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

1. Introduction

In this research the impact of the rights guaranteed in the ECHR on issues of private international law has been analyzed by an examination of the Court’s case law and the case law of national courts. This research demonstrates that the impact of the rights guaranteed in the ECHR on private international law is considerable. This starts with the observation that most, if not all, of the issues with which private international law is concerned are, in principle, covered by the rights guaranteed in the ECHR, as follows from the Court’s case law. Moreover, the Court has in the past few years delivered a number of decisions specifically dealing with issues of private international law. It has dealt with all three main issues of private international law: jurisdiction, applicable law, and the recognition and enforcement of foreign judgments. The Court’s decisions have been more detailed and forthcoming in some areas than in other areas of private international law, but one may nevertheless distinguish a clear pattern. With these decisions the Court has given further evidence that private international law as an area of law is not immune to the rights guaranteed in the ECHR. It follows from the Court’s case law that the result of the application of private international law rules, regardless of whether these are concerned with the issue of jurisdiction, applicable law, or the recognition and enforcement of foreign judgments, must always comply with the requirements following from the rights guaranteed in the ECHR. As has been discussed in this research, this may have some consequences for private international law.

The rights guaranteed in the ECHR should therefore be carefully considered by courts in relation to the three main issues of private international law. Even though the impact of fundamental rights on these issues is not a new phenomenon, it has been found in this research that the impact of the ECHR on issues of private international law, as determined by the Court in its case law, appears in certain respects not to have yet fully permeated at the national level, as some traditional private international law techniques are susceptible to leading to a violation of the ECHR. By way of conclusion, I will highlight the most important findings of this study in this chapter, before ending with some concluding remarks.
The role of Article 1 ECHR has proven to be an important preliminary issue in this research, and its role should not be underestimated in this discussion. In Article 1 ECHR the basic obligation undertaken by the Contracting Parties has been laid down, and it also defines the scope of the instrument with the phrase ‘within their jurisdiction’. As private international law by its very nature introduces foreign elements to the legal orders of the Contracting Parties, which possibly emanate from third countries (i.e. non-Contracting Parties), one should turn to Article 1 ECHR to see whether the rights guaranteed in this instrument are applicable at all in issues of private international law. It has been demonstrated that it follows from the Court’s case law concerning Article 1 ECHR that when a court of a Contracting Party either determines whether it is competent to hear an international case concerning an issue of private law, or recognizes and enforces a foreign judgment, the ECHR is applicable to such cases. This applies irrespective of whether a foreign law or judgment originates from either a Contracting or a non-Contracting Party (third country), or whether the case has a close connection to the Contracting Party concerned or little to none at all.

The fact that a third country has never signed the ECHR has no bearing on whether the ECHR is applicable to cases concerning the application of a foreign law or the recognition and enforcement of a foreign judgment emanating from a non-Contracting Party. It would, after all, ultimately be the court of one of the Contracting Parties whose determination of whether it has jurisdiction, whose application of a foreign law, or whose recognition of a foreign judgment violating one of the rights guaranteed in the ECHR would breach the ECHR. This could already be deduced from the Court’s case law concerning the extra-territorial effects of the ECHR, and has since been confirmed by the case law that specifically deals with private international law. It has been demonstrated that even in circumstances in which an issue of private international law has only a negligible connection with the Contracting Party, the situation does not change appreciably. Such situations still come within the jurisdiction of the Contracting Party within the meaning of Article 1 ECHR.

This observation does have some consequences for issues of private international law, particularly where it is concerned with the application of a foreign law or the recognition and
enforcement of foreign judgments of third countries possibly violating one of the rights guaranteed in the ECHR, as has been demonstrated in Chapter IV and is further elaborated upon in Chapters VI to VIII. It follows from this observation that it is only possible to restrict the rights guaranteed in the ECHR in such cases to the extent that this is permitted under the ECHR.

In this regard it should be noted that the most relevant rights guaranteed in the ECHR in the context of private international law – Article 6 (1) and Article 8 ECHR and Article 1 of Protocol No. 1 ECHR – are not absolute rights. Under certain circumstances these rights may be restricted. The exact manner in which these rights may be restricted depends on the particular right guaranteed in the ECHR concerned, but it is important to note from the outset that it is, in principle, possible to take into account private international law concerns in this manner.

Traditionally, however, private international law has protected fundamental rights with regard to a foreign applicable law or the recognition and enforcement of a foreign judgment by means of the invocation of the public policy exception. One may question, though, whether the public policy exception resulting in the non-application of the ECHR, because of the relative character of the exception, is permissible in light of Article 1 ECHR. These observations will be further elaborated on below in relation to the separate discussions of the impact of the ECHR on the three main issues of private international law.

2. The Impact of the ECHR on the Issue of Jurisdiction in Private International Law

As discussed in Chapter V, the impact of the ECHR on the issue of private international law is essentially limited to Article 6 (1) ECHR, which guarantees the right to a fair trial. The impact of Article 6 (1) ECHR has three distinct aspects. First, a plaintiff in international civil proceedings who is unable to find an open court may invoke the right of access to a court, which has been deduced from Article 6 (1) ECHR by the Court in Golder v. the United Kingdom. Second, a defendant in such international proceedings can also at least attempt to rely on Article 6 (1) ECHR, the right to a fair trial, if he or she is summoned before a court which has asserted jurisdiction based on a so-called exorbitant ground of jurisdiction. Third, the right to a fair trial
may arguably also be invoked against the abuse of jurisdictional rules in international civil litigation.

The right of access to a court has the most profound impact on the issue of jurisdiction in private international law. The right of access to a court can be invoked by a plaintiff in international civil proceedings in two different situations. First, a plaintiff could be faced with the fact that no (functioning) court is competent to hear his or her case. This could either be due to there being a negative conflict of jurisdiction, or to the fact that the normally competent court is unavailable on account of circumstances beyond the control of the plaintiff, such as a situation of war or a natural disaster. It is undisputed that Article 6 (1) ECHR obligates the Contracting Parties to open up their courts to plaintiffs under such circumstances. This has also found acceptance in the national legal practice of England, the Netherlands, and Switzerland. One may note also that the legislation of many Contracting Parties, which otherwise have hard and fast rules on jurisdiction, contains a forum necessitatis clause.

It has, however, been contended that a plaintiff’s right of access to a court may also play a role in a situation in which there is, in principle, a court available to the plaintiff. This is without question a more controversial conception of the right of access to a court in private international law. The Strasbourg Intitutions have not yet given an opinion on such a conception of the right of access to a court in private international law. In the only case in which this issue arose, Gauthier v. Belgium, the Commission did not really give an opinion. 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 may be found for the proposition that the right of access to a court could, under certain circumstances, indeed entail an extended right of access.

Three possibilities to extend the right of access to a court to situations in which there is already an available court in international proceedings have been distinguished and discussed in this research. It has been contended that the right of access to court may be engaged if the proceedings in the only available foreign court would not meet the standards of Article 6 (1) ECHR. The argument that 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 has also been examined.
Finally, the argument that the right of access could also play a role if it were certain that the judgment given in the only available foreign court could not be recognized and enforced in the Contracting Party has been discussed.

With regard to these three options, it should first be remarked that it is indeed possible for a Contracting Party to rely on foreign proceedings in fulfilling its 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. Moreover, this would essentially entail that plaintiffs would always have the right of access to a court in the forum of their choosing, which simply cannot be the case. However, such reliance on foreign proceedings by the Contracting Parties with regard to their obligation concerning the right of access to a court would still result in there being no access to a court in the respondent Contracting Party. Thus one could say that not only is the right of access to a court engaged in such a situation, but also that this right of access is restricted.

It is, in my opinion, conceivable that a plaintiff’s right of access to a court in international civil proceedings entails a right of access to a court in which proceedings must be deemed fair, or at least not at first sight result in a ‘flagrant denial of justice’. Because denying access to the forum on account of there being a foreign court competent to hear the case would be a restriction of the right of access, it would be possible in the review of this restriction to take the quality of the foreign proceedings into consideration, particularly in relation to the proportionality requirement. However, such a review of the quality of the foreign proceedings cannot be too strict, because in such a situation an assessment has to be made of foreign proceedings which have yet to take place. Only exceptional circumstances could suffice for finding a violation of the right of access to a court in this regard. This also follows from the Court’s case law in *Eskinazi and Chelouche v. Turkey*. Access to the forum may only be granted by the Contracting Party on the basis of the right of access to a court *ex* Article 6 (1) ECHR if it would be clear that proceedings in the otherwise available court would lead to a flagrant denial of justice. It has similarly been accepted in some national case law of England, the Netherlands, and Switzerland that Article 6 (1) ECHR entails the right of access to a court in accordance with the procedural standards of that provision.
It has been demonstrated that it would appear to be difficult to attach either a right to a substantive claim or the right to have a foreign judgment recognized and enforced to the right of access to a court. Even if it were 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 to a court. This would, after all, require a decision on the merits of a case before a decision on the preliminary question of jurisdiction has been taken. It is difficult to see how Article 6 (1) ECHR could entail an obligation for a Contracting Party to do so. Moreover, asserting jurisdiction on this basis may result in proceedings on a basis which could be fought by the defendant on the grounds of the latter’s rights under Article 6 (1) ECHR, as will be discussed below.

It is similarly questionable whether it is necessary, on account of a decision yet to be rendered abroad, which might possibly not be recognized and enforced in the forum, to pre-emptively grant a plaintiff a right of access before any proceedings have taken place abroad in the normally competent court, unless, of course, the lack of fair proceedings were to be the culprit in this regard. The latter situation – lack of fair proceedings in the only available court – would match the scenario discussed above, in which a plaintiff is unable to find a court where proceedings would be fair. This latter situation can be distinguished because no pre-emptive assessment of the merits of a case is required. One should also note, with regard to the impossibility of the recognition and enforcement of foreign judgments, that the ECHR, in principle, requires Contracting Parties to recognize and enforce foreign judgments, as will be further discussed below.

In the jurisprudence of the national courts of the Contracting Parties under analysis it has been found that it has occasionally been held that a plaintiff’s right of access to a court should entail a right of access where a fair trial could be had in accordance with the requirements of Article 6 (1) ECHR. Remarkably, a Dutch court has even been willing to extend further the right of access to a court to a situation in which a substantive result could not be had in the available foreign court. However, as noted above, this would seem to stretch this right too far.
The second aspect of the impact of Article 6 (1) ECHR on the issue of jurisdiction concerns the defendant in international civil proceedings. Article 6 (1) ECHR may also be invoked against the assertion of jurisdiction, where jurisdiction is based on exorbitant or inappropriate 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 (intra-state cases in) the United States. Even though there are important differences between the rules on jurisdiction in Europe and in 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. However, this right is until now more theoretical than practical, as little evidence can be found in the case law of the Court or in national case law of such an interpretation of the ECHR. Nevertheless, it would appear to be possible to construe such a due process-like right from the right to a fair trial.

Finally, Article 6 (1) ECHR may also have a role with regard to strategic litigation, where such procedural behavior could become abusive. It is, in international civil proceedings, 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. The Brussels regime is particularly vulnerable to this practice, due to its rules on *lis pendens*, overlapping jurisdictional rules, the possibility to sue for declaratory judgments, and 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. The starting point of this discussion is the decision of the ECJ in *Gasser*. In this case an appeal to Article 6 (1) ECHR was rejected by the ECJ, which cited, *inter alia*, the mutual trust of the Member States in each other’s legal orders and legal certainty. It has been found, however, that Article 6 (1) ECHR may play a more prominent role with regard to strategic litigation, even though, again, this is until now more of a theoretical possibility, as it has not yet been brought up in the case law.

In concluding a discussion on the impact of Article 6 (1) ECHR on jurisdiction in private international law, it is possible to observe that Article 6 (1) ECHR essentially requires the
Contracting Parties to use a balanced approach with regard to this issue, which would include procedural maneuvering. After all, while the role of Article 6 (1) for the plaintiff in international civil proceedings is quite clear, a good argument could be made that Article 6 (1) ECHR could also be invoked by the defendant in such proceedings, in order to fight jurisdiction. This further demonstrates that Article 6 (1) ECHR is an important factor in a balanced system of jurisdictional rules of the Contracting Parties.

3. The Impact of the ECHR on the Issue of Applicable Law

In examining the impact of the ECHR on the issue of applicable law in private international law, three different aspects have been distinguished in Chapter VI. The most important issue is the invocation of the rights guaranteed in the ECHR against the foreign applicable law violating the ECHR. Additionally, it has been examined whether one of the rights guaranteed in the ECHR can also be invoked against the lex fori, and whether the ECHR could thus also purport to favor the application of a foreign law over the lex fori. Finally, the act of applying foreign law by the national courts of the Contracting Parties has been examined and, in particular, whether the ECHR has an impact on issues relating to the identification of the content of the applicable foreign law.

This latter aspect is clearly different from the first two, as it is really a procedural issue and therefore only concerns Article 6 (1) ECHR. The impact of the ECHR on the other two aspects of the issue of applicable law, however, is concerned with the impact on the material result of the application of either a foreign law or the lex fori. It follows that, in principle, all the substantive rights guaranteed in the ECHR capable of having an impact on issues of private law could be invoked. It has been demonstrated, though, that Article 8 ECHR (the right to private and family life) and Article 1 of Protocol No. 1 ECHR (the right to property) are particularly important rights in this regard.

It has been established that it is generally accepted that the application of a foreign law interfering with one of the rights guaranteed in the ECHR by a national court of one of the Contracting Parties may lead to a violation of the ECHR by the respondent Contracting Party.
Nevertheless, the Court has never actually found a violation of the ECHR on this basis and has only dealt with a small number of admissibility decisions on this issue. Therefore, important questions on this topic remain unanswered by the Court.

One of the open questions is what the standard of control should be with regard to a foreign law applicable to a case possibly violating one of the rights guaranteed in the ECHR. Many have argued that the standard of control of the ECHR should be attenuated, particularly where the foreign applicable law originated from a third country. If a foreign applicable law of a third country were to be subjected to the full scrutiny of the ECHR there would be less room for the application of such foreign laws, as this would lead to the more frequent setting aside of the normally applicable foreign law. This could, in turn, lead to limping legal relationships (a relationship recognized in one country, but not in another), and it has even been argued by some that this would, on another level, result in different blocks of States each adhering to their own, different values.

While the attenuation of the standards of the ECHR in relation to the foreign applicable law may be desirable, because it would decrease the number of instances in which the application of a foreign law would be denied on the basis of its incompatibility with the ECHR, there are inherent limitations to the possibility of attenuation in this regard under the ECHR. This essentially follows from Article 1 ECHR. Restrictions to rights guaranteed in the ECHR are only permitted insofar as these are allowed under the respective rights guaranteed in the ECHR concerned. However, the rights guaranteed in the ECHR concerned with issues of private international law, and particularly the issue of applicable law, provide such leeway. This is because the rights concerned in issues of applicable law are usually so-called qualified rights, such as, for example, Article 8 ECHR and Article 1 of Protocol No. 1 ECHR, which means that they are subject to interference by the Contracting Parties in order to secure certain interests.

It has been contended in this research that in assessing whether a foreign applicable law would possibly violate one of the rights guaranteed in the ECHR, the Court should follow its usual approach with regard to restrictions to (qualified) rights. Thus, after having determined that the foreign applicable law would interfere with one of the rights guaranteed in the ECHR, it should
assess whether this restriction was in accordance with the law, had a legitimate aim, and whether it was necessary in a democratic society. This latter condition is often decisive. In accordance with its standard case law, the Court would determine whether the interference caused by the application of a foreign law fulfills a pressing social need. In reviewing this pressing social need the Court will evaluate whether the restriction was proportionate to the legitimate aim pursued and whether a less invasive measure could have been possible. The Contracting Parties enjoy a certain margin of appreciation in all of this, the extent of which will depend on the exact rights guaranteed in the ECHR concerned. It has been demonstrated that in its most relevant admissibility decision on the issue of applicable law, *Ammadjadi v. Germany*, the Court has more or less followed this approach.

As the Court has up until this point merely given a number of admissibility decisions in cases in which the issue of applicable law was a topic, it is not yet clear to what extent the Court would allow for the attenuation of the rights guaranteed in the ECHR in order to account for the international dimension of the issue of the application of a foreign law. However, in a first review of the available case law in this study, the Court does not appear to give much leeway in this regard.

A related issue concerning the invocation of the ECHR against the foreign applicable law is the manner in which the rights guaranteed in the ECHR are invoked by the national courts of the Contracting Parties. In almost all cases they use the public policy exception in private international law to consider the rights guaranteed in the ECHR with regard to the foreign applicable law. Formally speaking, there is no need to change course. The Court, after all, will only review the result the national court has reached with regard to the foreign applicable law and is, in principle, not concerned with the manner in which this result has been reached. However there are dangers inherent to the use of the public policy exception with regard to the impact of the rights guaranteed in the ECHR on the issue of applicable law in private international law.

The use of the public policy exception in this regard may lead to the setting aside of the rights guaranteed in the ECHR in cases which lack a sufficient link with the forum. The relative
character, which is generally ascribed to the public policy exception, could then result in the public policy exception not being applicable, which may, in turn, result in the right guaranteed in the ECHR not being applied to a case. However, as has been discussed, it follows from Article 1 ECHR that the ECHR is even applicable in cases which have only a negligible connection with the forum. Therefore, an attenuation of the standards of the ECHR by way of the use of the public policy exception could result in a violation of the ECHR.

A second aspect of the impact of the ECHR on the issue of applicable law that has been examined in this research is the possible invocation of the rights guaranteed in the ECHR against the lex fori in favor of the application of foreign law. This is a scenario which has been raised in the literature, where it has been argued that this could be a possibility under the ECHR. However it has been demonstrated that there is little indication to be found in the case law of the Strasbourg Institutions for such a conception of the ECHR.

There is one exception, though. In Losonci Rose v. Switzerland the Court held that the application of the lex fori resulted in a violation of Article 8 ECHR taken in conjunction with Article 14 ECHR, as the application of the lex fori by the authorities essentially took away the possibility of a husband to choose his preferred last name in accordance with his national (foreign) law after his marriage; this option would have been available if the applicant had been a woman. However, as this latter observation also demonstrates, this case was more concerned with the (result of) discriminatory nature of the relevant Swiss private international law rules and not so much with the possibility to invoke the ECHR against the application of the lex fori in favor of the application of foreign law.

With regard to the third aspect of the impact of the ECHR on the issue of applicable law, it follows from the Court’s case law that national courts should establish the content of the foreign applicable law in an expeditious manner. Otherwise, the Contracting Parties may be held responsible for a violation of Article 6 (1) ECHR due to the length of the proceedings. The difficulties national courts may face in the identification of the content of the foreign law are hardly a mitigating factor. If the complexities in finding the content of the foreign applicable law are too difficult to overcome another solution must be found, which could, for example, include
the national courts of the Contracting Parties resorting to the application of the lex fori, because it is paramount that a decision is taken within a reasonable time, as Article 6 (1) ECHR prescribes. A review of the practice in the national legal orders under analysis has demonstrated that national courts, in principle, have all the tools required to prevent such violations of Article 6 ECHR, as the national courts in question are allowed to apply the lex fori if it proves to be impossible to establish the content of the normally applicable foreign law within a reasonable time.

In conclusion, one could say that the impact of the ECHR on the issue of applicable law will largely be limited to the invocation of one of the (substantive) rights guaranteed in the ECHR against a foreign applicable law possibly violating this right and the impact of Article 6 (1) ECHR on the ascertainment of the content of the foreign applicable law. While questions remain concerning the extent to which rights guaranteed in the ECHR may be limited in the name of the internationality of a case or the origin of the foreign law, particularly laws originating from third countries, it should be noted that the national courts of the Contracting Parties are, in principle, well prepared for the possibility that a foreign law may violate fundamental norms of the forum.

Nevertheless, I would argue that national courts should take human rights more seriously in the sense that the use of the public policy exception in relation to the rights guaranteed in the ECHR against a foreign applicable law interfering with one of the rights guaranteed in the ECHR may result in a violation of the ECHR. This risk could, in my opinion, be mitigated by more directly examining the possibly repugnant foreign law in light of the right guaranteed in the ECHR concerned by examining the extent to which restrictions to the rights guaranteed in the ECHR may be permissible.

4. The Impact of the ECHR on the Recognition and Enforcement of Foreign Judgments

The impact of the rights guaranteed in the ECHR on the recognition and enforcement of foreign judgments has two distinct aspects, as the ECHR may contain both the obligation to recognize and enforce foreign judgments and the opposite obligation to deny recognition and enforcement of foreign judgments. These obligations have been examined separately in Chapters VII and
VIII. It has been established that Article 6 (1) ECHR, Article 1 of Protocol No. 1 ECHR, and Article 8 ECHR may entail an obligation for the authorities of the Contracting Parties to facilitate the recognition and enforcement of foreign judgments, while in the absence of fair proceedings abroad Article 6 ECHR may obligate Contracting Parties to deny recognition and enforcement. It is, finally, also possible that a substantive right guaranteed in the ECHR would stand in the way of the recognition and enforcement of a foreign judgment.

Article 6 (1) ECHR contains a general obligation to recognize and enforce foreign judgments in the sense that it applies to all kinds of foreign judgments, regardless of whether they originate from other Contracting Parties or from third countries. This obligation is not absolute. While the Court has not always been consistent in its case law, it appears to examine a failure to recognize and enforce a foreign judgment in relation to Article 6 (1) ECHR mostly as an interference with the right of access to a court. It has been demonstrated that the Court’s assessment entails that such a failure is only allowed if it has a legitimate aim – it must not be arbitrary – and is proportionate to this legitimate aim pursued. The proportionality requirement is usually the most important requirement in this regard.

It follows from the Court’s case law that the rules of private international law in the Contracting Parties concerned with the recognition and enforcement of foreign judgments must comply with the framework developed by the Court, discussed above. Any interference with the obligation to recognize and enforce based on traditional private international law defenses, such as, for example, the (substantive) public policy requirement, requirements as to jurisdiction, and even requirements regarding the service of documents instituting international proceedings, must thus meet the Court’s demands with regard to restrictions under Article 6 (1) ECHR. The Court found in Négrépontis-Giannisis that the invocation of the (substantive) public policy exception against the recognition of an American adoption order was arbitrary and disproportionate and it therefore found a violation of the ECHR.

Article 1 of Protocol No. 1 ECHR only entails an obligation to recognize and enforce foreign judgments which are concerned with some sort of possession, even though the Court has also found a violation on the basis of this right in a case in which the applicant’s status as an heir was
concerned. The obligation under Article 1 of Protocol No. 1 ECHR – including the possibility to restrict this obligation – is furthermore similar to the obligation under Article 6 (1) ECHR with regard to the recognition and enforcement of foreign judgments. There is clearly an overlap between these two obligations.

It has been shown that an obligation to recognize foreign family law judgments in which a status has been acquired or a family relationship has been established follows from Article 8 ECHR. This obligation is also not absolute, as is, of course, already indicated in the Article itself. However, in its case law in Wagner and Négrépontis-Giannisis, the Court found that there is a high threshold for the outright denial of recognition of international family law judgments establishing a family link where parties have a legitimate expectation that the judgment will be recognized and social reality demands recognition. However, this may be different in the situation where some of the effects of the foreign family law judgment have been recognized in the Contracting Party, as was found by the Court in Harroudj, which concerned the recognition of a kafala (adoption).

Regarding the outright denial of recognition of foreign family law judgments, traditional rules of private international law invoked by the (national courts of the) Contracting Parties against the recognition (and enforcement) may essentially be overruled by the Court. It follows from the Court’s case law that traditional private international law requirements concerning recognition and enforcement of foreign family law judgments must comply with the requirements of Article 8 ECHR. If such a requirement leads to a denial of recognition, it will be assessed as an interference under Article 8 (2) ECHR. In Wagner, for example, the requirement that a foreign adoption should be in accordance with the lex fori (a choice of law requirement) was set aside by the Court, while in Négrépontis-Giannisis the invocation of the substantive public policy exception by the Greek courts, which led to the denial of the recognition and enforcement of the foreign judgment, was deemed by the Court to be a violation of Articles 6 and 8 ECHR. However, in its admissibility decision in Hussin, the Court found in relation to a jurisdiction requirement that the ECHR could not be invoked against this decision, reiterating that it is not possible to complain before the Court about a situation to which the applicant herself has contributed.
It has been discussed in this research that the findings in *Wagner* and *Négrépontis-Giannisis* in particular have been hailed as ushering in a new methodology for private international law in this regard. I would not necessarily go that far, as it is possible to point to certain facts in both cases – facts relating to the legitimate expectations of the applicants that the foreign judgment would be recognized – which would make it possible for the Court to interpret its own findings in subsequent cases in a more narrow fashion. Moreover, the Court’s findings in *Hussin* demonstrate that it would certainly go too far to write off all private international law rules against recognition and enforcement of foreign family judgments. Nevertheless, national courts should carefully consider such private international law requirements in light of the obligation to recognize and enforce foreign family law judgments following from Article 8 ECHR.

It should be pointed out that while there may be a development towards a more recognition-friendly framework for international foreign family law judgments, important grounds for refusal remain in place. It has, for example, been demonstrated that the rights of others, which in international family law judgments may particularly play an important role, trump the obligation to recognize and enforce. This follows, *inter alia*, from the Court’s judgments in *Green and Farhat* and *Pini*. More generally, the obligation to recognize and enforce does not entail an obligation to recognize and enforce foreign judgments violating the ECHR.

As discussed in Chapter VIII, the second aspect of the impact of the ECHR on the recognition and enforcement of foreign judgments is that the ECHR may also be an obstacle to recognition and enforcement. It is, in principle, well established that the recognition and enforcement of foreign judgments can (also) be denied on the basis of Article 6 (1) ECHR. This would be the case if the proceedings abroad have been unfair, or if the defendant could not have been aware that proceedings were brought against him or her in another country.

However, the precise details of the role of Article 6 (1) ECHR in this regard are somewhat unclear, as the Court has created some confusion in its case law. In *Pellegrini v. Italy* the Court held that Contracting Parties have the obligation with regard to foreign judgments originating from third countries to avail themselves as to whether the proceedings did not violate Article 6
Yet the Court has since appeared to suggest that foreign judgments emanating from third countries should only be denied recognition and enforcement if not doing so would lead to a ‘flagrant denial of justice’. This would suggest that the standard of control with regard to Article 6 (1) ECHR should be attenuated. In its later case law the Court has acknowledged the fact that it is unclear which standard should be used, but it has not provided further guidance on this aspect. One of the problems with the standard of a ‘flagrant denial of justice’ is that it is unclear what this exactly entails. The few cases in which this standard has been further discussed give the impression that the procedural shortcomings have to be quite serious in order to qualify as a ‘flagrant denial of justice’. This would consequently suggest a lenient standard of control for foreign judgments emanating from third countries.

This is, in my opinion, an unattractive standard for the recognition and enforcement of foreign judgments. After all, by either recognizing or enforcing a foreign judgment a State gives effect to such a judgment within its territory, which it previously did not have. Once this judgment has been recognized and enforced by the receiving State, the effect of such a judgment is essentially equal to that of a domestic judgment. From that perspective, it would hardly seem fair to an injured party to use a different standard in relation to Article 6 (1) ECHR.

The Court’s judgment in *Pellegrini* does not answer the question of whether the standard of full compliance introduced in this case and the obligation to deny recognition and enforcement also applies to foreign judgments originating from other Contracting Parties. However, as it is clear that the procedural safeguards in the ECHR should already be protected in other Contracting Parties, it is, in my opinion, easy to argue that this should be the case. A possible complication with foreign judgments emanating from other Contracting Parties is that the local remedy rule may apply: in principle, complaints concerning an unfair procedure in the Contracting Party of origin of the judgment should be brought in that Contracting Party.
The jurisprudence of the national courts of the Contracting Parties under analysis demonstrates that the absence of fair proceedings abroad will, in principle, lead to the denial of recognition and enforcement of foreign judgments. The fairness of the proceedings abroad is, in fact, a requirement for the recognition and enforcement of foreign judgments. However, the exact standard of control with regard to Article 6 (1) ECHR is difficult to tell from the available case law.

With regard to the Court’s case law on the invocation of the substantive rights guaranteed in the ECHR against the recognition and enforcement of foreign judgments, a clear distinction should be made from the perspective of the Court between cases concerning the enforcement of a foreign judgment emanating from another Contracting Party and cases concerning foreign judgments originating from a third country. It follows from the Court’s decision in Lindberg that it appears to be difficult to successfully invoke one of the substantive rights guaranteed in the ECHR against the recognition and enforcement of a foreign judgment originating from another Contracting Party before the Court in Strasbourg. In this case the Court essentially applied the local remedy rule: the necessity to first exhaust national procedures. As noted above, this would require an applicant to seek a remedy within the Contracting Party of the origin of the foreign judgment and then go to Strasbourg, instead of awaiting enforcement proceedings in another Contracting Party. However, it has been found that this does not necessarily mean that the national courts of Contracting Parties should always follow suit in relying on the local remedy argument.

The Court has dealt only once with the invocation of one of the substantive rights guaranteed in the ECHR against the recognition and enforcement of a foreign judgment originating from a third country. The Court examined the enforcement of the foreign judgment as a restriction to the applicant’s right to property ex Article 1 of Protocol No. 1 ECHR and after balancing the interests of society as a whole in the enforcement against the applicant’s interest in denying the enforcement, the Court held that there had not been a violation. Yet even though the Court in its assessment of the restriction did acknowledge the international dimension of the case, it is still of limited relevance for private international law in general, as it concerned a forfeiture order to
help combat (international) drug trafficking, which is a very specific topic and gave rise to the wide margin of appreciation of the Contracting Party in this regard.

There is, similarly, little case law to be found in the national legal orders under analysis with regard to the recognition and enforcement of foreign judgments that possibly violate one of the substantive rights guaranteed in the ECHR, even though the principle of the refusal to recognize and enforce such foreign judgments has been recognized. Nevertheless, the substantive rights guaranteed in the ECHR appear not to have been invoked often in national jurisprudence, leaving many questions open in this regard.

5. Concluding Remarks

The rights guaranteed in the ECHR have an impact on all three main questions of private international law. Even though the Court’s case law on this topic remains somewhat limited, it is clear that issues of private international law will largely be covered by the rights guaranteed in the ECHR. It follows that the result of the application of the rules of private international law of the Contracting Parties should be in conformity with the ECHR. It has been demonstrated in this research that in some areas this impact of the ECHR is still somewhat underestimated.

An important question throughout this research has been whether the application of the rights guaranteed in the ECHR to issues of private international law would leave room for specific private international law concerns. It has been argued, particularly by specialists of private international law, that if the scrutiny of the rights guaranteed in issues of private international law was too strict, there would be too little room left for the application of a foreign law or the recognition and enforcement of foreign judgments, particularly where these originated from third countries. In this research, however, it has been argued that the rights guaranteed in the ECHR concerned with issues of private international law by their nature leave room for such concerns. The rights guaranteed in the ECHR that are concerned with issues of private international law are, after all, not absolute rights.
It is interesting to note that there appears to be a tendency in the Court’s case law concerning issues of private international law pointing to a less strict control of the rights guaranteed in the ECHR by the Court in such cases. In many issues of private international law the Court leaves a wide margin of appreciation to the Contracting Parties, for various reasons. Moreover, even in situations in which the Court had previously appeared to draw a strict line, such as, for example, with regard to Article 6 (1) ECHR and the enforcement of foreign judgments emanating from third countries in *Pellegrini*, in later cases the Court has seemingly distanced itself from this line. One could therefore conclude that although the possible impact of the ECHR on private international law is enormous, the Court’s approach appears to mitigate this impact somewhat.

What could further limit the impact of the ECHR on private international law is that the Court scrutinizes the procedural behavior of the parties very strictly in cases of private international law. One could, for example, cite the afore-mentioned local remedy argument with regard to the enforcement of foreign judgments originating from other Contracting Parties. Moreover, in multiple cases, such as, for example, *McDonald*, *Hussin*, and *Ammdjadi*, the Court held that no violation of the ECHR could be found because of its standard case law that applicants cannot complain about a situation to which they have themselves contributed. This may further limit the possibility to successfully invoke one of the rights guaranteed in the ECHR in issues of private international law. This may, in light of another trend of private international law – the increased role of party autonomy – even become a serious impediment, as it could be possible that the Court would set aside cases where the applicant could, for example, have prevented issues with a repugnant foreign law by entering into a choice of law agreement, as it essentially found in *Ammdjadi*. A similar observation could be made with regard to issues of jurisdiction in private international law. One can hardly imagine that the Court has introduced this line of reasoning in issues of private international law by design, but it is nevertheless an interesting observation.

A new area developed by the Court deviates a little from the afore-mentioned tendency to give leeway to the Contracting Parties in issues of private international law with regard to the ECHR. The Court has held that the ECHR essentially entails an obligation for Contracting Parties to recognize and enforce foreign judgments. The Court has found that particularly foreign family law judgments in which a status has been acquired should be recognized, notwithstanding
traditional grounds of refusal in the private international law regimes of the Contracting Parties, such as the public policy exception. This is an area of private international law where the full impact of the ECHR has yet to fully permeate into the national legal orders of the Contracting Parties. However, even with this case law one could argue that the Court has already begun to limit this right, as it has done in its latest case on this topic in Harroudj, as it held that giving partial effect to a foreign judgment did not violate the obligation to recognize foreign judgments.

In this research national jurisprudence of a few selected legal orders has been examined, namely England, the Netherlands, and Switzerland. Even though no fully comparative research has been undertaken, it is interesting to observe some of the differences in how the rights guaranteed in the ECHR are treated in issues of private international law in the various Contracting Parties. Additional comparative research could result in further valuable insights into the impact of the ECHR on private international law.

In conclusion, one may thus state that while the exact impact of the ECHR in many areas of private international law is still unclear due to the limited number of cases in which the Court has dealt with such issues, it is hoped that this research has contributed in further explaining that private international law is not immune to the impact of the rights guaranteed in the ECHR. Quite to the contrary, it follows from this research that the rights guaranteed in the ECHR have already had a considerable impact on the three main issues of private international law. It is quite conceivable that some aspects of the private international law regimes of Contracting Parties have to be adapted somewhat in order for the Contracting Parties to fulfill their obligations under the ECHR.

In particular, the manner in which national courts assess the rights guaranteed in the ECHR in relation to a foreign applicable law or a foreign judgment should be reconsidered, as it appears to be prudent for courts to regard the rights guaranteed in the ECHR more as a starting point in the discussion, instead of relegating their role to a correcting device afterwards by means of the public policy exception. Placing the rights guaranteed in the ECHR at the forefront would equally be of use in other discussions, such as the impact of the ECHR on jurisdiction and the obligation to recognize and enforce foreign judgments.