion, one may state that the impact of public international law on the issue of adjudicatory jurisdiction appears to be limited, despite many authors claiming the opposite. There is little case law from international courts which gives us something to hold on to regarding the issue of adjudicatory jurisdiction in private international law. One may derive from


\textsuperscript{424} An example of a national court being attentive to the question of whether the judgment will be recognized abroad is Gerechtshof ’s-Gravenhage, 21 December 2005. This case will be discussed in detail infra n. 565.

the fact that States assume jurisdiction in cross-border civil matters where neither the facts nor
the parties have a significant connection with the forum, and the fact that this leads to few state
protests, that public international law offers limited restrictions to the assertion of adjudicatory
jurisdiction in civil cases. However, if a State assumes jurisdiction under such circumstances,
chances are that any judgment following from this will not be recognized or enforced in foreign
countries. This is, of course, a serious limitation to the assumption of adjudicatory jurisdiction,
but is it questionable whether this is a limitation which can be derived from public international
law.

2.2.2 Denial of Justice

The doctrine of denial of justice has long been a part of public international law.426 The exact
meaning of the doctrine has long been discussed, but remains somewhat unclear.427 The doctrine
is generally regarded as a bar to a State’s (non)-assertion of jurisdiction under international law,
and although its exact content is not clearly defined, it is generally thought to pertain only to
gross or manifest instances of injustices.428 As such, its connotation with the issue of the right of
access to a court should be clear.429 What gross or manifest injustices exactly entail, though, is
not clear. As will become apparent from the discussion below on the right of access to court, the
problem with the doctrine of denial of justice is similar to some of the problems associated with
the right of access ex Article 6 (1) ECHR in private international law.430 It is, as such, in my
opinion, questionable whether, due to its vagueness, the doctrine of denial of justice can claim an
independent role separate from Article 6 (1) ECHR with regard to the right of access to a court in
private international law.

Law,’ 14 Canadian Yearbook of International Law (1976), p. 73-95; C. Focarelli, ‘Denial of Justice,’ in: R.
Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Oxford University Press 2008-, online
edition, [www.mpepil.com], visited April 2012; J. Paulsson, Denial of Justice in International Law (Cambridge,
University Press 2007). See with regard to the doctrine in private international law: L. Corbion, Le déni de justice en
428 See, e.g., Kessedjian supra n. 415, at p. 22; Cf. Focarelli supra n. 427, at no. 13.
429 The Court in Golder v. the United Kingdom also expressly referred to a ‘denial of justice’. See infra V.4.1.1.
430 See infra V.4.
3. The Applicability of the ECHR to Disputes concerning Jurisdiction in Private International Law

Before turning to the impact of the ECHR on jurisdiction in private international law, it is first necessary to further elaborate on the question of whether the ECHR can be applicable at all to this issue. This question has been considered in more general terms in Chapter IV. Here, the question of whether the ECHR can be applicable at all to the issue of jurisdiction in private international law will particularly be dealt with in relation to the impact of the right of access to court. As will be demonstrated below, Article 6 (1) ECHR – the right to a fair hearing – also entails the notion of the right of access to a court.

It is easy to see how this right could impact upon the question of which national court is competent to hear an international case. However, if a court of one of the Contracting Parties finds that it has no jurisdiction to hear a case on the basis of its jurisdictional rules, is it then possible for a plaintiff habitually residing in another country to invoke one of the rights guaranteed in the ECHR? In particular, this question may arise with regard to a plaintiff habitually residing in a third country, i.e. a non-Contracting Party. Would there then be a responsibility for a Contracting Party to uphold the right of access to a court derived from the ECHR? One could argue that this instrument only applies if a Contracting Party has jurisdiction to hear the case. If a court has no jurisdiction in the private international law sense, how could it be expected to guarantee the rights contained in the ECHR?

Although this argument may appear to be sound, it is not. The authorities of the Contracting Parties are obligated to secure to everyone within their jurisdiction the rights and freedoms guaranteed in the ECHR, as Article 1 ECHR prescribes. If a litigant of another Contracting Party or a third country brings proceedings before a court of one of the Contracting Parties, the decision of that court to either assert jurisdiction or not, based on the forum’s jurisdictional rules, has to be in line with the ECHR. The moment the foreign litigant brings proceedings in a court of

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431 See supra ch. IV.
432 See with regard to this issue also E. Guinchard, ‘Procès Équitable (Article 6 CESDH) et Droit International Privé’, in: A. Nuyts and N. Watté, eds., International Civil Litigation in Europe and Relations with Third States (Brussels, Bruylant 2005), p. 204ff.
433 See infra V.4.1.
434 See further supra ch. IV.
one of the Contracting Parties, he or she is within the jurisdiction of that Contracting Party in the sense of Article 1 ECHR. The jurisdictional rules of the forum cannot limit the applicability of the ECHR in this regard. If this were different, the right of access to a court would become meaningless.

The Court seemingly confirmed this stance in *Markovic and Others v. Italy*. This case was largely concerned with the same event that formed the background to the Court’s decision in *Banković and Others v. Belgium and Others*, i.e. the airstrike carried out by NATO forces on a building in Belgrade, Serbia. The applicants in *Markovic* were all citizens of Serbia and Montenegro (not a Contracting Party at the time) who had initiated civil proceedings for damages in Italy against Italy on behalf of relatives who had died in the afore-mentioned attack. However, the Italian courts held that they had no jurisdiction to hear the case, as – in short – the impugned acts, acts of war, were not open to judicial review. In this case a number of interesting issues relating to both Article 1 and Article 6 ECHR were raised. One was whether the applicants came within the jurisdiction of Italy within the meaning of Article 1 ECHR. The Court held on this issue that while the extra-territorial nature of the events which allegedly underlay the applicants’ action for damages may have an impact on the applicability of Article 6 ECHR and the outcome of the proceedings, it is beyond dispute that this does not affect the jurisdiction *ratione loci* and *ratione personae* of the respondent State. The Court came to the following conclusion, which would appear to leave little doubt:

‘If civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6 [ECHR]. The Court considers that, once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a “jurisdictional link” for the purposes of Article 1 [ECHR].’

This, of course, does not mean that courts of Contracting Parties would have to assert jurisdiction in the private international law sense in all cases. As will be further discussed below, Article 6 (1) ECHR, the right of access to a court, requires regulation by the State and is therefore

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436 *Markovic and Others v. Italy* [GC], no. 1398/03, ECHR 2006-XIV.
437 *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XI.
438 See with regard to this case also *supra* ch. IV.
439 *Markovic and Others v. Italy* [GC], no. 1398/03, par. 54, ECHR 2006-XIV.
inherently limited. Such limitations may be allowed under Article 6 (1) ECHR. However, such limitations to the right of access to a court are derived from Article 6 (1) ECHR. The (courts of the) Contracting Parties cannot simply dismiss the invocation of Article 6 (1) ECHR in this regard by finding that they have no jurisdiction in the private international law sense and by concluding that the ECHR therefore does not apply.

4. The Right of Access to a Court in Private International Law

Having sketched the background of the notion of jurisdiction in private international law, it is now time to turn to the core of this chapter, the impact of the ECHR on jurisdiction in private international law cases. The author submits that this is by and large limited to the impact of its Article 6 (1) ECHR, which guarantees the right to a fair trial. Three different manners in which this Article could have an impact on the issue of jurisdiction in private international law will be distinguished in this chapter. The first one is concerned with the right of a plaintiff to have access to a court.\textsuperscript{440} As will be demonstrated below, the right of access to a court has been derived by the Court from Article 6 (1) ECHR. This right will be examined in this section.

The examination of the right of access will start with an overview of the general case law of the Strasbourg Institutions regarding this right. It will be shown that the right of access to a court is not absolute. The overview of the Court’s case law will thus continue with a discussion of some important limitations to this right, which could also have an impact on jurisdiction in private international law (4.1). This general overview will be concluded with a discussion of the most relevant decisions concerning the right of access to a court in private international law, particularly the Commission’s decision in \textit{Gauthier v. Belgium}\textsuperscript{441} (4.2). A further analysis of the meaning of the right of access to a court for jurisdiction in private international law will follow. In this section the most important aspects of the right of access to a court will be further examined, whereby developments in the case law of national courts will also be analysed (4.3). Thereafter, it will be observed that the right of access may also be engaged if this right is

\textsuperscript{440} It should, incidentally, be clear from the outset that the right of access to a court \textit{ex} Article 6 (1) ECHR, or any other right guaranteed in the ECHR, does not entail a ground of universal civil jurisdiction for bringing claims concerning violations of the ECHR. See also supra ch. I.

\textsuperscript{441} \textit{Gauthier v. Belgium} (dec.), no. 12603/86, 6 March 1989.
restricted because of procedural bars (4.4). Finally, in order for the right of access to be effective, Contracting Parties may have to provide legal aid to (foreign) plaintiffs (4.5).

4.1. General Overview of the Right of Access to a Court in the Case Law of the Strasbourg Institutions

Article 6 (1) ECHR does not explicitly guarantee the right of access to a court, as it merely guarantees that ‘[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ However, in an early case, Golder v. the United Kingdom,442 the Court in Strasbourg made clear that the right of access to a court should also be understood to be part of the right to a fair trial.

This case concerned a detainee in an English prison whose right of access to a court was effectively barred by the decision of the Home Secretary to deny him leave to consult a solicitor. The Court recognized that ‘[t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognized fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 (1) [ECHR] must be read in light of these principles.’443 Moreover, there would be no point in describing in detail the procedural guarantees that parties enjoy without first protecting ‘that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.’444

In principle, a litigant may thus derive a right of access to a court from Article 6 (1) ECHR. Although Golder does not concern an issue of private international law, there is no reason to assume that this right of access to a court would not apply in such cases. Article 6 (1) ECHR after all applies to the determination of ‘civil rights and obligations’, which would appear to cover all issues with which private international law is concerned.445 The Court has held that the

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442 Golder v. the United Kingdom, 21 February 1975, Series A no. 18.
443 Golder v. the United Kingdom, 21 February 1975, par. 35, Series A no. 18.
444 Id.
445 It should be noted that the determination of ‘civil rights and obligations’ is not confined to relationships between private persons. In König v. Germany, 28 June 1978, par. 89-90, Series A no. 27, the Court held that in establishing
rights and obligations of private parties, such as, for example, matters of contract law, commercial law, tort law, family law, and employment law always concern civil rights and obligations. The Court has noted that this right of access to a court only extends to disputes over civil rights and obligations, which could at least on arguable grounds be recognized in domestic law, as Article 6 (1) ECHR ‘does not in itself guarantee any particular content for (civil) “rights and obligations” in the substantive law of the Contracting States.’ Article 6 (1) thus does not create a right of access to a court where the substantive right sought is not recognized under the domestic law, as Article 6 (1) ECHR does not in itself guarantee any particular content of the civil rights and obligations of the substantive laws of the Contracting Parties. One should note that this may give rise to a particular issue in private international law cases, as the substantive law in such a case – the applicable law – may very well be a foreign law.

The Court has found that the right of access to a court should not only exist in theory, but that it should also be effective. Merely having the opportunity to go to court with a civil claim does not suffice if the court in question will not decide on the merits. This effective right of access to a court also entails that the law regulating this access should not be so unclear or complex that it would result in legal uncertainty. The effective right of access may, under certain circumstances, also imply that if a litigant lacking in funds wishes to bring proceedings of a

whether a dispute concerns the determination of a civil right the character of the right was all that mattered. In H. v. France, 24 October 1989, Series A no. 162-A, the Court held that if the outcome of the case is conclusive for private law rights and obligations, then Article 6 (1) ECHR applies. See, e.g., Ringeisen v. Austria, 16 July 1971, Series A no. 13. See, e.g., Edificaciones March Gallego S.A. v. Spain, 19 February 1998, Reports of Judgments and Decisions 1998-I. See, e.g., Axen v. Germany, 8 December 1983, Series A no. 72. See, e.g., Rasmussen v. Denmark, 28 November 1984, Series A no. 87. This also includes family law issues, which have a public law character in the sense that the authorities are involved in, e.g., parental access to children, adoption, and fostering. See respectively P., C. and S. v. the United Kingdom, no. 56547/00, ECHR 2002-VI; Keegan v. Ireland, 26 May 1994, Series A no. 290; Eriksson v. Sweden, 22 June 1989, Series A no. 156. See, e.g., Buchholz v. Germany, 6 May 1981, Series A no. 42. See, e.g., James and Others v. the United Kingdom, judgment of 21 February 1986, par. 81, Series A no. 98 and Powell and Rayner v. the United Kingdom, judgment of 21 February 1990, par. 36, Series A no. 172. See, e.g., Fayed v. the United Kingdom, 21 September 1994, par. 65, Series A no. 294-B. See, e.g., Airey v. Ireland, 9 October 1979, Series A no. 32; Kutić v. Croatia, no. 48778/99, ECHR 2002-II; and Multiplex v. Croatia, no. 58112/00, 10 July 2003. See, e.g., Kutić v. Croatia, no. 48778/99, ECHR 2002-II and Multiplex v. Croatia, no. 58112/00, 10 July 2003. However, the extent of the right in international proceedings would appear to be more limited. See infra V.4.1.4.4. De Geouffre de la Pradelle v. France, 16 December 1992, par. 33-34, Series A no. 253-B.
complex nature which could not reasonably be successful without legal aid, there could be an 
obligation upon the State to provide such assistance if this is ‘indispensable for an effective 
access to court.’\textsuperscript{456} Whether or not legal aid is necessary for a fair trial depends on the 
circumstances of the case,\textsuperscript{457} such as what would be at stake for the litigants, the complexities of 
the case, and the ability of the litigants to represent themselves.\textsuperscript{458}

The Court in \textit{Golder} held not only that access to a court is inherent to the right to a fair trial, but 
also noted that this right is not absolute.\textsuperscript{459} As the right to a court by its very nature calls for 
regulation by the State, it may be subject to limitations. This presumably also applies to the right 
of access to a court in private international law. The Contracting Parties enjoy a certain margin 
of appreciation with regard to this regulation.\textsuperscript{460} However, such limitations should not rob the 
right of its meaning and as such the very essence of the right should not be impaired.\textsuperscript{461} The right 
of access must not only be theoretical, but also effective.\textsuperscript{462}

The Court has held that a limitation to the right of access is only compatible with Article 6 (1) 
ECHR if the restriction pursues a legitimate aim and there is a reasonable relationship of 
proportionality between the means employed and the legitimate aim sought to be achieved.\textsuperscript{463} 
One may note in this regard that these conditions are very similar to the system of restrictions in 
Articles 8 to 11 ECHR,\textsuperscript{464} except for the fact that the requirement of ‘prescribed by law’ is not

\textsuperscript{456} \textit{Airey v. Ireland}, 9 October 1979, par. 26, Series A no. 32.
\textsuperscript{457} \textit{Steel and Morris v. the United Kingdom}, no. 68416/01, par. 61, ECHR 2005-II. This case concerned two 
environmentalists who were sued for libel by McDonalds. As they defended their right to freedom of expression and 
had been sued for a huge sum of money, and the case itself was also quite complex, the Court found that Article 6 
(1) ECHR applied.
\textsuperscript{458} See with regard to the latter, e.g., \textit{McVicar v. the United Kingdom}, no. 46311/99, ECHR 2002-III, in which the 
applicant was deemed to be able to do without legal representation as a defendant in libel proceedings.
\textsuperscript{459} \textit{Golder v. the United Kingdom}, 21 February 1975, par. 38, Series A no. 18.
\textsuperscript{460} See with regard to this notion \textit{supra} ch. III.5.2.
\textsuperscript{461} See, e.g., \textit{Ashingdane v. the United Kingdom}, 28 May 1985, par. 59, Series A no. 93.
\textsuperscript{462} See \textit{supra} n. 453.
\textsuperscript{463} See e.g, \textit{Timnelli & Sons Ltd and Others and McElduff and Others v. the United Kingdom}, 10 July 
1998, par. 72, \textit{Reports of Judgments and Decisions} 1998-IV. See for an overview of the Court’s case law in this 
regard also \textit{Fayed v. the United Kingdom}, 21 September 1994, par. 68-83, Series A no. 294-B.
\textsuperscript{464} See the Concurring Opinion of Judge Martens in \textit{De Geouffre de la Pradelle v. France}, 16 December 1992, 
Series A no. 253-B, in which he argued that the test should be similar. In \textit{Fayed v. the United Kingdom}, 21 
September 1994, Series A no. 294-B, par. 67, the Court indeed appears to tie these conditions concerning Article 6 
(1) ECHR to the restrictions it had formulated in \textit{Handyside v. the United Kingdom}, 7 December 1976, Series A no. 
24, par. 41 regarding Article 8 (2) ECHR. See with regard to the restrictions contained in Articles 8-11 (2) also 
\textit{supra} ch. III.5.1.2.
cited by the Court. Examples of a legitimate aim accepted by the Court include the good
administration of justice,\(^\text{465}\) restrictions aimed at preventing the judiciary from overflowing,\(^\text{466}\) and international relations, which may require the granting of State immunity.\(^\text{467}\)

The Court has further expanded on what kind of, and under what circumstances, restrictions to
the right of access are permissible. Although most of the cases cited below do not specifically
entail issues of the right of access to a court in private international law, one may assume that
that the framework established by the Court in its case law concerning the right of access to a
court is also relevant for cases concerning jurisdiction in private international law and the
plaintiff’s right of access to a court, even though the exact scope of the right in cross-border
cases has to be further examined.

The Court has found that the right of access to a court is impaired when the rules regarding
access no longer serve the aims of legal certainty and the sound administration of justice, but
rather become an obstacle to the litigant who attempts to have his or her case heard before the
competent court.\(^\text{468}\) In many cases the restrictions in accessing a court are of a financial nature.
The principle of proportionality has an important role in this regard. If, in determining the exact
amount of the security that needs to be deposited, a court fails to take into account the fact that
the appellant has no financial means, this would essentially deprive him or her of their right of
access to a court.\(^\text{469}\) A similar line of reasoning applies to court fees, which are not ruled out
entirely by the Court, but which should be proportionate.\(^\text{470}\)

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\(^{465}\) Tolstoy Miloslavsky v. the United Kingdom, 13 July 1995, par. 61, Series A no. 316-B. It is interesting to note
that the good – or sound – administration of justice is one of the principles underlying the system of jurisdiction
of the Brussels I Regulation. See J.A. Pontier and E. Burg, EU Principles on Jurisdiction and Recognition and
Enforcement of Judgments in Civil and Commercial Matters according to the case law of the European Court of

\(^{466}\) Brualla Gómez de la Torre v. Spain, 19 December 1997, par. 36, Reports of Judgments and
Decisions (excerpts).

\(^{467}\) See, e.g., Al-Adsani v. the United Kingdom [GC], no. 35763/97, par. 54, ECHR 2001-XI. It will be recalled that
immunities are not covered in this research. See supra ch. I.

\(^{468}\) Kart v. Turkey [GC], no. 8917/05, par. 79, ECHR 2009 (excerpts).

\(^{469}\) See Aït-Mouhoub v. France, 28 October 1998, par. 57-61, Reports of Judgments and
Decisions 1998-VIII. Cf. X v. Sweden (dec.), no. 7973, 28 February 1979, in which the Commission examined the complaint of a Pakistani
citizen who ran a carpet business and resided at the time of lodging the application in Sweden. The applicant
instituted court proceedings against his bank in Sweden. The defendant bank requested the applicant to provide
security for costs on the basis of the relevant Swedish law, which provided at the time that any alien, regardless of
whether he lived in Sweden, could be asked to furnish security. The applicant declared himself unable to do so,
which normally would have resulted in a rejection of the action. However, the bank withdrew its request and the
The Court has on occasion held that a restriction on the right of access to a court based on the nature of the litigant may have a legitimate aim. Here one could think of restrictions of access to children and mentally ill people. However, even though certain limitations to access may be permitted, a total lack of access is not. The non-recognition of legal personality may also lead to a violation of the right of access to a court, as the Court held in *Canea Catholic Church v. Greece*, in which the domestic courts denied the church legal personality.

4.2 The Right of Access in Private International Law in the Strasbourg Case Law

As has been indicated above, there appears to be only one case in which the Strasbourg Institutions have specifically examined an issue relating to the right of access to a court and the issue of jurisdiction in private international law. *Gauthier v. Belgium* concerned a Belgian pilot, who worked for Air Zaire until he received a letter notifying him that he would be let go for economic reasons. The pilot brought proceedings against Air Zaire before the court in Brussels, Belgium. Air Zaire contended that the Belgian court had no jurisdiction, relying on the employment contract of the pilot which contained a jurisdiction clause favoring Léopoldville (now Kinshasa), the capital of Zaire (not a Contracting Party). In the first instance, the court set aside the jurisdiction clause, stating that it did not apply to the proceedings. Air Zaire appealed. On appeal the Belgian pilot argued that the Belgian court had to reject the jurisdiction clause, because it pointed to a country with a judicial structure which would not necessarily guarantee the impartiality of the judiciary and the right to a fair trial. This argument was rejected by the Belgian court, which found that it was not for the court to assess the justice system of a foreign state, or to replace a jurisdiction clause freely entered into by the parties.

Before the Commission in Strasbourg the Belgian pilot relied, *inter alia*, on Article 6 (1) ECHR, arguing that the Belgian courts, by finding that they lacked jurisdiction, had violated that provision. He argued that the declination of jurisdiction would lead to him being forced to turn to parties reached an agreement. The applicant’s complaint against the relevant Swedish law *in abstracto* was thereafter dismissed by the Commission. See also *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, par. 61, Series A no. 316-B.

470 See *Kreuz v. Poland*, no. 28249/95, par. 61-67, ECHR 2001-VI.
471 See *Winterwerp v. the Netherlands*, 24 October 1979, par. 75, Series A no. 33.
a court of a third country where the proceedings would not meet the guarantees of Article 6 (1) ECHR. The Commission, however, noted that the lack of jurisdiction was not the result of a unilateral decision by Belgium, but rather a jurisdiction clause into which the pilot had entered. It considered that neither Article 6 (1) ECHR – nor any other provision of the ECHR – prohibits the inclusion of such clauses. The Commission could not assume that in accepting the obligations of Article 6 (1) ECHR the Contracting Parties have the obligation to prevent persons within their jurisdictions from entering into jurisdiction clauses.

An interesting argument with regard to the right of access to a court and jurisdiction in private international law is brought up in this case. Is it possible for a plaintiff to invoke the right of access to a court ex Article 6 (1) ECHR in a situation where there is an alternative forum available in a third country where it is alleged that the proceedings would not meet the standards of Article 6 ECHR? Unfortunately the Commission did not really examine this issue here. Instead, the Commission focused on the fact that the parties had agreed upon a jurisdiction clause. Although one may not agree entirely with the reasoning employed by the Commission – one could question whether this case really came down to the obligation of Contracting Parties to prevent litigants from entering into jurisdiction clauses, or the applicability of Article 6 (1) ECHR to such clauses – the outcome of the case is not unreasonable. If a plaintiff agrees to a jurisdiction clause selecting a certain jurisdiction, it stands to reason that this plaintiff cannot subsequently object to this jurisdiction based on the argument that one is unlikely to receive a fair trial there – provided that the parties freely entered into the agreement and that the circumstances in the chosen jurisdiction do not radically change afterwards.474 In this regard one could also mention that the Court has generally found that it is possible to waive certain rights resulting from the right to a fair trial ex Article 6 (1) ECHR.475 One could argue that an applicant may waive certain rights ex Article 6 (1) ECHR by virtue of entering into a jurisdiction clause, even though certain minimum requirements would arguably have to remain in place.

By zooming in on the jurisdiction clause and by noting that the pilot had himself cut off the road leading to the Belgian courts, the Commission at least leaves open the possibility that Article 6

474 Of course, this would in most jurisdictions presumably be a condition for the validity of the jurisdiction clause – or any agreement for that matter.

(1) ECHR would require a Contracting Party to open its courts to international civil proceedings where the only available forum for the plaintiff would result in proceedings that would not meet the standards of Article 6 (1) ECHR. This possibility will be further examined below.\footnote{See \emph{infra} V.4.3.} What the \textit{Gauthier} case does make clear is that a plaintiff must not have contributed to the fact that only one open forum, of possibly questionable quality, is available, by agreeing to a jurisdiction clause.\footnote{See also \emph{infra} n. 516.}

The Commission has, in \textit{X v. Switzerland},\footnote{\textit{X. v. Switzerland} (dec.), no. 8407/78, 6 May 1980, D.R. 179.} had the opportunity to weigh in on a specific limitation to the right of access to a court in international civil proceedings. In this case the Commission had to examine time limits. This is an obvious limitation on the right of access to a court and it is generally categorized as falling under sound administration of justice and as such, in principle, an accepted limitation on the right of access.\footnote{See \textit{supra} V.4.1.} However, time limits may be quite stringent for plaintiffs living outside the country (not an uncommon feature of private international law cases) where they wish to bring their claim. Nevertheless, the Commission has, in \textit{X v. Switzerland}, which is admittedly an older case, established quite a strict approach in this regard.

The case concerned an applicant living in Norway who wished to bring an action in Switzerland relating to the partition of an inheritance. The applicant allegedly mailed his appeal more than a week before the deadline to the Swiss embassy in Oslo, believing that he had sent his appeal in time. The embassy allegedly forwarded the appeal the next day to the relevant court in Switzerland. However, the appeal did not reach the court until three weeks later and by then the deadline to appeal had passed. The Swiss court consequently rejected the appeal.

Before the Commission in Strasbourg the applicant invoked Article 6 (1) ECHR against the Swiss decision. The Commission considered that Article 6 (1) ECHR did indeed contain the right of access to a court. However, it also noted that this right does not restrain the Contracting Parties from setting up regulations regarding the access of litigants to appeal courts. Such

\begin{footnotesize}
\begin{itemize}
\item[476] See \emph{infra} V.4.3.
\item[477] See also \emph{infra} n. 516.
\item[478] \textit{X. v. Switzerland} (dec.), no. 8407/78, 6 May 1980, D.R. 179.
\item[479] See \textit{supra} V.4.1.
\end{itemize}
\end{footnotesize}
regulations help guarantee ensuring the sound administration of justice. The Commission found that the Swiss regulations did not prevent the applicant from lodging the appeal in time. By his own admission the applicant still had plenty of time when he first received the decision and he had not demonstrated that the embassy had assured him that by mailing the appeal to them he had fulfilled the obligation to respect the time limit. Moreover, a provision in the Swiss civil procedure law would have allowed for a request for an extension, but the applicant had not availed himself of this possibility. The Commission consequently found the application to be manifestly ill-founded.480

As has been demonstrated above, the right of access to a court is a right which has been developed by the Court itself. It has been further elaborated upon by the Strasbourg Institutions and one could therefore say that it is a well-established right. Nevertheless, the Strasbourg Institutions have not yet really developed this right in relation to the issue of jurisdiction in private international law. There is not much that could be derived from the case law with certainty in this regard, leaving open many questions, which will be further discussed below. One thing that does stand out is that the applicants in both these cases contributed to their own undoing in the eyes of the Commission. This is not to say that this was an unjustifiable finding in these cases, but it is also clear that the Commission was not willing to take their cross-border dimension into real consideration, despite the unique challenges posed by such cases. As the discussion in the subsequent chapters will demonstrate, this almost appears to be a theme in relation to the impact of the ECHR on private international law.481

4.3 The Scope of the Right of Access to a Court and Jurisdiction in Private International Law

It has generally been accepted that the right of access to a court following from Article 6 (1) ECHR is relevant to the issue of jurisdiction in private international law.482 It is also clear that

480 See with regard to the notion of ‘manifestly ill-founded’ supra ch. III.2.
481 See, e.g., Ammdjadi v. Germany discussed in ch. VI.3; and McDonald v. France discussed in ch. VII.2.
this right of access will mostly concern the plaintiff in international litigation. Defendants may also attempt to rely on Article 6 (1) ECHR in issues regarding jurisdiction in private international law; not so much in relation to the right of access to a court, but rather the (general) right to a fair trial, as will be discussed further below.483

What does the right of access to a court, as derived from the Court’s case law concerning Article 6 (1) ECHR, exactly entail with regard to the issue of jurisdiction in private international law? It follows from the case law discussed above that this question has several aspects. There is, first of all, a right of access to a court on which plaintiffs in international litigation may rely when they are utterly unable to find a court. This is not very controversial (4.3.1). An important question in this regard, though, is the extent of this right. Before delving further into this issue, it is first necessary to discuss whether it is possible for a Contracting Party to rely on proceedings in another country with regard to the right of access to a court in international proceedings (4.3.2). After it has been established that this is indeed the case, the question of the extent of the right of access to a court will be further examined. Three different scenarios will be discussed. The first has already been mentioned above, in relation to the Gauthier case:484 what if there is an open forum available to the plaintiff abroad, but it is uncertain that the proceedings in this available forum would meet the (procedural) standards of Article 6 (1) ECHR? One could argue that the right may entail the right of access to a court where the proceedings would be in line with the guarantees of Article 6 (1) ECHR.485 (4.3.3). It has also been argued that a denial of justice could occur in a situation where there is an open forum in another country, if it is clear that the plaintiff’s substantive claim would be denied in this available forum486 (4.3.4). Similarly, the argument has been raised that the right of access to a court could also arise in the situation of an open forum in another country where it is clear that the decision rendered by this open forum


483 See infra V.5.
484 See supra n. 441.
485 Matscher 1995-1998 supra n. 482, at p. 218. But see Marchadier supra n. 435, at p. 84ff. See also Corbion supra n. 427, at p. 189ff.
486 See Corbion supra n. 427, at p. 202ff and the authors cited there.
would never be eligible for recognition and enforcement abroad, robbing the decision of its effectiveness in international litigation  

4.3.1 A Negative Conflict of Jurisdiction

In the first instance, there are thus two different imaginable situations in which a plaintiff’s right of access to a court following from Article 6 (1) ECHR may play a role in international litigation. First, a plaintiff could be faced with the situation that there is no court, regardless of the question of its location or quality, which has jurisdiction to hear his case. This situation should be distinguished from the situation in which courts of more than one country have jurisdiction to hear the case. It will be recalled that this distinction is also referred to as the negative and positive conflicts of jurisdiction.

That the right of access to a court is engaged in the former situation, where the plaintiff is unable to find a competent court, is quite clear. If a court were to reject jurisdiction in such a situation, this would directly result in a denial of justice, which the Court in Golder held as being contrary to Article 6 (1) ECHR. This applies not only in the situation where there is no court of any country competent to hear the case in international litigation, but it also logically extends to the situation where there is realistically no other forum available to the plaintiff in international litigation due to extraordinary circumstances beyond the plaintiff’s control, such as the normally competent court being unavailable because of war. In such a case the refusal to assert jurisdiction would also directly lead to a denial of justice, as there would essentially be no other forum to which the plaintiff could turn. It is for this reason that many legal systems have incorporated a ground of jurisdiction based on necessity, often referred to as the forum necessitatis, for plaintiffs who otherwise have nowhere to turn.

4.3.1.1 The Right of Access to a Court: Forum Necessitatis

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488 See in this regard infra V.3.2ff.
489 See supra V.2.1.
490 See, e.g., Kinsch 2007 supra n. 482, at p. 44-45; Matscher 1995-1998 supra n. 482, at p. 218. See generally the literature cited supra n. 482.
491 See supra V.4.1.
492 See, e.g., Briggs and Rees supra n. 482, at p. 19-20.
The ground of jurisdiction known as *forum necessitatis* entails a rule allowing national courts to assert jurisdiction on the ground that there is no other (viable) forum available abroad, and it can be found in one form or another in many legal orders.\(^{493}\) It may thus be regarded as an elaboration of the right of access to a court.\(^{494}\) The existence of such a rule would appear to prevent issues of there being no forum available for a plaintiff in private international law and the right of access to a court *ex* Article 6 (1) ECHR. It is interesting to discuss the notion of *forum necessitatis* and the right of access to a court in the legal orders of England, the Netherlands, and Switzerland in this context.

With regard to the right of access to a court in private international law, one may still discern a fundamental difference between the English rules on jurisdiction, on the one hand, and the practice in the Netherlands and Switzerland, on the other. This is a divide that has not been completely closed by the Brussels I Regulation\(^{495}\) and the Lugano Convention,\(^{496}\) which have for a large part introduced similar rules with regard to jurisdiction for these three States.\(^{497}\) One result of this divide is that England does not have a *forum necessitatis* rule, while both the Netherlands and Switzerland do have one.\(^{498}\) One should nevertheless note that there are, in principle, few problems concerning the right of access to a court where there is no alternative foreign court available and the rules of jurisdiction in private international law in England, the Netherlands, and Switzerland.

Still, it is remarkable that while both the Netherlands and Switzerland have a *forum necessitatis* clause, England has no such rule.\(^{499}\) This does not mean that there are no differences between the

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\(^{494}\) See Nuyts 2007a supra n. 493, at p. 21-22.

\(^{495}\) See supra n. 394.

\(^{496}\) See supra n. 396.

\(^{497}\) See also supra ch. II.

\(^{498}\) See art. 9 of *Burgerlijke Rechtsvordering* (Dutch Civil Procedure) and art. 3 of the Swiss Private International Law Act. Another distinction is the much more prominent place of *forum non conveniens* in England. See infra V.4.3.1.2.

The Netherlands has two different versions of the *forum necessitatis* rule, one of which does not require a connection with the forum, while the other does. In Switzerland, a certain connection with the forum is always required. Interestingly enough, in the Netherlands this ground of jurisdiction has only recently been introduced and its entrance coincided with the abolition of the ground of jurisdiction based on the domicile of the plaintiff in the forum, which is now considered to be an exorbitant base of jurisdiction. This demonstrates the remarkable interaction between this *forum necessitatis* rule and other bases of exorbitant jurisdiction. Before the abolition of this exorbitant ground of jurisdiction there was little need for a *forum necessitatis* clause, as plaintiffs domiciled in the Netherlands could always find a ground of jurisdiction.

This does, of course, beg the question why England has no such rule of jurisdiction, and whether this could become an issue in relation to the right of access to a court. The answer lies in the fact that the (traditional) rules on jurisdiction in England are largely less strict with regard to the assertion of jurisdiction compared to the Netherlands and Switzerland (thus leaving the rules on jurisdiction following from the Brussels Regulation and the Lugano Convention out of the discussion), and this would seem to lessen the need for a general *forum necessitatis* clause.

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500 It could be noted in this regard that during the parliamentary proceedings leading up the new *forum necessitatis* clause in the Dutch Civil Procedure Code, reference was made explicitly to Art. 3 of the Swiss Private International Law Act. See *Kamerstukken II* 1999/00, 26 885, nr. 3, p. 41ff (MvT).


503 Although it should be noted that while the Netherlands did not have such a rule in the Dutch Civil Procedure Code, courts occasionally filled in this gap. See, e.g., HR 26 October 1984, *NJ* 1985, 696.

504 This interaction between the *forum necessitatis* rule and the previously incorporated exorbitant ground of jurisdiction of *forum actoris* in the Dutch Civil Procedure Code was acknowledged during the parliamentary proceedings. It was explicitly stated that the *forum necessitatis* should not result in the return of the *forum actoris*. See *Kamerstukken II* 1999/00, 26 885, nr. 3, p. 41ff (MvT). Cf. Ibili *supra* n. 501, at p. 121-122.

For example, the (traditional) general rule with regard to jurisdiction in personam\textsuperscript{506} is that the foundation of the court’s jurisdiction is the service of process. Whenever in proceedings in personam a defendant can be legally served with process, the court has jurisdiction to hear the case against him or her. It should be noted that this admittedly rather broad power of English courts to hear a case is somewhat balanced by the discretionary power of the courts to decline or stay proceedings where the doctrine of forum non conveniens applies.\textsuperscript{507}

However, an area where the jurisdiction of English courts is more limited is the area of family law.\textsuperscript{508} For example, for divorce proceedings, an English court has jurisdiction if the court has jurisdiction under the Brussels II bis Regulation,\textsuperscript{509} if no other court of one the parties to this Regulation has jurisdiction (i.e. EU Member States), and if one of the parties to the marriage is domiciled in England on the date of the start of the proceedings.\textsuperscript{510} It is thus clear that a more substantial link with the forum is required in this case compared to the jurisdiction in personam discussed earlier.

This latter observation raises the question of whether this more strict framework of jurisdiction regarding family law, combined with the absence of forum necessitatis, could lead to an issue with the right of access to a court ex Article 6 (1) ECHR. This appears to have never really arisen, although the English appeal court did discuss the possibility of the non-assertion of jurisdiction resulting in a violation of Article 6 (1) ECHR in Mark v. Mark.\textsuperscript{511} At issue was whether the English judge could entertain an application for divorce by a Nigerian woman who had essentially been abandoned by her Nigerian husband, who had returned to Nigeria but had made no arrangements for his wife to follow him. In the first instance it was decided that she

\textsuperscript{506} In short, a claim in personam is a claim brought against someone to compel him or her to do something, such as pay a debt etc. It does not incidentally include most family law cases, such as filing for divorce. See Dicey, Morris and Collins supra n. 499, at p. 306. In addition to an action in personam, there is the action in rem. The action in rem in English law concerns an action that lies with the Admiralty court against certain res, particularly a ship, and other res associated with the ship, such as its cargo. See e.g. Cheshire, North and Fawcett supra n. 505, at p. 414ff.\textsuperscript{507} See also infra V.4.1.4.1.1. See with regard to the doctrine in England, e.g., Dicey, Morris and Collins supra n. 499, at p. 461ff. See generally, e.g., R.A. Brand and S.R. Jablonski, Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements (New York, Oxford University Press 2007).

\textsuperscript{508} It should be noted that many of the rules in this area have undergone significant changes with the continued European harmonization in this area.

\textsuperscript{509} See supra n. 395.


could not be regarded as being habitually resident in England since she was ‘an overstayer’, and thus her presence was unlawful. However the divorce was granted on another ground, and the husband appealed against this decision.

The appeal court discussed, among other things, whether this deprivation of the wife’s right to petition would be contrary to Article 6 (1) ECHR, and considered that such a blanket restriction would indeed appear to be contrary to Article 6 (1) ECHR, although it was also acknowledged that the State could impose conditions upon this access. Ultimately, though, this case was not solely decided on human rights grounds. It should be noted that the House of Lords eventually affirmed the Court of Appeal’s decision to deny the husband’s appeal against the divorce, but held that there was no need to find its decision on the Human Rights Act (and the right of access).

In conclusion, one could thus state that it is generally accepted that when a plaintiff is absolutely unable to find a court in international proceedings anywhere in the world, this can be invoked in one of the Contracting Parties as a ground of jurisdiction based on the right of access to a court ex Article 6 (1) ECHR. There is one caveat that should be mentioned. This does not apply to the plaintiff who is him or herself responsible for an otherwise available foreign court no longer being available. It will be recalled that this was established by the Commission in Gauthier in relation to a jurisdiction clause. This was also the finding of the Obergericht Zürich in an old Swiss case. An Italian national, domiciled in Zürich, brought proceedings before the local court, which he regarded as the forum necessitatis because his Italian lawyers had negligently allowed the time limits for the initiation of proceedings in Italy to run out. The Swiss court found

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513 See Mark v. Mark [2004] ECWA Civ 168, Nos. 37-39, and especially No. 38. The essential question for Lord Thorpe LJ was whether the public policy rule, which was set out by Lord Scarman in R v. Barnet London Borough Council, ex p Nilish Shah and held that only a person lawfully in the UK could be regarded as being habitually resident in the UK, should now be recast in the light of the Human Rights Act 1998. See also No. 69 (Waller LJ) and No. 88 (Latham LJ).


515 See supra V.4.2.

516 Obergericht Zürich, II. Zivilkammer, 1 May 1959, Annuaire suisse de droit international 1961, p. 293-295. This case was delivered well before the entry of the Swiss Private International Law Act of 1987, but would still appear to be relevant with regard to the ground of jurisdiction of forum necessitatis.
that it had no jurisdiction on the basis of being the *forum necessitatis* under these circumstances, a decision that was upheld by the *Tribunal fédéral*.  

4.3.1.2 Forum Non Conveniens

Before moving on, it is necessary to examine one more doctrine – the *forum non conveniens* – which may impact upon the assertion of jurisdiction in private international law and could lead to a denial of access to a court. *Forum non conveniens* is a legal doctrine, mainly found in common law countries, that allows courts to decline jurisdiction even if that jurisdiction was formally prescribed by law and for which there would otherwise be a basis in deference to proceedings in a foreign court, where this court is considered to be a clearly more appropriate court for the proceedings. If an English court were to exercise its discretion to stay the English proceedings, it is certainly conceivable that an issue with regard to Article 6 (1) ECHR could arise. It is contended that there are three different scenarios in which such an issue may arise.

The first scenario is quite straightforward. If an English court stays the English proceedings in favor of proceedings abroad, it is clear that access to the English judge is denied. Could this result in a breach of Article 6 (1) ECHR? One could argue that this is, in principle, not the case, as the English court will stay the proceedings in favor of another (foreign) court. This would thus leave open an alternative forum for the plaintiff. So, in principle, this is not a problem, although this may depend somewhat on the quality of the alternative forum, which leads us to the second scenario.

The second scenario concerns the question of what if one could reasonably expect an unfair trial in the alternative forum abroad? The foreign court may, for example, be known for its lengthy and slow proceedings, or lack of an impartial judiciary. Would the staying of proceedings by an English court in favor of such a jurisdiction violate the right of access to a court? This issue has been discussed in *Lubbe v. Capre Plc.*, in which it was held that the existing principles

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517 See ATF 85 II 305, 309.  
518 See *supra* n. 507.  
519 Fawcett *supra* n. 512, at p. 9-10.  
520 See also *infra* V.4.3.  
concerning the stay of proceedings, as contained in Spiladia Maritime Corp v. Cansulex Ltd.,

were in accordance with the guarantees provided by Article 6 (1) ECHR. However, had the
court been inclined to stay the proceedings nevertheless, one could argue that Article 6 (1)
ECHR would have been violated.

The third scenario in which an issue regarding Article 6 (1) ECHR may arise concerns the length
of the proceedings. As the consideration by a court to stay the proceedings, followed by the
transfer of the case to a foreign court, would inevitably take up time, a stay on the ground of forum non conveniens could result in a breach of the right to a fair hearing within a reasonable
amount of time. This was one of the concerns put forward by Advocate General Leger in Owusu v Jackson against this doctrine. Although the ECJ did not follow the Advocate General
in this regard, it should be noted that the ECJ’s eventual judgment in this case has largely, if not
entirely, reduced the meaning of this rule of jurisdiction.

Even before the ECJ’s intervention concerning this legal doctrine, however, the doctrine had
never received much enthusiasm from lawyers in civil law countries. In the few cases in
Europe where the doctrine is still relevant, it should be clear that Article 6 (1) ECHR stands in
the way of its invocation where such invocation would lead to a denial of access to the courts.
However, as discussed above, the current interpretation of the doctrine would appear to be in line

523 Lord Bingham opined: “I do not think article 6 [ECHR] supports any conclusion which is not already reached on
application of Spiladia principles. (1561)
524 Cf. Briggs and Rees supra n. 482, at p. 20.
525 Fawcett supra n. 512, at p. 9.
527 See with regard to the meaning of this judgment to the future of the instrument, e.g., H. Duintjer-Tebbens, ‘From
Jamaica with pain: enkele aantekeningen bij het arrest van 1 maart 2005 van het Hof van Justitie in de zaak Owusu’
[From Jamaica with pain: a few notes on the judgment of 1 March 2005 of the ECJ in the case Owusu], in: P. van
der Grinten and T. Heukels, eds., Crossing Borders: Essays in European and Private International Law, Nationality
Law and Islamic Law in Honour of Frans van der Velden (Deventer, Kluwer 2006), p. 95-103; R. Fentiman, ‘Civil
528 See, e.g., H. van Lith, International Jurisdiction and commercial litigation (The Hague, T.M.C. Asser Press
2009); see for an early example H. Gaudemet-Tallon, ‘Forum non conveniens: une menace pour la convention de
Bruxelles (a propos de trois arrets anglais récents,’ 80 Rev.crit.dr.int.priv.(1991), p.491ff. It could, incidentally, be
noted that the old Dutch Civil Procedure Code did contain a more or less general provision on forum non
conveniens. However, this rule disappeared with the introduction of the new Dutch Civil Procedure Code in 2002.
See Kamerstukken II, 1999-2000, 26 855, nr. 3, p. 30-31. However, the doctrine has not entirely disappeared in
Dutch civil procedure. In some family law disputes the Dutch judge may decline jurisdiction. See art. 4 (3) –b and
art. 5 Rechtsvordering [Dutch Civil Procedure Code]. However, the scope of these two exceptions is rather limited.
with Article 6 (1) ECHR in this regard, save for a possible issue concerning the increased length of proceedings due to this doctrine, which could indeed be a concern.\textsuperscript{529}

4.3.2 Denial of Access to Court where a Foreign Court is Available?

Turning to the issue of positive conflicts of jurisdiction, one could first wonder whether it is even possible to speak of a denial of access to a court if there is foreign court available. Is the right of access to a court actually concerned with such a situation? Regardless of the quality and the level of independent judicial protection of the available foreign court, there is strictly speaking access to a (foreign) court in such a situation. One could consequently argue that the right of access to a court \textit{ex} Article 6 (1) ECHR is not applicable to such a situation, as there would be no infringement of this right. However, this mere availability of a foreign court raises the issue of whether it is possible for a Contracting Party to rely on this foreign court in a complaint about a lack of access to its courts in a private international law case.

Is it possible for a Contracting Party to rely on proceedings elsewhere in order to fulfill its own obligation to guarantee the right of access to a court? Proceedings elsewhere pose an obvious problem: it is difficult, if not impossible, for the Contracting Parties to exert control over such proceedings. Can they consequently rely on such foreign proceedings? It would be unrealistic in international proceedings to completely disregard foreign access to a court. The only alternative, after all, would be that everyone would have to be provided with access to a court in international cases, even in cases with little connection to the Contracting Party, which raises problems of its own.\textsuperscript{530} It is thus submitted here that Contracting Parties may, in principle, rely on foreign proceedings in this regard.

However, this does have as a consequence that even though there is access to a foreign court, there would be no access to a court in the respondent Contracting Party. Thus one could argue that the right of access is still engaged in this situation and that there is a restriction to the right of access. As has been discussed above, such restrictions to the access to a court are allowed, but may not go so far as to endanger the very essence of the right of access, and they must pursue a legitimate aim, while the measure restricting the access must also be proportionate to the

\textsuperscript{529} See with regard to England particularly \textit{Lubbe v. Capre Plc}, [2000] 1 WLR 1545.

\textsuperscript{530} See \textit{infra} V.5.
legitimate aim pursued.\footnote{See \textit{supra} V.4.1.2.} In this test the requirement of having a legitimate aim would probably not pose much of a problem.\footnote{See \textit{supra} V.4.1.2.} As stated above, disregarding foreign access would presumably not be a realistic option in international proceedings and would fulfill a legitimate aim. Whether one could thus speak of a violation of the right of access to a court where there was a foreign court available would consequently come down to the proportionality of such a decision.

In reviewing the proportionality of a Contracting Party’s decision not to open up its courts in international proceedings in a case where foreign access is guaranteed, the Court could, in my opinion, take the quality of the proceedings in the available foreign court into consideration. Furthermore, it may even be possible to take into account the link between the case and the foreign court – the appropriateness of the ground of jurisdiction – even though this is a more theoretical possibility. The Court could also assess the reasonableness of expecting the litigant to subject himself to foreign proceedings. Alternatively, the Court could also suffice with the test it has introduced in cases concerning the right of access and immunities of international organizations. In such cases applicants were faced with the issue of being unable to sue the international organization because the organization could invoke immunity. The Court examined the issue in relation to the right of access to a court.

In \textit{Waite and Kennedy v. Germany}\footnote{\textit{Waite and Kennedy v. Germany} [GC], no. 26083/94, ECHR 1999-I. See also \textit{Beer and Regan v. Germany} [GC], no. 28934/95, 18 February 1999, which was decided at the same time and is identical in its wording.} the Court had to deal with this issue. The two applicants’ right of access to the German courts was essentially blocked in proceedings against their employer, the European Space Agency (ESA), because as an international organization, ESA could invoke immunity before the German courts. After finding that this restriction to the right of access served a legitimate aim, the Court held that an important factor in deciding whether this restriction would be permissible was the question of whether the applicants had ‘a reasonable alternative means’ to protect their rights.\footnote{\textit{Waite and Kennedy v. Germany} [GC], no. 26083/94, par. 68, ECHR 1999-I.} It consequently noted that the ESA Convention offered several methods of settlement of private law issues, including staff matters, and that it was possible for the applicants to apply to the ESA Appeals Board, an institution independent from the ESA, which had jurisdiction to hear such disputes. This review satisfied the Court that
the German courts had not overstepped their margin of appreciation and that there had not been a violation of Article 6 (1) ECHR.

The Court could, in cases concerning the assertion of jurisdiction in private international law where a foreign court is available, thus similarly find that the mere availability of a foreign court would suffice. I will in this regard point out that the Court in \textit{Waite and Kennedy} does not impose strict requirements concerning the alternative means of redress.\textsuperscript{535} However, this method of review, in my opinion, does not suffice in international proceedings where a foreign court is available. It should first be noted that \textit{Waite} was specifically concerned with the issue of the immunity of an international organization. This left the Court with considerably less room for maneuvering, as immunities are after all a generally accepted limitation to jurisdiction in international law.\textsuperscript{536}

Moreover, as will be further discussed below, there are good arguments for the proposition that the right of access to a court in relation to jurisdiction in private international law will at least entail the right of access to a court of some procedural quality.\textsuperscript{537} It will be recalled that in addition to procedural demands upon this available court, it has also been suggested that the available court should live up to even higher standards.\textsuperscript{538} A number of scenarios will be examined further below. In the respective discussions national jurisprudence will also be considered.

\textbf{4.3.3 The Proceedings in the Available Foreign Court are not in Accordance with the Guarantees of Article 6 (1) ECHR}

Does Article 6 (1) ECHR, the right of access to a court, merely require that a trial is held somewhere, or does the right guarantee a court where the proceedings will meet the standards of a fair trial \textit{ex} Article 6 (1) ECHR? One should note that, in principle, this issue should only arise if the only court available to a plaintiff is the court of a third country. If a court of one of the


\textsuperscript{536} See supra V.2.2.

\textsuperscript{537} See infra V.4.3.

\textsuperscript{538} See further infra V.4.4.
other Contracting Parties is open, there should not be an issue in this regard, as presumably the proceedings would live up the standards of Article 6 (1) ECHR. But what if there is only a court of a third country available? This would guarantee a trial somewhere, but not necessarily that the proceedings there would meet the standards of Article 6 (1) ECHR.

The Court in *Ashingdane v. the United Kingdom* held that the right of access to a court following from its judgment in *Golder* ‘may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 (1) [ECHR].’ However this case did not concern the issue of jurisdiction in private international law and the required quality of the available court in a third country.

One could argue that it would be quite something for the Contracting Parties to be obligated to open their courts in all cases where there is a court of a third country competent to hear the case, but where it also is uncertain that the proceedings would be fair in the sense of Article 6 (1) ECHR. Furthermore, it is easy to see that such a conception of the obligations under Article 6 (1) ECHR would be less than well received in third countries, and it may also be difficult to assess the fairness of the foreign proceedings before they have actually taken place. It is any event doubtful whether this can be achieved at the jurisdictional stage of proceedings, rather than at the stage of recognition and enforcement.

On the other hand, the right of access to a court does appear to entail more than merely the guarantee of a trial, regardless of the quality thereof. In this regard one could also cite the Court’s finding that a right should not merely be theoretical, but also effective. What is the value of having an available foreign court in the knowledge that one is unlikely to receive a fair

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539 This is nevertheless not always the case. See infra V.6.3.
541 Marchadier *supra* n. 435, at p. 86.
542 See in this regard also *Al-Bassam v. Al-Bassam* (infra n. 547).
543 See *supra* n. 453.
trial there? Yet it would also be odd, and perhaps somewhat unrealistic, to demand that foreign courts live up to the standards of Article 6 (1) ECHR.

A possible solution to this dilemma may have been given by the Court in a case concerning international child abduction, *Eskinazi and Chelouche v. Turkey*. An application was made against the decision of the Turkish courts ordering the applicants to return to Israel. One of the arguments advanced by the applicants, based on Article 6 (1) ECHR, was that a return to Israel would result in an Israeli rabbinical having jurisdiction over both the divorce case and the related issues over personal status. The Court thus had to *a priori* assess the proceedings in Israel. It found that in such circumstances, where no proceedings concerning the applicants’ interests have yet been decided by a judicial decision in Israel, a Contracting Party is under the obligation to lend their assistance in the return, ‘unless objective factors’ caused the authorities to fear that the applicants ‘risked suffering a flagrant denial of justice’ — a standard which the Court frequently invokes in cases with a cross-border dimension. I would argue that a similar test could be used with regard to the right of access to a court in relation to the issue of allegedly unfair proceedings in the only available forum in international litigation.

Whether the right of access to a court in private international law cases entails the right of access to a court in accordance with the demands of a fair trial *ex* Article 6 (1) ECHR, and if so, what the standard of control should be, has not been definitely answered in the jurisprudence of national courts in the Contracting Parties. Nevertheless, the issue has arisen, and some interesting conclusions may be derived from the national case law.

Does Article 6 (1) ECHR provide the plaintiff with an alternative forum if the plaintiff is unlikely to receive a fair trial in accordance with Article 6 (1) ECHR in the only forum available

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544 *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005-XIII (extracts).
545 *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005-XIII (extracts), under ‘2. The Court’s assessment’ (referring to *Mamatkulov and Askaroy v. Turkey* [GC], nos. 46827/99 and 46951/99, par. 88, ECHR 2005-I; *Einhorn v. France* (dec.), no. 71555/01, ECHR 2001-XI; *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, par. 110; and *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, par. 113). See with regard to the Court’s case law concerning the extra-territorial effect of the ECHR also *supra* ch. IV.
546 See *supra* III.5.1.3 and IV.2.4.2.2.
in international civil litigation? In the English case of *Al-Bassam v. Al-Bassam*\(^\text{547}\) such an argument was more or less raised before the Court of Appeal in relation to the refusal to grant an injunction. The claimant had requested the English judge to exercise his discretion to grant an anti-suit injunction regarding proceedings in Saudi Arabia. In the first instance such an injunction had been granted, in which the fear that the claimant would not receive a fair trial had been part of the equation. The Court of Appeal, however, held that while the concerns regarding a fair trial in Saudi Arabia were not unfounded, this was not a matter for the jurisdiction stage. This issue should not arise until a judgment had been given abroad, when the English court would have to decide on the recognition and enforcement of such a judgment.\(^\text{548}\)

While this case concerns an injunction, the argument used here may still prove to be instructive. There is admittedly a distinction between a court allowing proceedings in the forum on the basis of the right of access *ex* Article 6 (1) ECHR because proceedings abroad in the only forum available to the plaintiff would allegedly be unfair in the sense of Article 6 (1), and granting an injunction prohibiting proceedings abroad for reasons of unfairness; the latter undoubtedly entails a more active approach, which raises questions with regard to Article 6 (1) ECHR on its own.\(^\text{549}\)

However, it is also easy to observe the parallel between these two situations. The reluctance of the English Appeal Court to defend Article 6 (1) ECHR at the jurisdictional stage is an interesting objection to the argument that Article 6 (1) ECHR requires access to a court where proceedings will take place in accordance with that provision. However, while it is correct that the recognition and enforcement of a foreign judgment violating Article 6 (1) ECHR could be denied,\(^\text{550}\) this would not help to ensure that the plaintiff would actually receive a fair trial. In such a case an argument for the right of access to a court could therefore be made, albeit only in the exceptional circumstances where it can be proven that there is the risk of a ‘flagrant denial of justice’.\(^\text{551}\)


\(^\text{548}\) Cf. Fawcett *supra* n. 512, at p. 13.

\(^\text{549}\) See in this regard Fawcett *supra* n. 512, at p. 13. The argument of the Court of Appeal regarding the possibility to deny recognition and enforcement is indeed more relevant with regard to the refusal to grant an injunction.

\(^\text{550}\) See further *infra* ch. VIII.2.

\(^\text{551}\) See *supra* the discussion of *Eskinazi* following n. 544.
Another English case which is instructive for the issue of whether the right of access to a court requires an available court that meets the standards of Article 6 (1) ECHR is *OT Africa Line Ltd v Hijazy (The Kribi).*552 This case also concerned an anti-suit injunction, but the argument was made that an anti-suit injunction would deny the defendants the right of access to a court in one of the other Contracting Parties. In this context it was held that ‘Article 6 of the ECHR does not provide that a person is to have an unfettered choice of tribunal in which to pursue or defend his civil rights.’553 According to Aikens J, Article 6 ECHR is not concerned with where this right would be exercised. The only relevant point is that a fair trial, in accordance with the guarantees provided for by Article 6 ECHR, should take place somewhere, regardless of its exact location. The argument here that an anti-suit injunction would deny the defendants’ right of access to a court was thus denied, as England was still available as a forum. In this case the English court thus finds that the location of the trial is irrelevant, as long as a trial is held somewhere *and* in accordance with the guarantees of the right to a fair trial.554 This latter part is, of course, an interesting finding. Then again, one should note that in this case England was still available as the (only) available forum, which may have made it easier for the court to make this observation.

In the Netherlands, the question of what to do if the plaintiff is unlikely to receive a trial to the standards of Article 6 (1) ECHR in the only available forum could arise in relation to Article 9 –c of the Dutch Civil Procedure Code.555 This article provides that a Dutch court may assert jurisdiction even where a foreign court has jurisdiction to hear the case if it would be unacceptable to expect the plaintiff to bring his or her case before that foreign court. Article 9 –c of the Dutch Civil Procedure Code does require a connection with the Netherlands. Plaintiffs invoke this article quite regularly, as would be expected, but courts in the Netherlands tend (justifiably so) to be quite reluctant in this regard.556 Occasionally plaintiffs will base their arguments as to why they cannot be expected to go to the foreign court on the right to a fair trial,

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552 *OT Africa Line Ltd v Hijazy (The Kribi)* [2001] 1 Lloyd’s Report 76.
553 *OT Africa Line Ltd v Hijazy (The Kribi)* [2001] 1 Lloyd’s Report 76, no. 42 (per Aikens J).
554 See also Fawcett *supra* n. 512, at p. 7.
555 See *supra* V.4.3.
556 *Ibili supra* n. 501, at p. 125-126.
although Article 6 (1) ECHR is not always (expressly) invoked in this regard. On a few occasions such arguments have been successful.

For Switzerland, the argument could be made that where proceedings before the only available foreign court would be demonstrably unfair, Swiss courts should assert jurisdiction on the basis of the *forum necessitatis* clause of Article 3 of the Swiss Private International Law Act, provided there was an argument that it could not reasonably be required that the foreign (available) court would be seized. It has been argued that the *forum necessitatis* exception can be invoked when one could reasonably expect that the competent foreign court would not render a decision within a reasonable time.

There is one more scenario that could be brought under this topic of the only available foreign court not meeting the standards of Article 6 (1) ECHR. It is also possible that a foreign court is available, but that this foreign court is barely connected to the case and that it could be considered to have asserted jurisdiction based on an exorbitant or inappropriate ground of jurisdiction. It will be demonstrated below that the argument could be made that Article 6 (1) ECHR may be invoked by a defendant against the unreasonable assertion of jurisdiction. This argument could similarly be used by a plaintiff, who would then only have the option to litigate in a forum with only a negligible connection to the case. In that case there would only be available a foreign court whose jurisdiction was based on questionable grounds. However, it is submitted that this possibility is mostly theoretical, as it is hard to imagine a scenario in which there would only be a foreign court available with an insufficient link to the case. Moreover, there is a distinct possibility that the forum seized by the plaintiff in this manner could also be regarded as exorbitant. This argument appears not to have been raised before national courts.

557 See, e.g., Rb. 's-Gravenhage 12 January 2006, LJN AV2498. The district court held that it had jurisdiction, although this was not based on art. 9 (c) Rv.

558 See Ktg. Amsterdam, 5 January 1996, NIPR 1996, 145 in which pilots of Kuwait Airways, who (also) lived in the Netherlands, who had previously held the Iraqi nationality, successfully argued that they could not receive a fair trial in Kuwait, because of their previous nationality. The Dutch judge set aside the exclusive choice-of-court clause and asserted jurisdiction.

559 This is a condition for the application of the *forum necessitatis* exception in Switzerland. See generally on this condition Bucher 2011 supra n. 487, at p. 65-66; Othenin-Girard supra n. 502, at p. 272-275 and the works cited there.

560 See Othenin-Girard supra n. 502, at p. 272. See also Tribunal fédéral, 5 March 1991, La Semaine judiciaire 1991, p. 457, in which this possibility was essentially raised in a case concerning a divorce in the Netherlands.

561 See infra V.5.
4.3.4 The Right of Access and the Denial of Substantive Justice

Is it possible to speak of a denial of justice, which would run counter to the right of access to a court following from Article 6 (1) ECHR, if a plaintiff before the normally competent court in another country was faced with the certainty that his claim would be denied there? The issue in such a case is not that the plaintiff does not have access to a court. However, the Court has consistently held, also particularly in relation to the right of access to a court, that the ECHR does not merely guarantee rights that are theoretical or illusory, but rather ‘rights that are practical and effective’. One could thus argue that for the rights guaranteed in Article 6 (1) ECHR to be effective, a court should also assert jurisdiction when it is certain that the normally competent (foreign) court would deny the plaintiff’s (substantive) claim.

It is clear that such an interpretation of the right of access to a court would seriously extend this right. It has been argued that such an interpretation would go too far in the sense that the right of access to a court merely entails the right to a fair hearing, but not the right to be victorious. One can only agree with this stance. It seems far-fetched that the procedural right of access to a court would also effectively entail the right to seek a court where one’s claim would be awarded. It is also questionable whether this is something that can be dealt with at the jurisdictional stage of proceedings, as it would require going into the merits of a case.

It is, however, possible to make this dilemma more difficult. What if it was certain that the rejection of the claim before the normally competent court would result in a violation of one of the substantive rights guaranteed in the ECHR? What if, for example, it was beyond doubt that the custody of a child of divorcing parents would automatically be awarded to the father in the only available foreign court? Could the mother argue, before a court of one of the Contracting Parties, a denial of justice based on Article 6 (1) ECHR, possibly in conjunction with other rights guaranteed in the ECHR?

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562 Airey v. Ireland. 9 October 1979, Series A no. 32, par. 24.
563 Briggs and Rees supra n. 482, at p. 21.
564 One could argue that this could constitute a violation of Article 8 ECHR (the right to private and family life) taken in conjunction with Article 14 ECHR (the prohibition of discrimination).
Although the situation of seeing that the action abroad would stand no chance of success would certainly infringe the plaintiff’s effective right of access to a court, difficulties similar to the ones discussed immediately above would still be present. This would require delving into the merits of a case. One would thus essentially have to decide the case on the merits before deciding whether the court is (internationally) competent to hear the case. As discussed above, the right of access to a court under Article 6 (1) ECHR is only concerned with procedural bars to this right, even though the demarcation between substantive and procedural obstacles in this regard is not always clear. Yet what is clear is that such a conception of the right of access to a court, including the right of access to a court where a certain outcome on the merits could be achieved, would more or less entail a substantive guarantee. This cannot be part of the mostly procedural right of the right of access to a court. However, despite these arguments against such a conception of the right of access, it is not entirely unheard of, as the Dutch case discussed directly below will demonstrate.

A remarkable decision concerning the ground of jurisdiction of *forum necessitatis* and the invocation of a substantive right was taken in the Netherlands by the *Gerechtshof ’s-Gravenhage*. The case concerned a joint application for a divorce by a Dutch wife and her Maltese husband who married in Malta. In the first instance their request was denied because the court held that it had no jurisdiction, as the couple had their habitual residence in Malta. On appeal, the appeal court first confirmed that on the basis of the Brussels II Regulation, Malta had exclusive jurisdiction. However, the appeal court went on to note that no divorce could be had (at the time) in Malta, regardless of the question of whether Dutch or Maltese law would be the law applicable to the case. The appeal court in The Hague, noting that the ECJ has consistently held that fundamental rights form an integral part of the general principles of law and that the ECHR is of particular significance in this regard, found that the jurisdictional rules of the Brussels II Regulation effectively barred the wife’s right of access to a court, which

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567 After the majority of the Maltese population in a (non-binding) referendum voted for the legalization of divorce, the Maltese parliament has passed a law legalizing divorce. The law was due to take effect in October 2011.
is a right that is guaranteed in Article 6 ECHR. The court thus set aside the provisions of the Brussels II Regulation. In its consideration the court further noted that the case concerned a joint application and the husband would thus not be forced against his will to appear in proceedings in the Netherlands.

The court thereafter referred to the Dutch rules on jurisdiction and found that it had jurisdiction on the basis of Article 9 –b Rv, as it would be unreasonable to require the parties to initiate proceedings in another country. The court further observed that under Maltese law a foreign divorce will be recognised if that decision is taken by the competent court of either the place of habitual residence of one of the parties or the court of which one of the parties is a national. The appeal court noted that its decision would thus be recognized under Maltese law, and granted the application for a divorce.

This is quite a remarkable decision, which has led to mixed reactions. A number of points can be made. It is, first, questionable whether a Dutch court is even permitted to refer to the forum necessitatis clause, which originates in the national Dutch rules on jurisdiction, once it has been established that the Brussels II Regulation is applicable to the case, even though no jurisdiction can be asserted on the basis of this instrument. What could the court have done instead? Neither the Brussels II Regulation, nor its successor the Brussels II bis Regulation, contain the escape route of a forum necessitatis clause. The appeal court could perhaps – although I imagine such an action would not be possible without the intervention of the relevant EU court in Luxembourg – have asserted jurisdiction referring to the right of access to a court ex Article 6 (1) ECHR, which, as also noted by the appeal court itself, is part of the general principles of law and has a special position in this regard. This would require, however, that Article 6 (1) ECHR is actually relevant in this case, which, in my opinion, is not the case.

569 See supra n. 498.
570 See with regard to this case, e.g., K. Boele-Woelki, ‘Internationaal Privaatrecht’ [‘Private International Law’], 55 Ars Aequi (2006), p. 5503-5504; Ibili supra n. 501, at p. 118, 147; G.E. Schmidt, ‘Forum necessitatis bij echtscheidingen’, 25 NIPR 2007, p. 116-121. Boele-Woelki and Ibili agree with the substantive result reached by the court, even though they question the method used by the court. Schmidt, on the other hand, finds that the Dutch court could rely on its national rules, despite the Brussels II bis Regulation being applicable, but questions whether the result reached by the court is correct.
571 Cf. Ibili 2007 supra n. 501, at p. 146. But see Schmidt supra n. 570, at p. 117, who argues that it would still be possible for a Dutch court to refer to its national rules on jurisdiction (including its forum necessitatis clause, if the
Does Article 6 (1) ECHR guarantee the right of access to a court in the situation where there is only one forum open to the plaintiff and where it is certain that the plaintiff’s action will be denied? Does it consequently matter what sort of action is concerned? As has been discussed above, it has been argued that Article 6 (1) ECHR merely guarantees that there is a forum where proceedings in accordance with the guarantees derived from that provision could take place.\(^{572}\) It is clear that in this case there was an open forum for the proceedings and there was, in principle, no reason to assume that the proceedings in Malta would not meet the procedural standards required by Article 6 (1), as Malta is a Contracting Party to the ECHR. This also was not in question. The only problem was that the expected outcome of the proceedings in this forum was not compatible with the parties’ wishes, as proceedings in Malta would not have resulted in the requested divorce at the time. This, nevertheless, does not mean that the right of access to a court \(ex\) Article 6 (1) ECHR is violated. While one may be sympathetic to the result reached by the Dutch court in this case, the manner in which it arrived at this decision is highly questionable.

Let us take this argument one step further. Would it matter if litigating in the only available forum would result in a violation of one of the other (substantive) rights guaranteed in the ECHR? It should be noted that this was not at issue in the case discussed above, as the right to a divorce is not protected under the ECHR.\(^{573}\) Yet even if a substantive right guaranteed in the ECHR was involved, it is difficult to see how the ECHR would force the Contracting Parties to open up their courts in such cases, and even more so in the event that the court of another Contracting Party was open. Even though the Court has held that rights must be effective, such an interpretation even in combination with another substantive right guaranteed in the ECHR would make this right more than effective.

It is perfectly understandable that States would want to keep open an option which could only be invoked under exceptional circumstances. It is, however, difficult to imagine that the Court would read into the right of access an obligation under Article 6 (1) ECHR to do so, particularly

\(^{572}\) See supra V.4.3.3.

\(^{573}\) See in this regard \textit{Johnston and Others v. Ireland}, 18 December 1986, Series A no. 122.
also in light of the fact that under Article 6 (1) ECHR the rights not only of the plaintiff in international civil proceedings should be considered, but also the rights of a defendant not to be forced to defend himself before a court based on exorbitant jurisdiction.\(^{574}\)

In Switzerland, it would appear to be difficult to invoke Article 6 (1) ECHR to gain access to the Swiss courts to obtain substantive justice which would be unavailable in the only normally available foreign court. It has been defended with regard to Article 3 of the Swiss Private International Law Act, which contains a *forum necessitatis* clause, that this ground of jurisdiction is not meant to be invoked in order to gain what cannot be obtained before a foreign court.\(^{575}\)

It is interesting to note that on a few occasions, substantive rights guaranteed in the ECHR have been invoked in cases at the national level in order to enforce the right of access to a court – without any reference to the right of access to a court *ex* Article 6 (1) ECHR. These attempts have all been unsuccessful, which is the correct approach, because, as the discussion up to this point also demonstrates, the substantive rights guaranteed in the ECHR do not entail a right of access to a court, while the procedural right of access *ex* Article 6 (1), in principle, does not contain a right to a substantive solution.

An illustration may be found in a Dutch case before the *Hoge Raad* concerning a divorce in which the applicant invoked Article 8 ECHR (the right to family life) against the finding of the Dutch courts that they did not have jurisdiction.\(^{576}\) The husband and wife were married in the Dutch Embassy in the United Arab Emirates. The husband was a Dutch national who usually resided in the Philippines. The wife was a Thai national who had never lived in the Netherlands and was also residing in the Philippines at the time of the proceedings. The District Court of Leeuwarden held that it had no jurisdiction to hear the case, on the basis of the Brussels II Regulation.\(^{577}\) This was upheld on appeal, and the *Hoge Raad* also rejected the appeal.\(^{578}\) The Advocate General, in his opinion, however, did briefly entertain the claimant’s argument for

\(^{574}\) See further *infra* V.5.  
\(^{575}\) See Bucher *supra* n. 487, at p. 64. Cf. Obergericht Zürich, BIZR 89 1990, no. 65, p. 139.  
\(^{576}\) HR 1 September 2006, *RvdW* 2006, 769; *JOL* 2006, 475; *JPF* 2006, 136 (note A.E. Oderkerk). See with regard to this case also Schmidt *supra* n. 570.  
\(^{577}\) See *supra* n. 566.  
\(^{578}\) It did so on the basis of Article 81 RO, which states that if the complaint before the HR cannot lead to cassation and no important questions of law are brought up, the HR may dismiss the complaint without stating further reasons.
jurisdiction based on Article 8 ECHR, but rejected this by merely pointing out that the Brussels II Regulation does not have a forum necessitatis provision.\textsuperscript{579}

This case is, of course, somewhat reminiscent of the Dutch case concerning Malta discussed above, in which the Dutch court did assert jurisdiction.\textsuperscript{580} In that case, however, Article 6 (1) ECHR was at least invoked in relation to the claim of a right of access to a court. It is simply not possible to derive the right of access to court from a right other than Article 6 (1) ECHR. In a Swiss case before the Tribunal fédéral an attempt to that effect by invoking Article 14 ECHR was therefore, in my opinion, also rightfully rejected by the Swiss court.\textsuperscript{581}

4.3.5 Access to a Court and the Impossibility of a Judgment being Recognized and Enforced

The last scenario that will be examined with regard to the denial of justice is whether this could apply when one faces the reality that the judgment delivered by the normally competent court abroad could not be recognized and enforced. This would render such a judgment meaningless. Could the right of access to a court create an obligation for the Contracting Party to open its courts if the foreign judgment would not be recognized? Any argument in this direction would also have to be based on the Court’s case law regarding the right of access to a court being an effective right.\textsuperscript{582} However, it is questionable whether it would be necessary to grant a plaintiff the right of access to a court pre-emptively, before any proceedings have taken place abroad in the normally competent court (unless, as discussed, it can be demonstrated that the proceedings would be blatantly unfair\textsuperscript{583}). One should also note that the rights guaranteed in the ECHR, in principle, require Contracting Parties to recognize and enforce foreign judgments unless there are very compelling reasons not to do so.\textsuperscript{584}

There is thus no immediate reason to allow proceedings on this basis. The argument could, however, be presented that should it nevertheless prove to be impossible to recognize and enforce a foreign judgment in the secondary forum (following fruitless foreign proceedings), a forum should be provided.

\textsuperscript{579} See \textit{supra} n. 576.
\textsuperscript{580} See \textit{supra} n. 565.
\textsuperscript{582} See \textit{supra} n. 453.
\textsuperscript{583} See \textit{supra} V.4.3.3.
\textsuperscript{584} See \textit{infra} ch. VII.
4.4 Restrictions to the Right of Access to a Court: Procedural Bars

As discussed above, the right of access to a court by its very nature requires regulation by the State, and may therefore be limited. A Contracting Party may not only regulate access to its courts in deference to other States in international civil litigation, but could also raise procedural bars to access within the forum particular to international litigation. The question is, of course, whether there are restrictions which are specific to international civil litigation in the forum and whether such restrictions would meet the requirements which the Court has developed in relation to the right of access to a court.

Traditionally there has been one important restriction in this regard, and that is the so-called cautio judicatum solvi, or security for costs. This is an instrument used in international litigation and it can be found in many countries including England, the Netherlands, and Switzerland, even though it has largely lost its prominence, as will be further discussed below. Security for costs in international litigation entails that a claimant who is not habitually resident in the forum is obligated to deposit a certain amount in order to have his claim heard. This ensures that a defendant’s possible costs relating to such international proceedings will be covered. Such costs could, in theory, be difficult to recover due to the fact that the claimant has no ties to the forum and/or no assets.

In Tolstoy Miloslavsky v. the United Kingdom the Court examined the requirement to pay a sizable amount as security for costs as a condition for the applicant’s appeal in relation to the right of access to a court. Tolstoy did not concern an international affair, but this judgment can nevertheless be applied to the use of this instrument in international proceedings. It demonstrates that security for costs has a legitimate aim, while the proportionality of the restriction depends on the particular circumstances. In this case the Court ultimately found that security for costs amounting to GBP 124,900, which had to be delivered within a short time frame (two weeks), did not result in a violation of Article 6 (1) ECHR. It will, however, be

585 Tolstoy Miloslavsky v. the United Kingdom, 13 July 1995, par. 61, Series A no. 316-B.
586 See, e.g., infra n. 594.
587 See also supra V.4.1.
588 But see the partly dissenting opinion of Judge Jambrek. He found that, while the security for costs order pursued a legitimate aim, it was disproportionate.
recalled that the financial means of the defendant must play an important role in this regard.\textsuperscript{589} It is thus certainly conceivable that the \textit{cautio judicatum solvi} is permissible in light of the right of access to a court, provided certain requirements are met.\textsuperscript{590} However, possible issues relating to the \textit{cautio} are not confined to the right of access to a court, as the national jurisprudence discussed below demonstrates.

The requirement of the \textit{cautio judicatum solvi} has quite frequently been discussed by national courts with regard to its conformity with the demands of Article 6 (1) ECHR. The \textit{cautio} has, incidentally, not solely been discussed in relation to the right of access to a court \textit{ex} Article 6 (1) ECHR.; it has been noted that there may also be issues relating to discrimination.\textsuperscript{591} The \textit{cautio judicatum solvi} is largely no longer permitted within the European Union with respect to nationals of a Member State of the European Union.\textsuperscript{592} An order for security for costs may therefore only be made if the claimant is resident out of the jurisdiction, but not resident in a State where either the Brussels I Regulation or the Lugano Convention applies, while there must also be reason to believe that the claimant will be unable to repay the costs of the defendant if ordered to do so by the court. If a non-resident has sufficient assets in another country in which a judgment would be easily enforced, the power to order security would be inappropriate.\textsuperscript{593}

In \textit{Nasser v United Bank of Kuwait}\textsuperscript{594} the English Court of Appeal discussed Articles 6 (1) and 14 ECHR in relation to the application for security of the costs of an appeal. The claimant was resident in the United States. The appeal court discussed \textit{Tolstoy Miloslavsky}\textsuperscript{595} in relation to Article 6 ECHR, while examining as to the issue of possible discrimination \textit{ex} Article 14 ECHR the distinction between residents inside and outside the Brussels and Lugano regime States. The

\begin{itemize}
\item \textsuperscript{589} See \textit{Aït-Mouhoub v. France}, 28 October 1998, \textit{Reports of Judgments and Decisions} 1998-VIII.
\item \textsuperscript{590} See also Marchadier infra n. 435, at p. 70ff.
\item \textsuperscript{591} It should be noted that several manifestations of the \textit{cautio judicatum solvi} have, with regard to discrimination, come under fire from the European Court of Justice. See for an early example ECJ 1 July 1993, Case C 20/92, \textit{Hubbard v. Hamburger}, ECR 1993, I-3777; see also A.A.H. van Hoek, ‘Artikel 12 EG-Verdrag en het (internationale) procesrecht; hernieuwde kritiek op de \textit{cautio judicatum solvi}’ [Article 12 EC-Treaty and (international) procedural law; renewed criticism of the \textit{cautio judicatum solvi}], 18 \textit{NIPR} (2000), p. 251-258; see also infra n. 597.
\item \textsuperscript{593} See Dicey, Morris and Collins supra n. 499, at p. 246-254.
\item \textsuperscript{594} [2001] EWCA Civ 556, [2002] 1 All E.R. 401 (CA).
\item \textsuperscript{595} See supra n. 465.
\end{itemize}
English appeal court held that although one cannot start with the inflexible assumption that anyone outside the Brussels and Lugano zone should deposit a security for costs, what matters is how great will be the burden of the defendant to enforce a judgment for costs against the plaintiff. The order for security for costs should be adapted to reflect the nature and size of the risk against which it is designed to protect. As it would probably be difficult for the defendant to secure enforcement in the United States, a certain amount for security for costs was justified in this case, according to the appeal court.

The appeal court in Amsterdam held that Article 224 of the Dutch Civil Procedure Code, which requires everyone not residing in the Netherlands to deposit security for costs, is not discriminatory, because everybody residing outside of the Netherlands, including Dutch persons residing elsewhere, would have to comply with this requirement. It should, incidentally, be noted that Article 6 EC Treaty was invoked in this case, and not Article 14 ECHR.

In older Dutch case law regarding the *cauto judicatum solvi*, which concerned an old provision, the right of access to a court *ex Article 6 (1) ECHR* was discussed. In one of these cases the district court held that the invocation of Article 6 (1) ECHR against an order for security for costs was unsuccessful because the plaintiff had not sufficiently shown that it lacked the funds for the deposit. A similar decision was reached in another case in which the district court held with regard to the plaintiffs’ invocation of Article 6 (1) ECHR and the claim that they lacked funds that merely declaring a lack of funds was not sufficient. Some tangible support for such a position is required. In this latter case the non-discrimination requirement was also discussed, albeit not in relation to Article 14 ECHR, but Article 26 of the International Covenant on Civil and Political Rights (ICCPR). The district court held that the *cautio* did not violate the...

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596 Art. 224 Rv [Dutch Civil Procedure Code].
598 Article 6 of the EC Treaty prohibited any discrimination on grounds of nationality.
599 One should note that this article was also discussed in Nasser (supra n. 594).
600 Article 152 Rv (oud) [(former) Dutch Civil Procedure]. This was the article of the former Dutch Civil Procedure Code, in which the rules concerning the *cauto judicatum solvi* were laid down. This article prescribed that all aliens could be required to pay security. This article has since been amended and the current article now uses residence as the connecting factor.
602 Art. 26 ICCPR states the following. ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and...
non-discrimination requirement because there was a reasonable and objective justification for it—in short, the fact that it would be very hard for the defendant company to recover its costs.603

In Switzerland, the Tribunal fédéral has also delivered a judgment on the cautio judicatum solvi and the right of access to a court.604 In a complex case concerning a number of oil companies, one of the parties, X, at a certain point brought a suit against another party, Y, in Switzerland, eventually demanding USD 5 million. The defendants argued that the plaintiff should deposit a cautio judicatum solvi. In the first instance this action was denied, as the court found that X was domiciled in one of the States party to the Hague Convention on Civil Procedure.605 However, the defendants later reiterated their objections in this regard, pointing out that X had changed his domicile to Mongolia, which is not a party to the afore-mentioned Hague Convention. They argued for a security of CHF 400,000. The plaintiff argued that the amount of CHF 400,000 was excessive and, relying on inter alia Article 6 (1) ECHR, complained of an inadmissible restriction to the right of access to a court.

The Tribunal fédéral rejected this complaint, carefully outlining the Court’s case law and its own previous jurisprudence. The Tribunal noted that the right of access to a court under Article 6 (1) ECHR by its very nature requires regulation of the State, and this also applies for private international law cases. In this regard States enjoy a certain margin of appreciation, so they can provide certain limitations, provided these do not affect the substance of the right of access to courts, they pursue a legitimate aim, and there is a reasonable relationship of proportionality between the restrictions imposed and the purpose.606 Thereafter, it observed that the Court has particularly recognized as a legitimate aim the claim of a defendant for the payment of security for costs so that the defendant does not face, in the event of dismissal of the appeal, the inability to recover his legal costs.607 According to the jurisprudence of the Tribunal, similar principles guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

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604 ATF 132 I 134.
606 The Federal Tribunal cited in this regard García Manibardo v. Spain, no. 38695/97, par. 36, ECHR 2000-II, as well as Patrono, Cascini and Stefanelli v. Italy, no. 10180/04, par. 58, 20 April 2006 and Besseau v. France, no. 73893/01, par. 23, 7 March 2006.
607 Referring to Tolstoy v. the United Kingdom (supra n. 465) and Kreuz v. Poland (supra n. 470).
apply to the right of access to courts as guaranteed by the Federal Constitution. Applying the above-cited findings to the case at hand, the Tribunal held that the amount was not disproportionate and that Article 6 (1) ECHR was thus not breached.

4.5 The Effectiveness of the Right of Access to a Court: Legal Aid

Above, it has been demonstrated that the Court’s finding that the right of access to a court should be an effective right may be invoked as support for the argument that the right of access should be further extended. Such a possible extension is not only limited to a possible extension of a denial of justice in situations in which there is another forum open, but could also have an impact on the position of a (foreign) plaintiff in issues of private international law.

It has been noted that in order to ensure that the right of access to a court is not merely a theoretical right, the Contracting Parties may have to offer legal aid in cases concerning complex issues where the assistance of a lawyer may be indispensable, as without representation such a case would be ineffective. It is thus certainly conceivable that a Contracting Party would have to offer legal aid in cases concerning issues of private international law. In this regard, one could wonder whether it would be permitted to offer such legal aid only to nationals, and to exclude foreigners from such a legal aid scheme. This would be a difference in treatment regarding the right of access to a court, which could be forbidden under Article 6 (1) ECHR taken in conjunction with Article 14 ECHR.

It is standard case law of the Court that a difference in treatment is discriminatory if there is ‘no objective and reasonable justification’ for that treatment, if it does not pursue a ‘legitimate aim’, or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realized.’ One could attempt to justify not providing legal aid to foreigners by pointing to budgetary reasons. Then again, the Court has also found that only ‘very weighty reasons’ would suffice for the Court to find the difference of treatment based solely on

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608 ATF 131 II 169, at no. 2.3.3.
609 See supra V.4.1.4.2. Note that the extent to which this is actually possible is not clear.
610 See, e.g., Airey v. Ireland, 9 October 1979, Series A no. 32 and Steel and Morris v. the United Kingdom, no. 68416/01, ECHR 2005-II.
611 See, e.g., James and Others v. the United Kingdom, 21 February 1986, Series A no. 98; Lithgow and Others v. the United Kingdom, 8 July 1986, Series A no. 102; Darby v. Sweden, 23 October 1990, Series A no. 187.
nationality to be compatible with the ECHR. This, taken together with the fact that the Court has held that the absence of legal aid endangers the very essence of the right of access to a court, would, in my opinion, suggest that it is not possible to withhold legal aid to foreigners in complex cases.

4.6 Preliminary Conclusions

In this section the impact of the right of access to a court on the issue of jurisdiction in private international law has been examined. The right of access, which has been derived from the right to a fair trial by the Court in \textit{Golder}, may be invoked by a plaintiff in international proceedings. It has been demonstrated that this right is, in principle, undisputed in the event that a plaintiff in international proceedings is unable to find a court in any country. However, it has been argued that the right of access may, under certain circumstances, also be invoked in the event that there would be a foreign court available. A number of scenarios have been reviewed.

It has been examined whether the right entails the right of access to a court in accordance with the procedural requirements of Article 6 (1) ECHR. It has also been reviewed as to whether the right of access could be concerned with the situation in which it would be certain that the applicant’s substantive claim would be denied. Finally, it has been examined whether the right of access could be invoked if it were certain that the judgment rendered by the only available foreign court would not be eligible for recognition and enforcement in the Contracting Party. In this examination the (little) relevant case law of the Court and the jurisprudence of national courts have been included. The author has argued that it is defensible that in determining whether the right of access to a court has been restricted in international proceedings, the procedural quality of the foreign proceedings may be considered by the court, even though this review would not be very strict.

It has further been found that the right of access to a court in international civil litigation is also concerned with procedural bars, such as, for example, the \textit{cautio judicatum solvi}. Such restriction to the right of access to a court must have a legitimate aim, while the restriction must also be

\footnote{Gaygusuz v. \textit{Austria}, 16 September 1996, par. 42, \textit{Reports of Judgments and Decisions} 1996-IV.}

\footnote{Cf. Marchadier \textit{supra} n. 435, at p. 79.}
proportionate to the legitimate aim pursued. It has finally been determined in relation to the right of access to a court in private international law cases that there may be an obligation for Contracting Parties to offer legal aid, regardless of the nationality of the parties involved.

5. The Invocation of Article 6 (1) ECHR against the Assertion of Jurisdiction

In the previous section the impact of the right of access to a court, as derived from Article 6 (1) ECHR, on the issue of jurisdiction in private international law has been discussed. Article 6 (1) ECHR deployed in this manner should ensure that the plaintiff in international litigation will be able to find a forum. In this section, however, one will find an examination of the possibilities for the defendant to invoke Article 6 (1) ECHR against the assertion of jurisdiction in private international law. Is it possible to invoke Article 6 (1) ECHR against the unreasonable assertion of jurisdiction in international litigation? Does Article 6 (1) ECHR provide a human rights check on the assertion of jurisdiction in private international law? As will become clear from the discussion in this section, there is little specific case law to support this stance. The discussion is thus mostly a theoretical one. However, as will be suggested below, there may be some situations in which Article 6 (1) ECHR, constructed as a check on the unreasonable assertion of jurisdiction, may provide relief for defendants in untenable situations.

The examination of this issue will start with an overview of the relevant case law of the Strasbourg Institutions (5.1). This will be followed by an examination of the different opinions that have been developed in the literature on this particular subject. As will be demonstrated below, the Due Process Clause of the US Constitution has been a source of inspiration for the role which Article 6 (1) ECHR could perhaps play with regard to the assertion of jurisdiction on an exorbitant ground (5.2). Thereafter, some consequences of this role for Article 6 (1), and the role that Article 6 (1) ECHR should ideally have, will be discussed (5.3). Finally, some preliminary conclusions will be drawn (5.4).

5.1 The Invocation of Article 6 (1) ECHR against Jurisdiction in the Strasbourg Case Law

There is very little case law of the Strasbourg Institutions that specifically concerns the issue of (adjudicatory) jurisdiction in private international law. However, the Commission has on one occasion examined the assertion of jurisdiction in private international law from the perspective
of Article 6 (1) ECHR in an unpublished decision of 13 May 1976.\textsuperscript{614} In the Digest of Strasbourg Case Law the following extract of the relevant part of the decision was given:

‘The applicant claims that he and his daughter are Greek citizens and as such are subject only to the jurisdiction of the Greek courts. The applicant does not state on which Article of the Convention he relies for this part of his complaint. The Commission has examined the complaint from the point of view of Article 6 and concludes that the right given by that Article to a fair hearing by an impartial tribunal, confers no right on a person to select the particular tribunal by which his case will be heard. Assuming that, in certain cases, a problem concerning the jurisdiction and the criteria on which it may be based must be considered for the application of Article 6 of the Convention, one must recognize in the present case that the fact that the applicant’s daughter lives with her mother in the United Kingdom, added to her mother’s British nationality, constitutes for the jurisdiction of the British courts a sufficient link according to general principles of international law. An examination by the Commission of this complaint as it has been submitted, including an examination\textit{ ex officio}, does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention and in particular in the above Article.’\textsuperscript{615}

As will be further discussed below, this case is often cited as evidence for the idea that Article 6 (1) ECHR could indeed play a due process-like role regarding the assertion of jurisdiction.\textsuperscript{616} It is, particularly, the Commission’s observation that the daughter living in the United Kingdom with her mother, coupled with the mother having British nationality, provided a ‘sufficient link’ with the forum for the British courts to assert jurisdiction that has sparked this idea. However, one could also observe that the Commission merely offers the fairly innocent remark here that there could be room for the application of Article 6 ECHR in regard to the criteria on which jurisdiction is based and that the domicile of the mother and daughter is in this case a sufficient link with the forum to assert jurisdiction.

Seven years later, the Commission had the opportunity to review another case, \textit{H v. the United Kingdom},\textsuperscript{617} which could have been very interesting with regard to the assertion of jurisdiction by the English courts if not for the finding that the applicant had failed to comply with the six month rule of – then – Article 26 ECHR.\textsuperscript{618} The applicant, an American citizen, was granted an oil exploration concession by the Libyan Government in 1957. The applicant exploited this concession jointly with British Petroleum (BP). After Iran seized three islands in the Persian

\textsuperscript{614} Decision of the European Commission of Human Rights, no. 6200/73, 13 May 1976.
\textsuperscript{616} See infra V.5.2.
\textsuperscript{617} \textit{H v. the United Kingdom}, no. 10000/82, decision of 4 July 1983, D.R. 33, p. 247.
\textsuperscript{618} Currently Article 35 (1) ECHR. See supra ch. III.2.
Gulf following the withdrawal of the United Kingdom in that area, Libya allegedly expropriated BP’s share of the concession in retaliation in December 1971. Libya subsequently exploited the concession jointly with the applicant until June 1973, when Libya also expropriated the applicant’s half of the concession.

BP consequently issued proceedings against the applicant, the American citizen, in London, and contended that their agreement was governed by English law. BP claimed that it was entitled to restitution in respect of the exploration and development costs of the concession. The applicant challenged the propriety of the proceedings in England and argued that English law was not the proper law of the contract. Regardless, the High Court held in a judgment of 4 November 1975 that English law was the law applicable to the contract between the applicant and BP. Leave to appeal this decision was granted to the applicant, but he decided against appealing on the advice of his counsel that such an appeal would be unsuccessful. In the case on the merits the applicant was eventually ordered to pay approximately USD 35 million. The proceedings did not end until the House of Lords’ final decision of 2 August 1982.

Relying on Article 6 (1) ECHR, the applicant complained in Strasbourg, inter alia, of the English court having exercised an extravagant jurisdiction over him by holding that English law was the law applicable to his contract with BP. In reviewing this matter the Commission noted that as far as the applicant’s complaint related to the assumption of jurisdiction by the English courts, the applicant’s proceedings against this decision effectively ended on 4 November 1975. The applicant contended that the assumption of jurisdiction was not his sole complaint and that the whole series of proceedings did not end until the House of Lords’ decision of 2 August 1982, but to no avail. The Commission found that the jurisdiction of the English courts concerned ‘a separate and separable preliminary issue, which was the subject of distinct proceedings’, and consequently found that the applicant’s application in this regard was out of time.

It is unfortunate that the Commission did not get to the merits of this case concerning the issue of the alleged extravagant assertion of jurisdiction. It would have been interesting to see whether

619 The jurisdiction of the English courts in this case over the defendant, who was not domiciled there, was derived from the fact that the contract was governed by English law.

620 H v. the United Kingdom (dec.), no. 10000/82, 4 July 1983, D.R. 33, p. 255.
Article 6 (1) ECHR could indeed have been successfully invoked against the assertion of jurisdiction in this case by the English courts. One could further wonder whether the Commission set a dangerous precedent by throwing out the claim with regard to jurisdiction on the basis of the six month time limit. Such an interpretation could severely limit one’s chances of raising a preliminary argument such as the issue of jurisdiction before the Strasbourg Institutions, or would at least force litigants to raise such issues in Strasbourg before the case has been decided on the merits. Although the Commission may be right in finding that the issue of jurisdiction in private international law is a preliminary issue, it is, in my opinion, unfortunate to suggest that this is a separable part of the proceedings in the sense that an appeal should be raised in Strasbourg before the case has been decided on the merits. This would only add to the Court’s case load. Then again, this is the normal practice, for example, before the ECJ in private international law cases regarding questions of jurisdiction. I would nevertheless contend that this is not a practical solution for the Court in Strasbourg.

5.2 Article 6 (1) ECHR and the Due Process Clause

Although there is little direct evidence in the case law discussed that Article 6 (1) ECHR may be invoked against the assertion of jurisdiction where this jurisdiction is based on questionable grounds, it has been suggested in the literature by several writers that Article 6 (1) ECHR could perform a role similar to that which the Due Process Clause of the US Constitution has in (inter-state cases within) the United States. The Due Process Clause functions as a constitutional check on the assertion of jurisdiction by courts in the United States. The The Due Process Clause could, in a similar manner, be invoked against jurisdiction based on certain exorbitant rules of jurisdiction.

622 There is a vast amount of literature on this particular subject. See, e.g., the works cited infra n. 628. 
While jurisdictional rules in the United States are essentially drawn up at the state level,\textsuperscript{624} the US law on jurisdiction has primarily been created by the US Supreme Court, and is primarily concerned with inter-state litigation.\textsuperscript{625} In the Supreme Court’s decision in \textit{Pennoyer v. Neff},\textsuperscript{626} Justice Field held that ‘proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.’\textsuperscript{627} Although the Fourteenth Amendment (the Due Process Clause) was not ratified until 1868, it is said that this case brought ‘the traditional sovereignty-based, international territorial rules of jurisdiction into the due process clause of the fourteenth amendment.’\textsuperscript{628} Thus, from this point on the Fourteenth Amendment – the Due Process Clause – functioned as a boundary post for state court claims of adjudicatory jurisdiction.\textsuperscript{629} In its subsequent case law this constitutional check has been further substantiated by the Supreme Court. In the well-known case of \textit{International Shoe Co. v. Washington}\textsuperscript{630} it was decided that the mere presence of a defendant was no longer enough to assume jurisdiction. The constitutionality of any exercise of ‘general jurisdiction’ should not be presumed solely on the basis of the presence of the defendant in the forum, but ‘due process requires only that in order to subject a defendant to a judgment \textit{in personam}, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”’\textsuperscript{631}

It is this latter case of the US Supreme Court, \textit{International Shoe}, which has spawned the debate on whether Article 6 (1) ECHR could perform a similar role as a constitutional check on the assertion of jurisdiction in the Contracting Parties.\textsuperscript{632} The immediate cause for the comparison between the Due Process Clause and Article 6 (1) ECHR appears to be the similarity between the

\footnotesize{\textsuperscript{624} Von Mehren 2002 \textit{supra} n. 386, at p. 75. \\
\textsuperscript{626} 95 US 714 (1877). \\
\textsuperscript{627} 95 US at 733. \\
\textsuperscript{629} It should be noted that the implication of \textit{Pennoyer v. Neff} did not become entirely clear until the \textit{Riverside & Dan River Cotton Mills v. Menefee} decision of the Supreme Court in 1915. (237 US 189). Cf. Von Mehren 2007 \textit{supra} n. 387, at p. 86. \\
\textsuperscript{630} 326 US 310 (1945). \\
\textsuperscript{631} 326 US at 316. \\
\textsuperscript{632} See \textit{supra} n. 621.}
Commission’s phrasing of the application of Article 6 (1) ECHR in its admissibility decision of 13 May 1976 and the minimum contact test used by the US Supreme Court in *International Shoe*. As has been set out above, the Commission found in the afore-mentioned decision with regard to the application of Article 6 (1) ECHR ‘that the fact that the applicant’s daughter lives with her mother in the United Kingdom, added to her mother’s British nationality, constitutes for the jurisdiction of the British courts a sufficient link according to general principles of international law.’

It is this similarity between the use of ‘sufficient link’ and ‘minimum contact’ which has triggered the discussion of the similarities between the role of the Due Process Clause and Article 6 (1) ECHR. However not everyone agrees that Article 6 (1) ECHR could assume a role similar to the Due Process Clause. It has been noted that ‘[t]he way in which Article 6 (1) [ECHR] is drafted does not suggest a parallel with the US Constitution.’ Others do see such a parallel, but warn that while due process in the mold of Article 6 ECHR does play a role in European jurisdictional thinking, its role is the exact opposite to that played in the United States, ‘as the Due Process clause in the United States protects the defendant against the unjustified assertion of jurisdiction, the trial principle in European law protects the plaintiff against the unjustified denial of jurisdiction.’ If one follows this line of reasoning, the role of Article 6 (1) ECHR would be limited to providing access to a court, but nothing beyond that (at least not with regard to the issue of jurisdiction in private international law).

It is indeed true that there are some important distinctions between American and European thinking about jurisdiction. In very general terms one could say that US courts are more plaintiff-friendly, while European jurisdictional practice favors the defendant. The difference between the role of the Due Process Clause and Article 6 (1) ECHR can thus be explained by

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633 See *supra* n. 614.
635 *Supra* n. 615 [emphasis added].
636 Hill *supra* n. 416, at p. 41.
pointing out that both instruments, in a way, counterbalance the respective jurisdictional practices of courts in the United States and Europe.639

The analogy between the Due Process Clause and Article 6 (1) ECHR is, in my opinion, certainly not perfect, as their respective roles are tailored to the jurisdictional regimes of, respectively, the United States and Europe. However, there is little need to get stuck in this comparison. The real issue is whether Article 6 (1) ECHR can be invoked by the defendant against the unreasonable assertion of jurisdiction. There are certainly cases, imaginable in Europe, in which the defendant needs more protection; protection which could be provided by a more due process-like interpretation of the right to a fair trial ex Article 6 (1) ECHR.

But on what argument should this be based, as the respective roles of the two instruments are clearly different? Article 6 (1) ECHR guarantees the right to a fair trial. It does so not only for the plaintiff, but also for the defendant, as there must be a balance between the two parties in litigation.640 The principle of equality of arms is an important element of the right to a fair trial.641 If one looks at the right to a fair trial from this angle, it is only a small step to derive from Article 6 (1) ECHR the defendant’s right of access to a fair court.642 In my opinion, the elements for such an interpretation of Article 6 (1) ECHR are thus already present. It is therefore not unimaginable that Article 6 (1) ECHR could be invoked against the assertion of jurisdiction on an exorbitant ground.

The next question would then be whether there is truly a need for such protection in the Contracting Parties, as defendants are generally favored in European jurisdictional thinking. In this regard it could be noted that exorbitant bases of jurisdiction have, of course, been outlawed under the Brussels/Lugano regime on jurisdiction.643 However this is not the case for defendants

639 Michaels supra n. 637, at p. 1054.
640 See in this regard, e.g., Steel and Morris v. the United Kingdom supra n. 457. See also Henrich v. France, 22 September 1994, Series A no. 296-A.
641 See, e.g., Dumbo Beheer B.V. v. the Netherlands, 27 October 1993, par. 33, Series A no. 274.
642 Cf. Nyuys supra n. 621, at p. 56ff; Kisch 2007 supra n. 482, at p. 65ff.
643 See Article 3 of, respectively, the 1968 Brussels Convention and the 1988 Lugano Convention on jurisdiction and enforcement of foreign judgments in civil and commercial matters.
originating from States outside the EU Member States to the afore-mentioned instruments. Many writers have already railed against this situation, but to little effect. Perhaps a due process-like interpretation of Article 6 ECHR could bring relief in such situations.

5.3 The Consequences of the Divergent Roles of Article 6 (1) ECHR

In the first part of the examination of the impact of Article 6 (1) ECHR on the issue of jurisdiction in private international law, the plaintiff’s right of access to a court has been discussed. In this part the possible role of Article 6 (1) ECHR as a line of defense for the defendant against the assertion of jurisdiction, based on grounds which have little connection to the forum, has been reviewed. It is interesting to note that these two roles of Article 6 (1) ECHR could intersect.

A court of a Contracting Party asserting jurisdiction based on a plaintiff’s invocation of the right of access to a court, as he or she has nowhere else to turn to, may simultaneously result in a defendant being forced to defend him or herself in a forum that has little or no connection to the case. This would, of course, be the kind of forum against which the defendant may invoke his or her right to a fair trial, as guaranteed in Article 6 (1) ECHR. All this would result in competing interests, remarkably derived from the same right. It would in this case fall upon the seized court of the Contracting Party to find a fair balance between these two competing rights.

What this demonstrates is that it is ultimately necessary to find a balance in relation to the issue of jurisdiction in private international law between the distinct interests of the plaintiff and of the defendant, who may both rely on Article 6 (1)ECHR in this regard. It would, however, primarily be the national and, where appropriate, the European legislator, who should find the necessary

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644 It should be noted that in the new proposal for the Brussels I Regulation the same rules will largely apply to defendants from within and outside of the EU. See supra n. 399. However, one could argue that with the new supplemental grounds of jurisdiction proposed, a new ground of exorbitant jurisdiction is created. This will depend on the interpretation of these articles, which for the moment appear to be broadly interpretable. See also A. Dickinson, ‘Surveying the Proposed Brussels I “bis” Regulation: Solid Foundations but Renovation Needed’, 12 Yearbook of Private International Law (2010), p. 280.
646 See supra V.4.
647 See the discussion supra V.5.1-5.2.
648 See generally on how the Court deals with competing rights supra ch. III.
balance between these two interests, as both the plaintiff and the defendant ultimately require the ground of jurisdiction to be acceptable on objective grounds. Article 6 (1) ECHR should ideally be an important factor in this regard, which further calibrates the rules concerning jurisdiction in private international law of the Contracting Parties in the sense that there is equity between the interests of the plaintiff and the defendant in international civil proceedings.

5.4 Some Preliminary Conclusions

What does all this mean for the jurisdictional rules in the private international law regimes of the Contracting Parties? Even though this is not the place to review extensively all the jurisdictional rules of the Contracting Parties, it is possible to briefly touch upon some of the possible consequences of the impact of Article 6 (1) ECHR on the issue of jurisdiction in private international law.

It follows from the discussion of the right of access to a court in the first part of this chapter that Article 6 (1) ECHR requires, under certain circumstances, that there is a court made available by a Contracting Party for a plaintiff in international proceedings in the event that he or she is otherwise unable to find a forum, even though the exact extent of this right is not yet clear. It has nevertheless been argued that there is a good case for extending this right in the event that the only available court would offer no guarantees for a fair trial. One could in this regard note that many countries have a forum necessitatis exception, ensuring that a plaintiff has access to a court.

However, this right should not extend so far that it would violate a defendant’s right to a fair trial, which is also guaranteed in Article 6 (1) ECHR. In this light, the requirement of there being a sufficient link with the legal order, which can be found in the forum necessitatis exception in Switzerland, may thus be regarded as a sensible solution in light of Article 6 (1) ECHR, although I would argue that this requirement of a significant link should be severed where a plaintiff runs the risk of being unable to find any forum and where simultaneously a defendant’s right to a fair trial would not be endangered. The Dutch forum necessitatis clause, under certain circumstances,

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650 See supra V.4.1.
requires no link with the Dutch legal order. This solution therefore carries the risk of violating a defendant’s right to a fair trial. These divergent rights originating from Article 6 (1) ECHR need to be carefully weighed by courts with regard to the issue of jurisdiction in private international law.

One may thus observe that the issue of jurisdiction in private international law requires a balanced system. States do not only have to account for the interests of other States, but the interests of private parties in international litigation are also of a primary concern. In my opinion, Article 6 (1) ECHR is the anchor which ensures that the system remains in balance in the Contracting Parties. This is particularly true because this Article not only contains the right of access to a court, which ensures that plaintiffs in private international law always have a forum in international litigation, but it arguably also includes checks on the assertion of jurisdiction. In the following section the important role of Article 6 (1) will be further underscored, as it will be demonstrated that this Article can also be invoked against the abuse of procedural rules.

6. Article 6 (1) ECHR as a Brake on Strategic Litigation

A last area in which Article 6 (1) ECHR may have an impact on international civil jurisdiction is that of strategic maneuvering in international litigation. Strategic maneuvering in international litigation, in this context, is concerned with the manipulation of jurisdictional rules by one of the parties in order either to secure a more preferable forum, although this forum may not necessarily be the most appropriate, or – at worst – to willfully evade justice by seeking to obstruct or (endlessly) delay proceedings. This practice is also referred to as forum shopping. Forum shopping, in principle, is not illegal. It is essentially nothing more than the plaintiff weighing his or her options among the available jurisdictions (with a sufficient link) to initiate proceedings, whereby it is only logical that the plaintiff would eventually settle on the forum that would offer the best prospects to him or her. It could, as such, be regarded as unavoidable procedural

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651 See supra V.4.3.1.1.
653 As Lord Simon of Glaisdale eloquently put it in The Atlantic Star [1974] A.C. 436 at 471: “‘Forum shopping’ is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor indignation.’
behavior within true federal legal systems, such as the United States, and systems such as the Brussels regime, which is in many ways similar to a federal legal system.

Although forum shopping may be a normal consequence of a system where more than one forum is possibly open to a plaintiff, it cannot be denied that this phenomenon could also lead to the abuse of jurisdictional rules. It should be noted, for instance, that the jurisdictional rules laid down in the Brussels I Regulation are particularly vulnerable to such strategic litigating, because of the strict *lis pendens* rules of the Regulation\(^\text{654}\) and its emphasis on legal certainty and the mutual trust in the judicial systems of other Member States, while *forum non conveniens*\(^\text{655}\) or the use of injunctions are not allowed.\(^\text{656}\)

While it is normally the plaintiff who has the right to choose where the proceedings will take place, a party aware of the fact that proceedings are likely to be brought against him or her can initiate proceedings for negative declaratory relief, thereby essentially establishing a role reversal: the presumed defendant would become the *de facto* plaintiff.\(^\text{657}\) The advantage of selecting the best forum usually enjoyed by the plaintiff then thus transfers to the defendant. In many jurisdictions the possibility of bringing such claims for negative declarations is restricted,\(^\text{658}\) but under the Brussels I Regulation there are no real obstacles to such claims.\(^\text{659}\)

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\(^{655}\) See *supra* V.4.3.1.2.


\(^{659}\) See ECJ 8 December 1987, Case C-144/86, *Gubisch Maschinenfabrik/Giulio Palumbo*, ECR 1987, I-4861 and ECJ 6 December 1994, Case C-406/92, *Tatry v. Maciej Rataj*, ECR 1994, I-5439. See also with regard to Article 5 (3) Brussels I Regulation the recent case of the CJEU 25 October 2012, Case C-133/11, *Folien Ficher and Fofitec* (not yet published), in which the court held that an action for a negative declaration seeking to establish the absence of liability in a tort case could fall within the afore-mentioned article. With this finding the court, incidentally, went against the Opinion of the Advocate General.
Not only is it thus possible for a party who would normally be a defendant to choose the best forum, it is also conceivable that this party could further abuse the jurisdictional rules by bringing a case to court despite there being an exclusive choice-of-court clause selecting another court. It will be interesting to see to what extent Article 6 (1) ECHR may function as a brake on tactical litigation in this regard.

Below, one will find an examination of the possible impact of Article 6 (1) ECHR on the prevention of this abuse within the context of the jurisdictional provisions of the Brussels I Regulation, whereby particularly the rules regarding *lis pendens* will be examined. First, the state of the law will be presented. Although the Strasbourg Institutions have not yet had the chance to decide a case on this issue, the ECJ has delivered an important and well-known judgment in which it has also considered the role of Article 6 (1) ECHR. This will be followed by a further analysis of the possible impact of Article 6 (1) ECHR on strategic litigation.

### 6.1 The State of the Law: Gasser

Although the Strasbourg Institutions have not yet been asked to directly decide on this issue, the ECJ has, in *Gasser v. MISRAT*, given an important and (in)famous judgment with regard to the abuse of jurisdictional rules in the Brussels I Regulation and the role of Article 6 (1) ECHR. Gasser was an Austrian company that had entered into a contract with MISRAT, an Italian company. The contract allegedly included a choice-of-court agreement in favor of an Austrian court. A dispute between the two companies arose and the Italian company first brought proceedings in Italy. This was followed by Gasser bringing proceedings in Austria. The Austrian courts eventually made a reference to the ECJ, asking whether the Italian proceedings prevented the Austrian courts from hearing the case. The ECJ held that this was indeed the case.

The UK Government, which made submissions to the court, argued that the strict principle of *lis pendens* should not apply in this case, due to there being an exclusive choice-of-court agreement in favor of Austria, which naturally precluded all other courts from having jurisdiction. Moreover, it was argued by the UK Government that the *lis pendens* provisions should be

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661 This was actually disputed, but the case was considered by the ECJ on the assumption that the choice-of-court agreement was valid.
interpreted in conformity with Article 6 (1) ECHR, whereby it pointed out the possibility for abuse of the strict application of the *lis pendens* rule.

The ECJ rejected these arguments. It observed with regard to the first argument that the second court seized is not in a better position to judge whether or not the first court has jurisdiction.662 Regarding the compatibility of the interpretation of the *lis pendens* rules with Article 6 (1) ECHR, the ECJ held that the Brussels regime is ‘necessarily based on the trust which the Contracting States accord to each other’s legal systems and judicial institutions.’663 The court added that the Brussels regime thus ‘seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.’664

6.2 Strategic Litigation and the Role of Article 6 (1) ECHR

The *Gasser* judgment of the ECJ has been much discussed, and although the ECJ’s position with regard to this issue may not have been completely surprising, the judgment was largely negatively received.665 And, indeed, the ECJ does appear to leave the door open for unscrupulous litigants willing to manipulate the Brussels regime to their advantage. While the underlying motive of the rules of *lis pendens* in the Brussels I Regulation – namely the prevention of parallel proceedings, which brings along the risk of irreconcilable judgments – is in itself praiseworthy, one could question whether it is, in principle, allowed to subordinate the rights guaranteed in Article 6 (1) ECHR to this goal.666 It would certainly be interesting to see how the Court in Strasbourg would weigh these goals. Nonetheless, the ECJ’s decision in *Gasser* at first sight would appear to leave little room for the invocation of Article 6 (1) ECHR against such an abuse of jurisdictional rules, despite the fact that the ECJ has acknowledged over and

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664 Id.
666 Cf. Gaudemet-Tallon supra n. 482, at p. 184ff.
over again that fundamental rights are considered to be part of the general principles of EU law and that the ECHR has a special position in this regard.667

It has, however, been suggested that the ECJ’s decision in Gasser should perhaps not be interpreted as categorically denying the possible impact of Article 6 (1) ECHR. It has been proposed that the court’s findings are merely a response to the United Kingdom’s argument that the second court seized should be able to take on the proceedings where proceedings ‘generally’ last an unreasonable time in the first court seized.668 The sweeping nature of this statement was something that the ECJ could not accept in light of the principle of mutual trust. A more focused argument from the United Kingdom could perhaps have been more successful.

Be that as it may – and it has to be acknowledged that the ECJ in Gasser may well have been deterred by the rather general nature of the arguments put forward, which would certainly have somewhat undermined the functioning of the Brussels regime in this regard – the ECJ’s decision concerning Article 6 (1) ECHR is still questionable. By allowing such procedural behavior, the ECJ – or rather the Austrian court, following the ECJ’s lead – possibly not only violates the right to have a fair hearing within a reasonable time, but additionally the right of access to a court is endangered.

How would the Court assess the situation resulting from the finding in Gasser with regard to the right of access to a court? This right would appear to be directly engaged here.669 By upholding the ECJ’s decision and applying the strict *lis pendens* rules, the Austrian court would after all clearly infringe upon Gasser’s right of access to a court. As has been discussed, the right of access to a court may be restricted, although this is only allowed if the very essence of the right is not endangered, if the right remains effective, if the restriction pursues a legitimate aim, and if there is a reasonable relationship of proportionality between the means used and the aim achieved.670

669 Cf. Bomhoff *supra* n. 658, at p. 7ff.
670 See *supra* V.4.1.
Does the decision of the Austrian court curtail the very essence of the right of access or its
effectiveness, which would result in the restriction not being allowed at all? While there would
indeed be no access to the Austrian court, at least until the matter would be resolved in Italy, this
argument is difficult to sustain. As has been noted above, it is possible to rely on courts of other
countries in international proceedings with regard to the right of access to a court. It would
consequently fall upon Gasser to make the case that this alternative is not a realistic option, as
proceedings in Italy are known for their longevity, which the Court itself has confirmed on
occasion. Assuming that the Court would find that the Austrian court’s decision to heed the
ECJ’s decision would indeed be a restriction on the right of access, one has to determine whether
this restriction would consequently result in a violation of Article 6 (1) ECHR. In this case the
legitimate aim would in all likelihood not be an issue. It would thus come down to the Court’s
assessment of the proportionality of the decision.

It is unclear how exactly the Court would decide in such a situation. What is clear is that such a
case would be comparable to the scenario discussed above, in which the right of access is
invoked when there is a foreign court available, but where the proceedings are not in line with
the requirements of Article 6 (1) ECHR. It has been contended above that the Court could take
the quality of the available foreign court into consideration in its decision regarding the
proportionality of such a restriction to the right of access. As the Court has previously found
proceedings in Italy to be lacking with regard to the requirement of a trial within a reasonable
time, it could thus be argued that as a result of the ECJ’s finding in Gasser, Austria could have
been held responsible for a violation of Article 6 (1) ECHR before the Court in Strasbourg. This
would, of course, leave the Contracting Parties, who are also EU Members (with the
exception of Denmark), with contradicting obligations under such circumstances.

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671 See supra V.4.3.2.
672 See, e.g., Salesi v. Italy, 26 February 1993, Series A no. 257-E. In response to the numerous breaches of the right
to have judicial proceedings within a reasonable time in Italy, the so-called Pinto Act has been introduced, which
enables claimants to have such violations remedied at the domestic level. This has, however, not solved all such
problems. See, e.g., Scordino v. Italy (no. 1) [GC], no. 36813/9, ECHR 2006-V.
673 See supra V.4.1; V.4.3 See also supra n. 465.
674 See supra V.4.3.
675 See supra n. 672.
677 In this regard one could note that – under admittedly entirely different circumstances – the Court has held, in a
case of Community law possibly violating the rights guaranteed in the ECHR, that it was not necessary to examine
It should be noted that the issue with which *Gasser* was directly concerned has been resolved in the proposal for a new Brussels I Regulation in the sense that, despite the strict rules on *lis pendens*, the court which has exclusively been named in a jurisdiction clause will be allowed to first rule on its jurisdiction, even if a case has first been brought in another country. While this is certainly a step in the right direction, which should preclude cases like *Gasser* from re-occurring, this does not provide a solution for the situation in which a case is deliberately brought before an ill-suited court, which does not have jurisdiction, to evade proceedings in the more suitable court in the absence of a jurisdiction clause. While in this latter scenario the willful evasion of a jurisdiction clause is absent, it would still be possible for cunning parties to slow down litigation by bringing proceedings first in a ‘wrong’ court.

There may be a turning point with regard to such strategic procedural behavior where the tactical use of the rules of jurisdiction becomes abusive. If a litigant stretches the limits of what is reasonable in international litigation, and the rules of international civil procedure do not put a stop to this, it is certainly arguable that the right to a fair trial *ex* Article 6 (1) ECHR could help to put a brake on such procedural behavior. It is important to remember that Article 6 (1) ECHR ultimately entails an obligation for the Contracting Parties to guarantee a fair trial to all parties concerned.

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whether the measure had been proportionate to the aim pursued, as it held that the protection of fundamental rights by Community law is, in principle, equivalent to the protection of the ECHR system. See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* [GC], no. 45036/98, par. 155, ECHR 2005-VI. This case concerned the issue of whether the implementation of a sanction regime by Ireland by way of EC Regulation 990/93 would violate Article 1 of Protocol No. 1 ECHR, the right to property. It is unclear whether the Court would follow a similar line of reasoning with regard to conflicting requirements under the Brussels I Regulation and Article 6 (1) ECHR.


7. Conclusion

In this chapter the impact of the ECHR on the issue of jurisdiction in private international law has been examined. Jurisdiction in private international law is concerned with the question of which court of which country has adjudicatory competence in international civil proceedings. It has been demonstrated that the impact of public international law on this subject is fairly limited.

In order to answer the question of what the impact of the ECHR on the issue of jurisdiction in private international law is, the question of whether the ECHR is at all applicable to this issue has first been revisited. The answer to this question can be found in Article 1 ECHR, which determines that the Contracting Parties are obligated to secure the rights and freedoms contained in the ECHR to everyone within their jurisdiction. If a litigant brings proceedings before a court of one the Contracting Parties, the decision of that court with regard to whether or not it should assert jurisdiction based on its jurisdictional rules must be in conformity with the ECHR, as the litigant is, in principle, within the jurisdiction of that Contracting Party in the sense of Article 1 ECHR from the moment of bringing the proceedings before the court of the Contracting Party. The jurisdictional rules of the forum therefore cannot limit the applicability of the ECHR in international civil proceedings. The Court has seemingly confirmed this stance in *Markovic and Others v. Italy*.

It has been demonstrated that the impact of the ECHR on the issue of jurisdiction in private international law is largely limited to the impact of Article 6 (1) ECHR, which guarantees the right to a fair trial. There are three basic instances in which Article 6 (1) ECHR may play a role with regard to the issue of jurisdiction in private international law that have been distinguished in this chapter. First, the right of access to a court, which can be derived from Article 6 (1) ECHR, can be invoked by a *plaintiff* in international civil proceedings who is unable to find a court to hear his or her case. Second, the right to a fair trial may also be invoked by a *defendant* in international civil proceedings if he or she is summoned before a court which has asserted jurisdiction based on a so-called exorbitant or inappropriate ground of jurisdiction. Finally, the
right to a fair trial may play a role in the area of strategic maneuvering in international litigation. These three instances have been elaborated upon in this chapter.

The right of access to a court may be invoked by a plaintiff in international civil proceedings. This right has been derived from the right to a fair trial by the Court in *Golder v. the United Kingdom*. There are two scenarios, which may be distinguished, in which a plaintiff may have to rely on this right. First, a plaintiff could be faced with the situation that there is no court available to hear his or her case. This situation could occur not only in the event of a negative conflict of jurisdiction (meaning that no court anywhere is willing to assert jurisdiction), but also where the normally competent court is unavailable due to circumstances beyond a plaintiff’s control, such as a situation of war. It has been demonstrated that it is generally accepted that the right of access to a court can be invoked in such a scenario, even though it follows from an examination of the case law of national courts that some connection with the forum State may still be required.

However, it has been contended that a plaintiff’s right of access to a court may also apply when there is a foreign court available. This is a more controversial conception of the right of access to a court in private international law. The Strasbourg Institutions have not yet given an opinion on this conception. In the only case on this issue, *Gauthier v. Belgium*, the Commission has left this issue open. Nevertheless, in the Court’s general case law on the right of access to a court, particularly in the Court’s finding that this right must be effective, some support can be found for the proposition that the right could, under certain circumstances, also be applicable even where there is a foreign court available. It has been demonstrated that Contracting Parties may rely on foreign proceedings in fulfilling their obligation to guarantee the right of access to a court. It would be unrealistic to completely disregard foreign access to a court in international civil proceedings.

Three such scenarios have been distinguished and examined. It has been discussed whether the right of access to court may be engaged if the proceedings in the only available foreign court would not meet the procedural standards of Article 6 (1) ECHR. In other words, does the right entail the right of access to a court in accordance with the requirements of Article 6 (1) ECHR? It
is actually possible to distinguish two scenarios under this heading. A plaintiff may, first, face unfair proceedings in the only available court. As will be discussed further below, there is a good argument to be made that the right of access to a court may entail the right of access to a court where the proceedings meet a certain procedural standard. A second, more theoretical, possibility is that the only available foreign court would be an inappropriate court in the sense that there would no link between the case and the available court.

It has also been examined whether a denial of justice could occur if it would be certain that the plaintiff’s (substantive) claim would be denied in the only available foreign court. Could a plaintiff rely on the right of access in such a situation? Furthermore, it has been examined whether the right of access could be invoked if it were certain that the judgment given in the only available foreign court could not be recognized and enforced in the Contracting Party.

The author has argued that if proceedings in the only available foreign court would allegedly be unfair in the sense of Article 6 (1) ECHR, this could be taken into consideration by the Court in reviewing whether the right of access to a court in a Contracting Party should be granted, despite there being a foreign court available. This could be reviewed within the framework the Court usually applies to restrictions to the right of access to a court – whether a restriction to the right has a legitimate aim and whether the restriction was proportionate to the legitimate aim pursued. Ultimately, whether a decision not to grant access to the forum was proportionate should be reviewed. However, it is conceivable that the review of the quality of the foreign proceedings could not be very strict and that an attenuated standard would be used in the sense that only in the event of a flagrant denial of justice would access be granted. At least some support for the argument that access should be granted if proceedings in the only available court would be unfair in the sense of Article 6 (1) of the ECHR can be found in all three legal orders that have been further examined.

It is more difficult to see how the right of access to a court could also include the right of access in the other two afore-mentioned scenarios. Even if it was certain that a plaintiff’s claim would be rejected on the merits in the only available foreign court, it is hard to see how a plaintiff could derive a right to a substantive outcome in a case from the procedural right of access.
Nevertheless, in one remarkable Dutch case, the right of access was deemed to be applicable in such a situation.

The last scenario concerns the right of access possibly being involved when it would be certain that the decision rendered in the only available forum would not be eligible for recognition and enforcement in the Contracting Party. It is questionable whether it would be necessary to preemptively grant a plaintiff the right of access before any proceedings have taken place abroad in the normally competent court. One should also note that the ECHR, in principle, requires Contracting Parties to recognize and enforce foreign judgments unless there are very compelling reasons not to do so.

The right to a fair trial may also be invoked by the defendant against the assertion of jurisdiction in international civil proceedings, where this jurisdiction is based on questionable grounds. It has been suggested in the literature that Article 6 (1) ECHR could play a role similar to the role that the Due Process Clause of the US Constitution fulfills with regard to the assertion of jurisdiction in private international law in the United States. Even though there are important differences between the rules on jurisdiction in Europe and the United States, which explain the different roles of Article 6 (1) ECHR and the Due Process Clause, the Court’s interpretation of the right to a fair trial would appear to allow for a due process-like role with regard to the defendant’s right to a fair trial.

Article 6 (1) ECHR may finally also have a role with regard to strategic litigation, where such procedural behavior could become abusive. In international civil proceedings it is perfectly normal for litigants, if they have a choice between different competent courts, to choose the one most favorable to their cause. However it is possible that such strategic litigation could lead to abuse of jurisdictional rules. The Brussels regime is particularly vulnerable to this practice, because of the emphasis on legal certainty and mutual trust. It has been examined whether Article 6 (1) ECHR may function as a brake on strategic litigation where this becomes abusive, and it has been found that there is some evidence for Article 6 (1) ECHR having such a role. However this has not yet been reflected in practice.
It is, in conclusion, interesting to reiterate that Article 6 (1) ECHR can, with regard to the issue of jurisdiction in private international law, be invoked by both the plaintiff as well as the defendant in international proceedings. It should be clear that it is possible that these two rights, under certain circumstances, may clash. If one were to give in too easily to a plaintiff demanding the right of access to a court even though a foreign court would have jurisdiction, the defendant may be forced to defend him or herself in a court that has asserted jurisdiction on an exorbitant ground. This observation may point to the true role of Article 6 (1) ECHR with regard to jurisdiction in private international law. Ideally, this right should ensure that the Contracting Parties use a balanced approach with regard to jurisdiction, taking into consideration both the interests of the plaintiff as well as the interests of the defendant in cross-border proceedings.