

*The Impact of the ECHR on Private International Law: An Analysis of
Strasbourg and Selected National Case Law*

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Summary

In this research the interaction between the rights guaranteed in the European Convention of Human Rights (ECHR) and private international law has been analyzed by examining the case law of the European Court of Human Rights (the Court) in Strasbourg and selected national courts. In doing so the study has focused on the impact of the ECHR on the three main issues of private international law: jurisdiction, applicable law, and the recognition and enforcement of foreign judgments.

In Chapter II, a concise presentation of important issues of private international law introduces the concept of private international law to readers less familiar with this topic. In this chapter important issues, such as the internationality of the sources of private international law, are discussed. Furthermore, the first foray into the discussion of the impact of the ECHR on private international law will be found here, as in this chapter the notion of the public policy exception as the instrument of private international law which has been used historically to deal with the impact of fundamental rights is considered.

Chapter III provides an introduction to the ECHR. Issues which are discussed in this chapter include its enforcement machinery, the status of the ECHR in the national and international legal orders, and the structure and content of the ECHR. The nature of the Contracting Parties' obligations following from the rights guaranteed in the ECHR is also reviewed. The manner in which certain rights guaranteed in the ECHR may be limited under specific circumstances is particularly significant for this research. An important question is the extent to which Contracting Parties may restrict such rights in issues of private international law.

Chapter IV discusses the role of Article 1 ECHR. Article 1 ECHR defines the scope of the instrument, and the part this provision plays is an important preliminary issue for this research. In private international law cases, foreign elements are introduced to legal orders. Occasionally, private international law will introduce foreign elements from third countries, i.e. countries that

are not Contracting Parties to the ECHR. It is interesting to consider what the role of Article 1 ECHR is in such cases. Following from the Court's case law concerning Article 1 ECHR, the ECHR is applicable 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. 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. This observation may have important consequences, particularly for the use of the public policy exception in issues of private international law, as has been further elaborated in the later chapters on applicable law and the recognition and enforcement of foreign judgments.

The impact of the ECHR on jurisdiction in private international law is examined in Chapter V. It is demonstrated in this chapter that the impact of the ECHR is limited to Article 6 (1) ECHR. This right may be invoked by both plaintiffs and defendants in international civil proceedings. Plaintiffs may rely on the right to access to a court, which has been derived by the Court from Article 6 (1) ECHR. The right of access to a court not only plays a role in international proceedings in the event of negative jurisdiction – where there is no court available – but, under certain circumstances, a plaintiff might also rely on this right where there is more than one court available.

Defendants in international proceedings can also rely on Article 6 (1) ECHR. Article 6 (1) ECHR may be invoked *against* the assertion of jurisdiction, where jurisdiction is based on exorbitant or inappropriate grounds. It has been argued that 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. Finally, Article 6 (1) ECHR may additionally have a role with regard to strategic litigation. In international civil proceedings, it is perfectly normal for litigants who have a choice between different competent courts to choose the one most favorable to their cause. However, such strategic litigation might lead to abuse. This chapter examines whether Article 6 (1) ECHR can function as a brake on strategic litigation where this becomes abusive.

In Chapter VI the issue of applicable law is reviewed. It is demonstrated that the possibility to invoke one of the rights guaranteed in the ECHR *against* the foreign applicable law violating the ECHR is the most important issue for the impact of the ECHR on the issue of applicable law. 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 questions that remain open is what the standard of control should be with regard to a foreign law applicable to a case that possibly violates one of the rights guaranteed in the ECHR. This question is elaborated in this chapter. Another important issue discussed in this chapter is the manner in which the rights guaranteed in the ECHR are invoked, and the use of the public policy exception, by the national courts of the Contracting Parties.

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*, is also examined in this chapter. Finally, the act of applying foreign law by the national courts of the Contracting Parties is discussed and, in particular, whether the ECHR has an impact on issues relating to the identification of the content of the applicable foreign law.

The discussion of the impact of the ECHR on the issue of the recognition and enforcement of foreign judgments has been divided into two parts. Chapter VII focuses on the obligation to recognize and enforce foreign judgments which can be derived from the ECHR. The ECHR may not only obligate Contracting Parties to recognize and enforce foreign judgments, but might also be invoked against the recognition and enforcement of foreign judgments. This aspect is discussed in the following chapter. The scope of the obligation to recognize and enforce foreign judgments following from the ECHR is examined in Chapter VII. It is demonstrated 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. However, this obligation is clearly not absolute.

As mentioned above, the invocation of one of the rights guaranteed *against* the recognition and enforcement of foreign judgments is the subject of Chapter VIII. 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, for example, 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, there is no clarity to be found in the Court's case law concerning the standard of control which should be used in such cases, as the Court appears to have used varying standards. In this discussion attention is also paid to the manner in which national courts should apply the rights guaranteed in the ECHR.

With regard to the invocation of the substantive rights guaranteed in the ECHR against the recognition and enforcement of foreign judgments, it is shown that, from the perspective of the Court, a clear distinction should be made 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 case law 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, as any complaints against the judgment should have been brought in Strasbourg against the Contracting Party of origin of the judgment. However, it has been found that this does not necessarily mean that the national courts of the Contracting Parties should always follow suit in relying on this argument.

The conclusion of this research is found in Chapter IX – in short, that the rights guaranteed in the ECHR have a considerable 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 private international law is not immune to the impact of the rights guaranteed in the ECHR. It is quite conceivable that some aspects of the private international law regimes of Contracting Parties

should be adapted to some extent in order for the Contracting Parties to fulfill their obligations under the ECHR.