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Competing norms and European private international law Sequel to “Promoting Human Rights within the Union: the Role of European Private International Law”

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Competing Norms and European Private International Law

Sequel to ‘Promoting Human Rights within the Union: the Role of European Private International Law’

This contribution is a sequel to the article “Promoting Human Rights within the Union: the Role of European Private International Law”, which was submitted as the first “Private International Law” (PIL) contribution to the Refgov-project. Like the first contribution this second contribution also discusses the importance of the discipline of PIL if the ambition is to find ways of promoting human rights within the Union, especially by exchanging “best practices”.

This second contribution goes further in the theoretical analysis, of course taking into account recent developments. It focuses on finding either the “regulatory” or “liberalising” role of PIL rules if one has to do with “competing norms”. The central question here is whether there is a need for a central European regulator in the regulation of PIL issues: to what extent does central European regulation of PIL issues creates either opportunities or risks, in the sense that States will be tempted to learn from each other either in a positive, or in a negative way? Should regulation of PIL issues at European level be welcomed, if one wants to avoid the “risks of unregulated competition” and if one wants to increase the level of human rights protection within the Union? In an attempt to answer this question, the article analyzes – seen from this perspective - the manner in which European authorities intervened in PIL so far, and discusses current developments and possible future actions. The analysis of the European interference in PIL in the article includes both the promulgation of pure PIL-rules at European level, as the European regulation of PIL-issues which occasionally occur in regulating other areas of law, as the control of national PIL-legislation by the European Court of Justice. To that end, the author examines a number of case studies, in which either “Europe” regulated PIL issues, or the settlement of PIL issues were left to the Member States: international labour law, including international Posting of workers; international tort law, with particular emphasis on international environmental pollution and international defamation; international family law, including international family law in interaction with other branches of law; international company law; international contract law, with particular attention to consumer contracts and the project to create a European Civil Code.

The conclusion is that European interference in PIL shows a “double face”. The potential for European regulation of PIL issues in terms of promoting human rights and stimulating Member States to implement “the best law”, is high and attractive. But at the same time, it is important to be warned against creating dynamics of race to the bottom and reduction of the level of protection of weaker parties, precisely as a result of European interference in PIL issues. Consciousness of these opportunities and risks is necessary if one is discussing ways of avoiding unregulated competition and ways of encouraging the exchange of best practices.

I. Introduction

I.A. A Sequel to the First Contribution to the Refgov Project

This article is a sequel to the article entitled ‘Promoting Human Rights within the Union: the Role of European Private International Law’.¹ Like the first contribution, this contribution deals with the relevance of the discipline of private international law (‘PIL’) as a means of promoting human rights in the European Union (‘EU’). The search for ways of promoting human rights in the EU sparks off debates on issues such as ‘regulatory competition’ and ‘collective learning’, and, as I pointed out before, PIL may be relevant to these debates.

This contribution is a follow-up to the earlier research. In the first contribution, I had illustrated certain processes on the basis of dynamics in a number of subdisciplines of PIL. In this context, I focused attention mainly on aspects of tort law, contract law, labour law and family law in international legal relationships. I have used some of these subdisciplines of PIL as ‘case studies’. For example, I pointed out the extent to which these branches of law are affected by ‘Europeanization’ of PIL and discussed the question to what extent the European legislator gives substance to this development and the scope for policy-making to be left to the Member States; for example, I pinpointed the impact of Europeanization of PIL at the level of human rights protection – and, in a broader sense, protection of parties that are traditionally considered ‘weaker parties’ in law – maintained in the EU. In the end, I attempted to define, in a fragmentary manner, the convergence or tension between ‘old’ and ‘new’ European trends to instrumentalise PIL, and their interaction with the promotion of human rights.

Likewise, I will base this contribution on a number of case studies, mostly the same as those in the first contribution. Naturally, in discussing these case studies, I will identify developments that have occurred after I finished the previous article – for example, the publication of the final version of the Services Directive and the Rome II Regulation, recent court decisions in the field of international labour law, a recently published opinion rendered in the *Grunkin-Paul* case etc. These developments show that more and more is being regulated at European level – and I will describe the manner in which this has happened and the choices that have been made – but that at the same time, the European legislator has deliberately refrained from adopting further European rules in some cases and has left the body of national or already existing European PIL intact – e.g. the regulation of PIL aspects concerning defamation, even if regulation in this area has been postponed and may be addressed at a later stage; see also, for example, the exclusion of the regulation of international labour law aspects from the Services Directive. I will highlight these and other developments and in that sense, I aspire to venture beyond the scope of the first contribution both in theoretical and in chronological terms. But, as I pointed out in the first contribution, I do not at all intend to make an exhaustive analysis this time either; by contrast, I once again

¹ The original version of the contribution was published at the website of the Refgov project, see <http://refgov.cpdr.ucl.ac.be> under ‘Publications’, ‘Fundamental Rights’, ‘FR4’ (under the title ‘The Promotion of Fundamental Rights by the Union as a contribution to the European Legal Space: the Role of European Private International Law’); the final version of the contribution will be published in the volume entitled *Fundamental Rights and the EU – in the Web of Governance*, O. De Schutter (ed.), Brussels, Bruylant. An abridged version of the contribution was already published in the *European Law Journal*, 2008, pp. 105-127 under the title ‘Promoting Human Rights within the Union: the Role of European Private International Law’.

seek to identify and expose areas of tension in an exploratory fashion, this time in a more extensive analysis.

I.B. ‘Competing Norms’: the Regulatory/Liberalising Function of PIL Rules. Opportunities for States to ‘Learn from Each Other’ in a Positive or Negative Way?

For the purposes of this analysis, it is useful to consult recent legal literature. This legal literature underlines the great significance of the manner in which PIL issues are regulated, either by national authorities or by a supranational legislator. There is an ever increasing sense of urgency, mainly among PIL experts themselves but also among others², about defining the significance of European PIL in the context of globalisation, which involves different legal systems and norms and competition between these legal systems and norms.

As for recent publications, Muir Watt’s ‘Guest Editorial’ published on the weblog www.conflictoflaws.net on 2 April 2008 provides several reference points. The Guest Editorial was published under the title ‘Reshaping Private International Law in a Changing World.’ In her Guest Editorial,³ Muir Watt puts her finger on the problems concerned and, where she talks about the need for or the role of a central regulator for the regulation of PIL, she addresses the heart of the central question in this contribution.

The creation of a central regulator that is permitted to regulate PIL aspects in some way or another is not self-evident: one of the essential features of the discipline of PIL is that PIL is in essence a national branch of law.⁴

Traditionally, national PIL rules have included defence mechanisms that allow the relevant country’s authorities to put a check on unlimited ‘forum shopping’ and ‘law shopping’ between legal systems – for example, by invoking the plea of international public order or by applying specific rules that qualify as ‘mandatory rules’ (or internationally mandatory rules’) in the forum. But at the same time, it is these very PIL rules, whether of national or supranational origin, that permit one or both parties to a greater or lesser extent to take advantage of differences in legislation between countries – for example, because the PIL rules include flexible recognition and enforcement conditions or because applicable law rules offer a wide range of choice of law options. PIL rules themselves sometimes create the possibility of gaining an advantage from foreign law or avoiding the law applicable in the forum – for example, by permitting ‘forum shopping’ to a certain extent, by offering choice of law options, by not remedying a foreign court’s disregard of the ‘internationally mandatory rules’ applicable in the forum in the phase of recognition of this foreign court’s decision. In a similar vein, I addressed the concepts of ‘availability’ and ‘transferability’ in a PIL context before.

² See, for example, the recent publication by L. de Lima Pinheiro, ‘Competition between Legal Systems in the European Union and Private International Law’ *IPrax* 2008, issue 3, pp. 206-213.

³ See also her earlier published contribution: H. Muir Watt, ‘Choice of Law in Integrated and Interconnected Markets – a Matter of Political Economy’, *EJCL* 2003, Vol. 7/3 (also available at www.ejcl.org). In it, Muir Watt says the following, *inter alia*: ‘In the absence of a central authority, the extent to which public interest concerns interfere with party choice is left to the unilateral decision of each state’, in which context she identifies ‘risks of under or over-regulation’. Muir Watt writes about the ‘requirements of collective welfare within the internal market’.

⁴ I made the same point in my previous contribution.

In the legal literature there are debates on whether offering such ‘shopping options’ to parties ultimately results in the ‘best’ law automatically emerging as it were. Does this ultimately lead to the creation of ‘race-to-the-bottom’ or ‘race-to-the-top’ dynamics?, as the question is often formulated as well. This discussion is reflected, *inter alia*, in a recent contribution by Lima de Pinheiro, entitled ‘Competition between Legal Systems in the EU and Private International Law’.⁵ It contains the warning that in an area such as international company law, the shopping option may be at the expense of the protection of legitimate third-party interests.⁶

If we consider the foregoing from a broader perspective, the question arises whether this kind of competition between legal systems may ultimately be at the expense of the level of protection of human rights and the protection of weaker parties in the EU. In the context of the project for which this contribution has been written and in which the ‘OMC’ method is the key element, the question also arises whether there is any risk, viewed from the perspective of the protection of human rights and the interests of ‘weak’ parties, that States may ‘learn’ from one another in a *negative* manner in this process.

I.C. ‘Risks of Unregulated Competition’ – Need for a Central Regulator? – The Role of European Institutions or the European Member States

The foregoing justifies the following conclusion: on the one hand, national PIL provisions have traditionally played a regulatory role; on the other hand, liberal PIL rules at national level may be at the root of specific ‘risks’ occurring in a situation of globalisation. Naturally, this observation raises the question whether it is desirable to create a ‘central regulator’ able to put a check on these ‘risks’. Muir Watt⁷ formulates it as follows in her Guest Editorial:

⁵ L. Lima de Pinheiro, ‘Competition between Legal Systems in the EU and Private International Law’, *IPrax* 2008, issue 3, pp. 206-213, particularly p. 209. On this subject, see also – even though this relates to the American situation, but the description equally applies to developments in Europe – R. Wai, ‘Transnational Liftoff and Juridical Touchdown: the Regulatory Function of Private International Law in an Era of Globalization’, *Columbia Journal of Transnational Law* 2002, pp. 209-273.

⁶ See p. 212. Cf. also R. Wai, p. 254, where he talks about a ‘basic concern’: “Regulatory competition in an international system where private actors are able to move from jurisdiction to jurisdiction in order to find the most favorable regulatory climate. In this situation, not only will private actors slip through the “gaps” of a fragmented regulatory regime, but through actual movement abroad, or threats of such movement, economic producers may also generate pressure on individual jurisdictions to lower domestic regulatory standards below what they would otherwise have been. This can be viewed as an externalities problem (...) The analysis of regulatory competition focuses on the challenges posed by the increasing mobility of economic actors in a global economy for the maintenance of domestic regulatory standards (...) The basic concern is that states will face pressure to lower their regulatory standards in order to attract or retain investment and employment within their borders. Examples include lowering of tax rates, labor standards, and environmental standards. This problem has been a common topic in discussions of regulation of economic activity in federal states, such as the United States. More recently, it has become a key subject in European integration. (...) There is a substantial academic debate as to whether international regulatory competition is always a “race to the bottom””.

⁷ After first having issued the following warning: “Indeed, one of the most important issues raised by globalization from a private international law perspective is the extent to which private economic actors are now achieving “lift-off” from the sway of territorial legal systems. To some extent, traditional rules on jurisdiction, choice of law and recognition/enforcement of judgements and arbitral awards have favored the undermining of law’s (geographical) empire, which is already threatened by the increasing transparency of national barriers to

‘Indeed, inter-jurisdictional mobility of firms, products and services is once again the means by which law is made to appear as offering on a competitive market, designed in turn to stimulate legislative reactivity and creativity. As illustrated in the global context, one of the market failures to be feared in the context of unregulated competition is the exporting of costs or externalities linked to legislative choices of which the consequences may affect other communities. However, in an integrated legal system, these risks are restricted by the existence of a central regulator, armed with tools such as approximation of substantive rules, or, where diversity is deemed to be desirable, constitutional instruments designed to discipline the various States in their mutual dealings.’

The central theme of Muir Watt’s contribution is the possibility that one or both parties may take the initiative to use PIL rules for the purpose of escaping the sway of national provisions that nevertheless offer more protection in the area of fundamental rights and the pursuance of legitimate considerations – such as ensuring proper terms and conditions of employment for employees, combating environmental pollution etc. It is suggested in this context that if these attempts at avoiding national law are allowed without any restrictions, this may lead to regression and possibly even overall decline. For example, Muir Watt clearly makes her point that, when viewed from this perspective, there is a need for a regulatory supranational institution.

But she does not point out how or where to find this supranational institution. What Muir Watt leaves open in her Guest Editorial but what is highly significant in the context of the Refgov project for which this contribution has been written is the role to be played by the *European* legislator as ‘central regulator’: Muir Watt does not deal – at least not explicitly⁸ – with the question whether ‘Europe’ could be a suitable regulator or whether it would be better – also for the purpose of adhering to the subsidiarity principle⁹ – to entrust this regulatory responsibility, where necessary, to the Member States themselves. She merely states as a follow-up to the above quotation relating to the *European Court of Justice*: ‘Here, as recent conflicts of laws implicating both economic freedoms and worker’s rights have shown, the Court of Justice is invested with an important balancing function which clearly overflows into the political sphere’, and in a footnote she refers to the *Viking* and *Laval* decisions, which I will address below. In this quotation, Muir Watt rightly points to the *political* aspect of the balancing process – which I will address below as well.

In my analysis I will consider the question to what extent the European institutions – both the Court of Justice and the European legislator – are equal to the task of reducing the ‘risks’

cross-border trade and investment. Party mobility through choice of law and forum induces a worldwide supply and demand for legal products. When such a market is unregulated, the consequences of such legislative competition may be disastrous.”

⁸ However, Muir Watt draws attention to the ‘Posted Workers Directive’ and Article 7 of the new Rome II Regulation concerning environmental pollution (see footnote 14 to her Guest Editorial), but she does not present these as specifically ‘European’ initiatives. I will deal with both of them below.

⁹ See the discussions in this context at the time of the preparation of the Rome III Regulation. As for the Netherlands’ view on the adherence to the subsidiarity principle, see the letter written by the Speakers of both Houses of Parliament (30 671 session year 2006-2007), available at <http://europapoort.eerstekamer.nl>. As for the European Commission’s reaction to that, see: http://www.cosac.eu/en/info/earlywarning/doc/comments_commission. For a view totally different from that of the Netherlands, see http://www.bundestag.de/bic/a_prot/2006/ap16054.html (*rechtsausschuss des Deutschen Bundestages Drucksache 16/2784*).

caused by liberal PIL rules to a minimum. I will also consider the question whether it is possible – or indeed, *a fact* in some cases – that the European institutions themselves are responsible for the ‘risks’. To put it even more sharply: do European institutions act mainly as ‘guardian angel’, or rather as ‘culprit’?

In any case, in recent years, European institutions have definitely intervened in PIL in a far-reaching manner. It should be borne in mind in this context that since the Amsterdam Treaty, the European legislator has received broad powers in the field of PIL.¹⁰ Since then, it has exercised these powers quite eagerly. Naturally, ‘European concerns’ also affect *the manner* in which PIL rules are shaped. ‘European’ concerns include concerns about the encouragement of the free movement of goods, persons, services and capital, as well as adherence to the principle of non-discrimination; these ‘economic’ targets may well affect PIL in a ‘liberalising’ sense, and, consequently, create or enforce rather than restrict the ‘risks’ mentioned above – i.e. as a result of the production of PIL rules or the assessment of national PIL rules against EC law. The question then arises whether as a result of the Europeanization process, ‘economic’ considerations and ‘liberalising’ tendencies in the enactment of PIL rules will be *more* important than in the past, when the power to regulate PIL issues was still vested in the Member States themselves, and whether this type of European interference may have a disastrous effect on the protection of the legitimate interests of weak parties, the pursuance of social interests within Europe etc. Viewed from this angle, it could be argued that European interference with PIL may well encourage and favour rather than discourage ‘liberalising’ dynamics and impulses affecting PIL, which in turn may ultimately lead to the erosion of human rights protection. In that case, Europe would be a ‘deregulator’, an obstacle to attempts to stop ‘race-to-the-bottom’ dynamics, an obstacle to the Member States’ attempts to halt the undermining of a specific level of ‘protection’, but, by contrast, an institution that contributes towards the further ‘undermining’ of regulatory mechanisms.¹¹

The European legislator may be aware of the foregoing and exercise restraint in enacting PIL rules and it may prefer to leave the enactment of PIL rules to national authorities, which could enact, if required, European or internationally-oriented PIL rules *and*, if required, provide for ‘regulatory’ defence mechanisms at the same time. But it is unmistakably true that by 2008, European interference with PIL also increasingly consists in the assessment of national PIL rules by the *European Court of Justice*; and just as much as the European legislator, this Court of Justice may be keenly aware of concerns relating to internal liberalisation, the encouragement of the free movement of persons, goods etc., or give priority to these interests over other interests following a difficult balancing process ... This means that an adverse ruling issued by the Court of Justice hangs like a sword of Damocles over national PIL rules: national defence mechanisms may not pass the test administered by the Court of Justice. And, accordingly, not only the European legislator but also the Court of Justice may be at the root of the ‘risks’ identified by Muir Watt.

If we take the foregoing into consideration, we face two basic questions: first of all, the question whether it is wise to entrust the regulation of PIL to institutions that may be too

¹⁰ See also my first contribution, which dealt with the ‘Europeanization of PIL’, which was effected by the Treaty of Amsterdam.

¹¹ See Muir Watt’s quotation in footnote 7 above.

keenly aware of the importance of economic considerations. Subsequently, as far as the substantive demarcation of this power is concerned, the question whether these institutions may be expected ‘to play a disciplinary role’, or whether it is to be feared that these very institutions will create great risks, because they will force Member States to recognise one another’s decisions almost without limitation, restrict resistance to the application of foreign rules that afford less ‘protection’ etc.

In this context, however, one might immediately suggest that Europe’s role should be regarded in a more balanced manner than I described above: conceivably, it is necessary to differentiate according to subject matter, PIL subdiscipline or PIL regulation; it is also conceivable that ‘economic considerations’ may sometimes be a driving force towards a higher protection level, a higher level of human rights protection in a process that uplifts the Member States. I already suggested in my first contribution that, conceivably, it is necessary to differentiate and pursue a more balanced approach.

This is because there are many tensions between ‘competing norms’, and these tensions manifest themselves in varying constellations, as I will explain in this contribution, too. For the purposes of this contribution, the term ‘competing norms’ includes both ‘legal rules’ and ‘values’. There are many kinds of tensions: both within PIL and between PIL and European freedoms and the European non-discrimination principle, and within European law – for example, between various European freedoms; between Member States and European institutions etc. In this contribution I will pinpoint and expose these tensions and identify the opportunities and risks that may be attached to European interference in this field. The case studies I will deal with briefly centre on the analysis of these tensions.

Before dealing with these case studies, I will, for the purpose of illustrating the extent to which PIL is currently in the midst of various legal and political forces, first describe briefly (in Chapter II) how at this very juncture international family law – being a subdiscipline of private international law – is under pressure from political policy considerations at the national level in the Netherlands. Next, I will relate this – in Chapter III – to European impulses by addressing a number of case studies.

This analysis will reveal that, generally speaking, there is European PIL interference ‘at two speeds’, because on the one hand, Europe proceeds expeditiously when it comes to enacting its own ‘pure’ PIL rules – even if this enactment is sometimes preceded by difficult balancing processes, and even if Europe occasionally decides to refrain from enacting rules. On the other hand, ‘Europe’ turns out to exercise more restraint when it comes to enacting PIL provisions in regulations that are not primarily PIL-oriented but that occasionally include PIL questions. This restraint is sometimes found to be inspired by the fear that such provisions might trigger mechanisms of some kind in a veiled manner – for example, in relation to provisions concerning the free movement of EU citizens and their relatives. Nevertheless, European interference in this field would make a world of difference and generally result in a very liberal, ‘modern’ regime. To the extent that this result is considered ‘better’, it is possible to argue that European interference may be quite beneficial. The question, however, is *whether* this result should be regarded as ‘better’ without any discussion: naturally, this, too, involves a *normative* issue, and opinions may differ on this issue. In matters other than human rights protection it is, of course, quite difficult to make any statements on what system or what norm is the ‘best’. Accordingly, the decision about whether or not to interfere at

European level and Europe's decision to interfere in some way or another ultimately depend mainly on legal policy choices. This contribution does not seek to make choices in this legal policy area but only to indicate that *if* legal policy choices are made, the manner in which PIL rules are dealt with may have a great impact on the implementation thereof. In the end, I will argue in this contribution, too, that the importance of PIL at this juncture may by no means be underestimated.

II. Forces Affecting PIL. An illustration at National level

The genesis of the national PIL codification projects of the past few years –in Belgium, for example – and those that are still in progress – in the Netherlands, for example – reveals that in 2008 there may still be differences of opinion about the content of PIL rules to be issued. Even experts from the same country often have differences of opinion, and a comparative law study shows that countries frequently opt to issue different PIL rules or, at the very least, to create different nuances. Hence, PIL is not a quiet thing most of the time. In addition, there is intensive interaction between PIL and other branches of law *and* the policy objectives defined therein, as is shown at the national level in the Netherlands by the forces and movements that have affected parts of Dutch international family law in recent years. This is because there is a growing awareness that residency, social law and nationality claims of aliens are to a significant degree related to family law relationships on which the relevant parties rely (marriage, adoption, registered partnership, parental access rights, etc.). There is an awareness that since international family law defines the terms and conditions under which family law relationships may be created or terminated, this discipline acts as a hinge in this area. Accordingly, specific interference with the rules of international family law – ultimately amounting to *disregarding* PIL rules – may certainly strengthen or weaken these residency, social law and nationality claims.

In the light of this awareness, the Dutch government quite often acts accordingly, resulting in the weakening of the legal position of non-European aliens and their family members.¹² Occasionally, as an exception that proves the rule, the strategic use of PIL rules by the Dutch government has a *positive* effect on the person involved. For example, the 'silent force' of PIL in the Netherlands emerged in a manner that was positive for the person involved in the celebrated *Hirsi Ali* case. This case centred on the question whether or not Hirsi Ali had acquired Netherlands nationality given the fact that she had used the name 'Hirsi Ali' at the time of her naturalisation application. In this case, Minister Verdonk had first stated on the

¹² On this subject, see earlier publications, *inter alia*, V. Van Den Eeckhout, 'Internationaal privaatrecht: een discipline in de luwte of in de branding van heftige juridisch-maatschappelijke belangen?', *FJR* 2005, pp. 236-244. In these situations, PIL has an unpleasant surprise in store for the parties involved: people who thought that they had specific rights find that they cannot exercise these rights after all: the rights turn out to be worthless. In this context, I refer to practices with respect to the relationship between international family law and legislation concerning aliens or social legislation, where PIL exerted or exerts a disruptive influence. A person believes, in good faith, that he is married and that he has a right of residence based on this marriage, but on further consideration, he is not regarded as being married after all. Another example – relating to a practice that has by now been abolished but that existed in the Netherlands for years: a person believing himself to be a child's legal father is not regarded as father for the purposes of child benefit claims based on legal parentage because PIL rules have been disregarded. People's claims in the field of rights of residence, labour law and nationality etc. are sometimes rejected as a result of the manner in which PIL rules and foreign law are dealt with – ultimately by the setting aside of PIL rules.

basis of a Dutch Supreme Court decision dated 11 November 2005¹³, that Hirsi Ali had never acquired Netherlands nationality because she had been naturalised on the basis of false or incorrect personal data. Next, a thorough search was made for a way to circumvent the Supreme Court ruling. It was found that in his opinion rendered in this case, the Advocate General had stated that in specific cases involving inaccurate personal data, the naturalisation decree did not need to be without legal effect: ‘This might include (...), or cases where the name given is a name under which the person seeking naturalisation is also known and has been used by him in a duly authorized manner – *according to the applicable law*’ (italics by *vvde*), which idea the Supreme Court had followed up on in its phrase ‘barring special circumstances’. Essentially, this refers – albeit in veiled terms – to the discipline of PIL, because, in addition to rules concerning international jurisdiction and recognition and enforcement of foreign judgments and instruments, this discipline comprises applicable law rules, meaning rules that define the law applicable to a legal relationship, including, for example, the subdiscipline of the law of international names. The Minister responded to this in a highly flexible manner: she invoked Somalian law and under Somalian rules, the name used would have been permitted; statements made by family members were accepted as corroborating evidence. At the end of the day, Hirsi Ali was permitted to retain Netherlands nationality thanks to the strategic use of Dutch PIL in combination with Somalian rules. PIL is used almost as a legal trick here, in this case in favour of the person involved.¹⁴

But, as said above, in many other cases PIL is used to the detriment of the persons involved. In this way there is a risk that PIL may be increasingly used as a tool in a process of erosion of claims.

In a general sense, there appears to be a trend towards instrumentalisation of PIL at the national level in the Netherlands: it turns out to be attractive for national governments to use PIL rules for the purpose of pursuing specific policy objectives, which sometimes do not have any bearing on PIL at all.

III. Forces Affecting PIL. Should PIL be Regulated at European Level and, if so, How?

III.A. Structure

Naturally, in areas where the European institutions regulate PIL, not only ‘national’ but also ‘European’ policy objectives will play a role. First and foremost, this includes considerations concerning the encouragement of the internal market, the creation of an area of freedom, security and justice, the promotion of European fundamental freedoms, adherence to the non-discrimination principle.

Even if it is not true that Dutch international family law has ‘lost its innocence’ in current developments, as stated in the second chapter, this is certainly true for PIL in the European

¹³ Supreme Court decision dated 11 November 2005, *NJ* 2006/149.

¹⁴ And possibly, as far as this specific matter is concerned, for others as well. With respect to the change in the position adopted by the Supreme Court itself in its decision dated 30 June 2006 compared to the decision dated 11 November 2005, see the contributions by Samkalden and van der Burg in *NJB* 2006, issue 27. See also the note by G.R. de Groot to the decision rendered by the Supreme Court on 11 November 2005 in *JV* 2006/2.

context: in the legal literature, the ‘lost innocence’ of PIL was hinted at before in the light of the growing impact of state interests on PIL, particularly in an integrating Europe within which PIL functions as a legal policy instrument.¹⁵

From the perspective of the legal protection of ‘weak parties’ and the perspective of human rights promotion within the EU, the question may arise whether this loss of innocence is a good or a bad thing: Do these forces affecting PIL, which are also of European origin, have any adverse effects on the legal protection of weak parties? Is PIL in the process of becoming an instrument that creates race to the bottom dynamics or is it functioning as a catalyst for more far-reaching legal protection? To what extent is PIL under pressure from concerns about European objectives; to what extent does this give rise to frictions with the PIL of the respective EU Member States; to what extent do the European institutions press ahead with the idea of regulating PIL at European level, and what are the effects of these dynamics when viewed from the perspective of ‘human rights promotion within the EU’? Below, I will explore a selective number of ‘case studies’ from this perspective. After that, in Chapter IV, I will conclude by making some general observations.

III.B. Some Case Studies on the Europeanization of PIL

III.B.1. International Labour Law

Specific international labour law aspects had already been regulated at European level even before the Amsterdam Treaty amended the EC Treaty and assigned PIL powers to the European institutions themselves. The Rome Convention 1980¹⁶ included applicable law rules that are applied by the contracting European Member States if a court in one of these Member States faces the question of what law is to be applied to an international employment relationship. The Rome Convention has existed for a long time now, but only in the near future will this PIL source become a European PIL source in the ‘true sense’ of the word: the Rome Convention 1980 is to be converted into a regulation, known as the ‘Rome I’ Regulation.¹⁷

This Regulation will not include fundamental changes in the field of PIL rules relating to employment relationships. For example, Rome I continues to adhere to the basic principle that PIL should regard the employee as the weaker party that should be protected in the context of the adoption of applicable law rules – see also clause 23 of the Preamble of the Rome I

¹⁵ See H. Muir Watt, ‘Choice of Law in Integrated and Interconnected Markets – a Matter of Political Economy’, *EJCL* 2003, Vol. 7.3., speaking of ‘a case of lost innocence’ as a result of the growing impact of state interests in PIL, and in note 2, she refers to H. Kronke. As for a critical stance adopted on the instrumentalisation of PIL for European policy objectives, see also J. Meeusen, ‘Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?’, *European Journal of Migration and Law* 2007, Volume 9, Number 3, pp. 287-305.

¹⁶ Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980. The EEX Convention, which has by now been converted into a regulation, contains – if formally applicable – procedural PIL rules: rules concerning jurisdiction on the one hand, and recognition and enforcement on the other.

¹⁷ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L177/6, 4 July 2008.

Regulation, which reads as follows: ‘As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules’, which, as far as contracts of employment are concerned, finds expression in the rule provided for in Article 8 of the Rome I Regulation. Accordingly, there is no room for controversies, is there? Nevertheless, if we consider the European PIL rules concerning contracts of employment a little more thoroughly and in broader terms, it is certainly possible to make some relevant observations and to identify remarkable dynamics and areas of tension from the perspective of the project for which this contribution is written. Below, I will make some notes concerning the Rome Convention 1980, viewed from the broader perspective of EC law.

III.B.1.a. PIL, Free Movement of Persons and Non-Discrimination: PIL as Achilles Heel of the Protection of Mobile Workers in Europe?

Let us depart from one of the great European basic principles, particularly Article 39 of the EC Treaty (previously Article 49 of the EC Treaty). The first paragraph of Article 39 of the EC Treaty enshrines the principle of the free movement for workers, and the second paragraph includes the non-discrimination principle. Article 39 of the EC Treaty is certainly designed to further the economic objective of free movement for workers within Europe, but at the same time, it expresses a ‘social interest’¹⁸: In the end, Article 39 of the EC Treaty confirms the right of the country of employment, and as such it is possible to pursue both the objective of the protection of equal treatment of workers within the territory where they reside, irrespective of whether they work on a permanent or temporary basis in the country of employment, and the objective of discouraging competition with respect to terms and conditions of employment. Competition with respect to terms and conditions of employment would not only be detrimental to a number of national social achievements, but it may also be contrary to the ‘proper’ operation of the internal market, specifically fair competition. In this way, Article 39 of the EC Treaty ultimately succeeds in meeting both the interests of mobile workers and those of local workers and the interests of Member States in combating social dumping or unfair competition. Thus, Article 39 of the EC Treaty succeeds in striking a balance between social and economic interests.

‘Translated’ into PIL, Article 39 of the EC Treaty would result in adherence to the country of employment principle in PIL. And this is what actually happens in Article 6 of the Rome Convention 1980. In the respective EU Member States, various labour law systems are applicable, but if an international labour law dispute is submitted to a court in one of the Member States, this court will usually apply the law of the country where the employee habitually carries out his work pursuant to Article 6 of the Rome Convention 1980. In PIL technical terms, this is based on the ‘protection principle’ as recognised by PIL: the law with which the employee, being the weaker party, is assumed to be the most familiar is declared applicable.

¹⁸ See, *inter alia*, M. S. Houwerzijl, ‘Bevordering van het EU-dienstenverkeer met behulp van gedetacheerde werknemers: tijd voor bezinning?’ SMA 2005, pp. 406-415. See also the recent publication by F. Hendrickx, ‘Arbeidsrecht en vrij dienstenverkeer: een stand van zaken na de Dienstenrichtlijn’, *Arbeidsrechtelijke Actualiteiten* 2007, issue 2, pp. 43-83, particularly p. 55.

But on closer consideration, the rule based on the country of employment principle, as enshrined in Article 6, is not applied unconditionally after all. This is because the country of employment principle is not an absolute principle in Article 6 of the Rome Convention 1980, if the full text of the Article is considered. As a result of choice of law options and the special rules included in Article 6 of the Rome Convention 1980,¹⁹ it sometimes happens that only the mandatory provisions of the country of employment are applied, and sometimes no provisions of the country of employment are applicable at all. For example, it may be that as a result of the application of PIL rules, an EU employee who works in another EU country is subject to terms and conditions of employment inferior to those applicable to local employees. In this way mobile EU employees may have less protection than local employees, and there is still a risk of social dumping after all. This is why in the legal literature PIL was labelled ‘the Achilles heel of the Community discrimination prohibition, which forms the cornerstone of the free movement of workers.’²⁰ It turns out possible to escape the prohibition against discrimination based on nationality indirectly through PIL rules.

If ‘social dumping’ is to be avoided, a specific interpretation of the rules of Article 6 of the Rome Convention 1980 may be what is needed. Sometimes Article 7 of the Rome Convention – which includes the tenet of the ‘mandatory rules’ – may also be invoked for the purpose of having specific ‘host country’ rules declared applicable.²¹

III.B.1.b. PIL and the Free Movement of Services

*** Application of Article 7 of the Rome Convention 1980 as Disruptive Factor in the Exercise of the Free Movement of Services – Case Law of the Court of Justice**

In international posting situations, however, it has been found that the application of Article 7 of the Rome Convention 1980 may be contrary to another European freedom, particularly, the free movement of services. The judgment rendered by the Court of Justice in the *Rush Portuguesa*²² case and later decisions along similar lines constituted the basis for the foregoing. In this case, the parties involved – Portuguese employees of a Portuguese undertaking that wanted to provide services in France – could not invoke the free movement of persons and the related non-discrimination principle for the purpose of setting aside a French provision relating to required work permits: Under the transitional scheme applicable at the time, Portuguese employees could not exercise the right to the free movement of persons yet. The Court found a solution, however, by invoking the free movement of *services* and stating that the French requirement constituted an unjustified infringement of the

¹⁹ See Article 6(1) of the Rome Convention 1980, as well as Article 6(2), the b-situation and the ‘unless’ provision, as well as the special scheme in Article 6(2) under (a) for employees who habitually work in a country but who are ‘temporarily’ employed in another country (as for the exact meaning of the concept of ‘temporariness’, see also Recital 36 of the Preamble to the Rome I Regulation). As for the views of PIL experts on the necessary adherence to the choice-of-law principle, the distinction that ought to be made in PIL between ‘internally mandatory’ and ‘internationally mandatory’ rules etc., see M.S. Houwerzijl (see footnote 18 above).

²⁰ See H. Verschueren, *Internationale arbeidsmigratie. De toegang tot de arbeidsmarkt voor vreemdelingen naar Belgisch, internationaal en Europees gemeenschapsrecht*, Brugge: Die Keure 1990, p. 338.

²¹ It also turns out that national interests that reflect ‘protectionism’ may also be presented as ‘humanitarian’ interests, particularly if the national interest is presented as an interest of the mobile employee.

²² EcJ *Rush Portuguesa*, C-113/89, 27 March 1990.

Portuguese undertaking's right to the free movement of services. Later court decisions revealed a varied range of casuistic reasoning, in which the Court invariably had to address the question whether or not the host country's imposition of local terms and conditions of employment constituted a justified infringement of the right to the free movement of services vested in a foreign European undertaking that posted employees abroad.

And this is how the imposition of the host country's labour law rules – which may be regarded as the application of the country of employment principle, which in itself reflects the free movement of persons – was challenged by the foreign service provider as being 'disruptive' of the exercise of the free movement of services.²³

In the *Arblade*²⁴ case, the Court ruled that the 'freedom to provide services may be restricted only by rules justified by overriding requirements related to the public' but that 'the overriding reasons related to the public interest which have been acknowledged by the court include the protection of workers (...)'. Even so, the Court had to strike a balance and the legal literature²⁵ points to the 'danger' of the role assigned to the Court of Justice in this way, particularly the danger that in balancing the free movement of services against the protection of mobile workers, the Court may give priority to the former interest.

- **The Issue of the Posted Workers Directive by the European Legislator**

- After a period marked by a lack of clarity, the European legislator itself intervened by issuing the Posted Workers Directive²⁶ in 1996. This directive guarantees workers who in the context of the free movement of services are temporarily posted to a Member State other than that the State where they normally work the applicability of a number of hard-core provisions of the host country,²⁷ irrespective of the law that may otherwise be applicable pursuant to Article 6 of the Rome Convention 1980²⁸, or irrespective of whether internationally mandatory rules are applicable under Article 7 of the Rome Convention 1980. The directive itself codifies, as it were, some 'internationally mandatory provisions' in PIL jargon, i.e. minimum provisions the Member States are under an obligation to apply.

Like Article 39 of the EC Treaty, the Posted Workers Directive is regarded as the result of the search for a balance and convergence between economic considerations – promotion of the free movement of services – on the one hand, and 'social' considerations – the protection of

²³ Cf. Hendrickx (see footnote 18 above), note 9 and the reference to the commission report, which also points out this 'disruptive' factor of national labour law.

²⁴ ECJ *Arblade*, 23 November 1999, cases C-369/96 and 376/96, nos. 34 and 36.

²⁵ See, for example, Hendrickx (see footnote 18 above), p. 14, in footnote 40, where he writes that the Court must strike a balance, but he goes on as follows: 'There is a real danger that the Court may develop an ever broader interpretation of unauthorized obstacles. In this context, the Member States' restrictive employment law provisions may also be regarded as barriers to the internal market.'

²⁶ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L018, pp. 1-6, 21.01.1997 ('Posted Workers Directive'). This Directive is sometimes represented to be more or less a replacement of the discrimination prohibition with respect to workers in the case of posting.

²⁷ For example, in the field of the minimum number of paid annual holidays.

²⁸ The Rome Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980.

mobile workers or the protection of local workers against social dumping on the other: the Posted Workers Directive was issued both for the purpose of achieving fair competition – combating social dumping – and for the purposes of protecting the legal position of mobile workers and promoting the free movement of services.²⁹

- **Proposal for a Services Directive and the Final Version of the Services Directive**

Even after the date of issue of the Posted Workers Directive, possibilities of restricting the free movement of services, about which the Posted Workers Directive itself failed to provide clarity, continued to be debated and were submitted to the Court of Justice several times. But during the first few years of this century, something quite different suddenly caused a great deal of commotion, particularly the proposal for a Services Directive³⁰ that included a ‘country of origin principle’.³¹ Because PIL as such was not excluded from the scope of application of this principle, it was argued that the country of origin principle could well have a large impact on international employment relationships as well. Even though the proposal for a Services Directive included an exception for the Posted Workers Directive and for ‘choices of law’³², it was conceivable that the Posted Workers Directive would now be regarded as a maximum rather than a minimum scheme – the application of Article 7 of the Rome Convention 1980 would unmistakably be rendered more difficult and, apart from that, there could be situations where the Posted Workers Directive would not be applicable and where, for that reason, only the labour law of the country where the undertaking is established is applicable pursuant to the country of origin principle.³³ All in all, it was feared that the Services Directive would result in a much lower protection level for workers.³⁴

²⁹ On the Posted Workers Directive, see M.S. Houwerzijl, *De Detacheringsrichtlijn*, Deventer: Kluwer 2005.

³⁰ Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM (2004), 2final/3, 13 January 2004.

³¹ Article 16 of the proposal is entitled the ‘Country of Origin Principle’. Article 16 (1) read as follows: ‘Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field.’ As I pointed out in my first contribution, the original proposal for the Services Directive could have had a fairly large impact – in a manner that would perhaps have surprised many – unintentionally? – on the PIL regime concerning employment relationships: in the original proposal for the Services Directive, the PIL regime concerning employment relationships as such was *not* excluded from the country of origin principle. Not only would the application of the famous country of origin principle have changed the applicable law rules – in many cases with adverse effects on employees – but, even though the Posted Workers Directive would continue to exist, its minimum protection regime might have been transformed into a maximum protection regime. See also my first contribution.

³² See the ‘General derogations from the country of origin principle’, as included in Article 17 of the proposal: under (5), the Posted Workers Directive was mentioned and under (20): ‘The freedom of parties to choose the law applicable to their contract.’

³³ See, for example, De Schutter and Francq (O. De Schutter and S. Francq, « *La proposition de directive relative aux services dans le marché intérieur: reconnaissance mutuelle, harmonisation et conflits de lois dans l’Europe élargie* », Cahiers de droit européen 2005, issue 5-6, pp. 603-660) concerning the situation that local employees are engaged by an undertaking established abroad. In this context, Francq and De Schutter also cite the case law of the Court of Justice concerning the freedom of establishment of undertakings.

³⁴ It is true that the application of Article 6(2), under (a), of the Rome Convention 1980 often results, through its provision concerning ‘temporary employment’, in the application of the law of the country from where the worker is posted, but if one wants to use the term ‘country of origin principle’ in this context, this does not relate to the country of establishment of the *undertaking* but the country where the *employee* habitually carries out his work, not necessarily the same country: Accordingly, even if Article 6(2), under (a) is applied in the case of ‘temporary’ employment in another country and if one insists on the applicability of the law where the employee habitually carries out his work, Article 6(2), under (a), designates another legal system than the law designated

After a great deal of debate, it was decided to take out the country of origin principle from the final version of the Services Directive.³⁵ In addition, the Services Directive explicitly provided that PIL was not to be interfered with. This meant ‘going back to square one’ after the issue of the Services Directive – the situation governed by the Rome Convention 1980 and the Posted Workers Directive, and the still more far-reaching³⁶ case law of the Court of Justice concerning the assessment of the free movement of services.

III.B.1.c. Current Problems: PIL, Free Movement of Persons; Free Movement of Services

Other problems continue to surface, however. For example, there was a great deal of commotion about the ‘mandatory rules’ in the proposal for the Rome I Regulation,³⁷ and specifically, the ground contained in Recital 13, which reads as follows: ‘Respect for the public policy (*ordre public*) of the Member States requires specific rules concerning mandatory rules and the exception on grounds of public policy. Such rules must be applied in a manner compatible with the Treaty’. It was feared that if the Court of Justice had to assess the compatibility of ‘mandatory rules’ with European freedoms, ‘mandatory rules’ would hardly be applied at all and the barrier against ‘social dumping’ by means of the application of ‘mandatory rules’ by Member States would disappear. The open letter sent by a number of experts in France and the counterletter following the disclosure of the letter reflected this commotion.³⁸

More recently, the *Viking*, *Laval* and *Ruffert* rulings of the Court of Justice caused a great deal of commotion in international labour law³⁹, particularly in connection with industrial action by trade unions. At this juncture, conferences are being organised in connection with these Court of Justice rulings under such impressive titles as ‘The Internal Market after the ECJ Rulings in *Viking* and *Laval*; Balancing Economic and Social Objectives’.⁴⁰

under the ‘principle of origin’ of the proposal for the Services Directive. Incidentally, the current status quo of Article 6 itself – and, under specific circumstances, Article 7 – allows a party to make applicable the system of law, or a part thereof, of the ‘host’ country. The country of origin principle would have rendered such ‘escape operations’ virtually impossible. See also footnote 33 above, for the impact of the country of origin principle on the legal position of local employees who would be engaged by an undertaking established abroad, Francq and De Schutter.

³⁵ Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market, OJ L376/36, 27.12.2006 (‘Services Directive’). See Articles 1, 6 and Article 3(1)(a) and (2).

³⁶ See, for example, the decision in the *Mazzoleni* case dated 15 March 2001, C-165/98, see also ECJ *Commission v. Luxembourg* 21 October 2004, C-445/03, ECJ *Commission v. Germany* 19 January 2006, C-244/04.

³⁷ Proposal for a Regulation, COM (2005) 650 final.

³⁸ The ‘lettre ouverte’ and the ‘contre-lettre’ are available at http://bruxelles.blogs.liberation.fr/coulisses/2007/01/ne_dites_pas_ma.html.

³⁹ ECJ *Viking* 11 December 2008, C-438/O5, ECJ *Laval* 18 December 2007, C-341/05, ECJ *Ruffert* C-346/06 3 April 2008. In this context, see also, with respect to the Dutch situation, the letter ‘*Vrij verkeer van werknemers uit de nieuwe lidstaten. Brief minister over de zaken Viking, Laval en Ruffert van het Europese Hof van Justitie en de uitspraak van de Poolse rechter*’, [‘Free Movement of Employees from the New Member States, Letter from the Minister about the *Viking*, *Laval* and *Ruffert* of the European Court of Justice and the decision of the Polish Court’] Parliamentary Papers 2007-2008, 29407, No. 80, Dutch House of Representatives.

⁴⁰ Conference organized in Leiden on 28 June 2008 (47th Leiden-London Meeting), see http://www.law.leidenuniv.nl/org/publiekrecht/europainstituut/nieuws_1.jsp.

The foregoing justifies the following conclusion: on the one hand, it is feared that European impulses may have adverse effects on the European body of PIL (in the form of the Rome Convention 1980 and the Posted Workers Directive), particularly the European fundamental freedom concerning the free movement of services. At the time, when the Court of Justice placed international posting at the centre of the free movement of services through the *Rush Portuguesa* case, it was feared that a specific application of Articles 6 and 7 of the Rome Convention 1980 would be set aside if it ‘clashed’ with the right to the free movement of services – it was feared at the time (and it is still feared with respect to the issues that have not been resolved yet) that the Court of Justice would give precedence to uninterrupted movement of services. Later, when the proposal for the Services Directive was formulated, it was feared that the European legislator itself would virtually undermine the operation of the Posted Workers Directive, which had been issued earlier, by allowing it to be transformed from a minimum protection instrument into a maximum protection instrument, and it was also feared that the country of employment principle used in PIL would be replaced by the country of origin principle, resulting in ‘race-to-the-bottom’ dynamics. Even though PIL has traditionally been regarded as the Achilles heel of the protection of the mobile worker in Europe, people wanted to try to preserve this traditional body of European PIL where it came under pressure from new European impulses.

On the other hand, it is also conceivable, as is shown by the foregoing, that these very European impulses might ‘lift’ the protection level of EU workers employed in another EU country. Particularly the European fundamental freedom concerning the ‘free movement of workers’ might have this kind of impact: the consistent application of the principle of the free movement of workers and non-discrimination in relation to local workers could result in mobile employees being entitled to the host country’s employment protection, even though they may not be entitled to this under the classical PIL rules. In my earlier contribution, I discussed the relationship of the European body of PIL with European incentives, and, as far as labour law is concerned, I highlighted only the ‘negative’ European ‘incentives’ caused by the proposal for a Services Directive – incentives from outside PIL that put pressure on the European body of PIL that has already accumulated. In that case, I said that ‘the issue to adhere and consolidate the ‘*acquis communautaire*’ is what matters. The foregoing shows, however, that European incentives may also have a positive effect in that these may result in more far-reaching promotion of human rights or rights that protect weaker parties than was previously the case in the European body of PIL, which means that amending the European body of PIL might well be contemplated.

In this context, however, the Court of Justice’s decision in *Finalarte*⁴¹ is important, specifically in relation to international posting situations. This case concerned an international posting situation whereby the host country wanted to apply specific employment rules to employees posted from abroad. The foreign service provider challenged the host country’s stance. The case was assessed in the light of the free movement of services, but both the opinion and the decision addressed the question of the extent to which Article 39 of the EC Treaty was applicable in the case at hand. What is remarkable in this context, however, is the *party* that invoked Article 39 of the EC Treaty in this case, and the *manner* in which it was attempted to interpret Article 39 of the EC Treaty. In his opinion, the Advocate General

⁴¹ *Finalarte*, Case C-49/98, decision dated 25 October 2001.

reacted by stating that Article 39 of the EC Treaty must be cited by the employee in the sense that he must be treated the same as local employees in the country where he works (on a temporary basis) rather than the undertaking posting the employee in the sense that the posted worker must be treated the same as the employees in the country of origin of the undertaking, in order to be better able to compete against employees in the host country.⁴² The judgment, too, sets aside the Article concerning the free movement of workers.⁴³ Both the opinion and the decision include a reference to the decision in *Rush Portuguesa*, in order to make it clear that the present case – a case of international posting – revolves around the free movement of services. It is remarkable, however, that whereas in the *Rush Portuguesa* case, the Court of Justice assessed the case in the light of the free movement of services, being motivated by the awareness that in the relevant case, no use could be made of the free movement of workers because the parties involved did not have any claim thereto anyway, the Court ruled in the *Finalarte* case, quite reversely, that Article 39 of the EC Treaty was not operative although the case in hand did centre around EU employees. Thus, the Court's line of reasoning in the *Rush Portuguesa* case in favour of employees who *could not* rely on the free movement of persons, and as an escape option for those who would not enjoy protection as a result of that but would miss out on it, seems to boomerang on EU employees who might want to rely on the free movement of workers and who are *not permitted* to do so.

Recently, Verschueren⁴⁴ criticised this case law. He regrets that the Court declared Article 39 of the EC Treaty non-applicable and thinks it wrong that the Court ruled in this way. In this context, he talks about the 'simultaneous application of two fundamental freedoms of the international market, leading to conflicting issues'.

Specific legal publications – including publications after the *Finalarte* decision – make mention of the possibility of invoking Article 39 of the EC Treaty if it concerns EU employees *without* referring to the *Finalarte* case.⁴⁵

But it is abundantly clear that there is a tension between the free movement of workers and the non-discrimination principle effective in this context on the one hand, and the free movement of services on the other hand, and in international posting cases, the Court may face the invocation of both freedoms, which might have opposite implications for PIL.

The Court of Justice's role in all this is delicate, as is shown by the *Finalarte* case, in which the parties involved simultaneously invoked two fundamental freedoms, and also by the earlier court decisions in cases where service providers had invoked the freedom of services in international posting situations, and also by recent cases such as *Viking* and *Laval*⁴⁶, which

⁴² See the opinion rendered in the *Finalarte* case (dated 13 July 2000), no. 21 *et seq.*

⁴³ See the *Finalarte* decision, nos. 19-24.

⁴⁴ H. Verschueren, paper 1 April 2008, 'Cross-border Workers in the European Internal Market: Trojan Horses for Member States' Labour and Social Security Law?' (already available at www.uva.nl, which is to be published in the *International Journal of Comparative Labour Law and Industrial Relations*, Volume 24 2008, issue 2).

⁴⁵ See, for example, Houwerzijl (footnote 18 above), footnote 27, where she writes: 'EU employees may be deemed to also use their right to the free movement of employees, whilst they have been posted by their employer in the framework of the free movement of services.'

⁴⁶ See footnote 39 above.

also centred around the freedom of services. It is also apparent from Muir Watt's statement in the quotation given above, when she referred to the *Viking* and *Laval* decisions: 'As recent conflicts of laws implicating both economic freedoms and worker's rights have shown, the Court of justice is invested with an important balancing function which clearly overflows into the political sphere'. The Court may decide in favour of more as well as less 'protection' for employees and may as such play a 'double role' when it comes to its case law at the level of employee protection.

The European *legislator*, too, may play a double role as a 'central regulator', as is shown by the issuance of the Posted Workers Directive on the one hand, and the proposal for the Services Directive on the other. On the one hand, the European legislator 'supported' the protection of social interests by issuing the Posted Workers Directive and the manner in which it is functions (particularly as minimum protection), but on the other hand, it was this same European legislator that threatened to interfere with the European body of PIL accumulated earlier.

III.B.2. International Tort Law: Should European PIL rules be issued if there is risk that these rules may reduce the level of protection of the victim?

III.B.2.a. Recent Action of the European Central Regulator

In contrast to international labour law, there was not yet any European body of PIL in the field of international tort law when the Amsterdam Treaty conferred PIL powers on the European institutions: there was no convention or draft convention that could be converted into a regulation.

In my previous contribution, I already referred to the proposal for the Rome II Regulation.⁴⁷ By now, the final version of the Rome II Regulation has been published in the Official Journal.⁴⁸ The regulation will enter into force in January 2009.

III.B.2.b. Manner of Acting: Acting in an Interplay of Classical and Modern Trends in PIL; European Considerations ...

Those engaged in the preparation of this regulation faced difficult balancing processes, because the PIL in relation to the Member States' tort law showed some major and minor differences, for example, with respect to the precise compromise struck between the application of the classical '*lex loci delicti*' rule and the possibilities of deviating from this rule; or with respect to the specific or non-specific regulation of a number of special 'torts/delicts' – such as international environmental pollution. In the context of the European unification of these rules, it was necessary to address the question which applicable law rules used in the Member States had best be issued at European level and how best to give expression to European considerations in the PIL rule to be issued.

⁴⁷ Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II') COM (2003)427 final, 22 July 2003.

⁴⁸ Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II'), OJ L 199, 31 July 2007.

PIL in relation to tort law has long been confronted with the tension between the ‘classical’ view – focussed on the loss-causing event and the wrongdoer – and ‘modern trends’ – being more focussed on the damage or loss inflicted and the victim. In this context, European concerns regarding the encouragement of the internal market seem, at first sight, to be more in line with the classical PIL view, where the applicable law is determined mainly on the basis of the wrongdoer’s place of residence and the place of the loss-causing occurrence – a kind of ‘country of origin principle’ as it were; if one opts for the more modern view and seek a connection with the law of the victim’s place of residence or the victim’s expectations, or indeed, the law of the country where the victim pretends to have suffered damage or loss, the person who operates internationally and is confronted with tort liability incurs the risk of facing different tort law systems if, depending on the victim’s expectations or place of residence, another system of law would be declared applicable each time. Arguably, the need to reckon with the tort law of various other countries in addition to the tort law of the country where a person has his place of residence would certainly not be a factor that stimulates international operation.

What position was taken at the time of the issuance of the Rome II Regulation? Article 4⁴⁹ of the Rome II Regulation includes a fairly balanced set of rules concerning applicable tort law, the main rule being that the ‘*lex loci damni*’ is applicable, but there are various possibilities of deviating from this basic rule.

Rome II includes remarkable provisions concerning a number of special ‘torts/delicts’. In my previous contribution, I pointed to the plans for the regulation of international environmental pollution. These plans provided for a unilateral right of option for the victim of international environmental pollution; naturally, this arrangement is disadvantageous to the person who has committed the tort/delict, but it was argued that combating international environmental pollution was one of Europe’s objectives, and the inclusion of this kind of PIL rule would enable Europe to contribute its mite in the fight against international environmental pollution. The final version of Rome II includes this proposed arrangement, particularly in Article 7. This clearly meant a political choice and taking a firm stand in a debate that involves various interests. Thus, Rome II aspires to achieve a Europe that pays heed to considerations that are not purely economic in nature.

⁴⁹ Article 4 applies if no special regulation must be applied and if no choice of law has been made pursuant to Article 14 of Rome II – incidentally, the choice of law option itself also reflects a ‘modern’ PIL trend concerning tort law. In my previous contribution, I already identified tensions between what may be called the ‘country of origin principle’ and modern views on PIL in the context of the issuance of this kind of ‘general rule’ (then, in the proposal for Rome II, numbered as Article 3, and in the final version, re-numbered as Article 4). As for the country of origin principle and the Rome II Regulation, see also the complications that arise as a result of the rules embodied in Article 6 with respect to ‘unfair competition and acts restricting free competition’ in the context of a situation of unfair electronic competition – which is also governed by a directive (the e-commerce directive) and about which there is a debate in respect of the question whether or not this directive incorporates a country of origin principle concerning PIL rules. On this subject, see, *inter alia*, from the Dutch perspective: www.javisite.nl, in ‘*archieff*’, issue of June 2002, article by M. Vermeer ‘*De Ipr-kluwen van elektronische ongeoorloofde mededinging*’, and from the Belgian perspective: B. De Groote, ‘*Elektronische handel – enkele overwegingen bij de interpretatie van het herkomstlandbeginsel*’, see http://webs.hogent.be/~bgro479/Documentatie_Bestanden/Teksten/Documentatie_teksten_main.htm

It is worth mentioning that in the past, there were some people in the Netherlands who – when addressing the question how to issue PIL rules concerning international torts/delicts at the Dutch national level – advocated the introduction of such unilateral right of option for the victim.⁵⁰ These pleas did not make it into the Unlawful Act (Conflict of Laws) Act [*Wet Conflictenrecht Onrechtmatige Daad*]. With effect from January 2009, this right of option will be applicable after all, because from that time on, the European PIL regulation, which includes this right of option, will replace the national PIL regulation. Accordingly, if we compare the current national regulation of the Netherlands to the European regulation, which will enter into force in the near future, it is clear that the position of the victim of international environmental pollution – the ‘weaker party’ – is improved as a result of the European unification of PIL rules relating to international environmental pollution and the manner in which these rules are interpreted.

But, when viewed from a broader perspective, Europe has ‘not gone far enough’, according to some, when it comes to the manner in which the Rome II Regulation centrally regulates PIL aspects in the field of tort law. For example, Muir Watt states in her aforementioned ‘Guest Editorial’: ‘Typically, the recitals introducing Rome II attribute virtues to the determination of the applicable law which are far removed from the traditional private interest paradigm. There is still room for further improvement, however. Scrutinizing Rome II through the lenses governmental interest analysis, Symeon Symeonides has shown that in many cases, it would be desirable, as in the field of environmental pollution, to take account of true conduct-regulating conflicts, and to give effect if necessary to the prohibitive rules of the state of the place of conduct if its interest in regulating a given product is greater than that of the state where the harm occurs, when it provides for a laxer standard of care. For the moment, this result is only possible through article 16.’⁵¹ Muir Watt’s observation is relevant in the context of the project for which this contribution has been written.

III.B.2.c. Result: Unification of Applicable Law Rules: Exclusion of Shopping Options, or Not?

As for this Article 16 that Muir Watt cited, it seems appropriate to make the following remark. Article 16 of the Regulation – with the heading ‘Overriding mandatory provisions’ – reads as follows: ‘Nothing in this Regulation shall restrict the application of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.’ What is special⁵² is that Article 16 does not include any possibility of applying *foreign* ‘mandatory rules’; it provides only for the possibility that the court before which proceedings have been brought applies ‘mandatory rules’ based on its own law. This means that it is important before what European court proceedings are brought: the Rome II Regulation may have unified the PIL rules concerning torts/delicts, which, as a general rule, guarantee the same result wherever in Europe proceedings are commenced, but in the end, the result may be different as a result of the operation of mandatory rules after all,

⁵⁰ See, for example, B.M.M. Weiffenbach, ‘*Justitia en Mercurius. Materieelrechtelijke tendenzen in het internationaal privaatrechtelijke conflictenrecht bij grensoverschrijdende milieuvervuiling*’, TMA 1989, 1-11.

⁵¹ See her Guest Editorial for a reference (in footnote 15) to the contribution by Symeonides. In footnote 16, Muir adds another point: ‘Article 17 does not seem intended to be interpreted bilaterally, and the escape clause of article 4-3 does not appear to allow an issue by issue approach.’ (Article 17 concerns particularly ‘Rules of safety and conduct’).

⁵² The Rome I Regulation does provide for the possibility of applying foreign mandatory rules.

depending on the European court to which the case has been brought. Consequently, there is certainly a ‘shopping possibility’, also after the entry into force of the Rome II Regulation.

It is conceivable that parties may ‘shop’ in different ways as well. For example, the parties may take advantage of the manner in which courts in specific countries ‘treat’ foreign law. The European legislator seems to be aware of this in the context of Rome II, since particularly the ‘review clause’ of Article 30 of the regulation prescribes that a ‘report on the application of this regulation’ must be produced, and in paragraph 1(i), it is stated that the report ‘shall include a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation.’ At the end of the day, one or both parties may ‘shop’ by taking advantage of differences between EU courts in the way they treat foreign law – and, I could add, the way they treat the PIL rules themselves.⁵³ For example, by litigating in a country that embraces the tenet of ‘optional PIL’, a party may ultimately be able to thwart the European unification process of PIL rules in the field of torts/delicts, which process has by now been completed. In this way, they might be able to circumvent the applicability of tort law that, at first sight, appeared to be applicable pursuant to the Rome II regulation.

III.B.2.d. International Defamation: No Unification of Rules concerning Applicable Law – Avoiding European regulation also for fear of weakening the legal position of the ‘weaker party’ if it is regulated at European level?

As a matter of fact, the process of unification of PIL rules in the field of torts/delicts has not been *completely* finished: the substantive scope of the Rome II Regulation excludes a number of matters.

In my previous contribution, I already touched on the fierce debates on whether there should be European-level PIL rules in the field of defamation. In the end, it was not decided not to regulate this matter when the final version of Rome II was issued – see Article 1(2)(g) of the Regulation, which excludes ‘non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation’ from the scope of the regulation.

As pointed out above, many trends converged with respect to the issue of the regulation of this matter– classical and modern PIL trends, and European concerns about the encouragement of the internal market and the international movement of services. Was it feared that if the European legislator enacted rules, European concerns about the encouragement of the internal market and the international movement of services would be given too high priority, at the expense of the victim/‘weaker party’ in a dispute, and that for this reason, the regulation of this matter had better be left to the national legislators, as a result of which the ‘national body of PIL’ may be left intact?

Anyway, as matters stand, there are no European rules in this field, but two reservations can be made: first, even though the European legislator refrained from regulating this special matter at the time the Rome II Regulation was issued, it did announce that such rules would

⁵³ In this context, more specific questions concerning ‘optional PIL’ arise; on this subject, see V. Van Den Eeckhout, ‘*Europeanisatie van het ipr: aanleiding tot herleving van discussies over facultatief ipr, of finale doodsteek voor facultatief ipr?*’, to be published in *NIPR*, 2008, issue 3.

be adopted in the future. The ‘review clause’ of Article 30(2) of the Rome II Regulation includes the following provision: ‘Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.’ Second, one should always bear in mind that ‘European interference’ may also consist in the *Court of Justice*’s assessment of national PIL rules, in respect of which parties may argue, for example, that they constitute an unjustified infringement of the right to the free movement of services. The question arises how national PIL rules designed to protect the victim of defamation would be assessed in such proceedings.

III.B.3 International Family Law and a Discussion of Parallel Developments in International Company Law, and the Problem of ‘Shopping’

III.B.3.a. International Family Law: the Catalyst Function of PIL. Drive towards Increasingly Liberal International Family Law?

In my previous contribution I pointed out to what extent European impulses along with human rights impulses are the driving force behind the liberalisation of European international family law⁵⁴. This statement may have to be qualified a little and, in addition, it should be borne in mind that trends may sometimes point in the opposite direction as well,⁵⁵ but in general, the European input into the international family law of the Member States in recent years – in the form of replacement/absorption of national PIL rules by European PIL rules as well as the Court of Justice’s reviewing national PIL for compliance with EC law – has stemmed the tide of more restrictive rules in the field of international family law. In my contribution, I also observed that this dynamics creates a domino effect, which may ultimately have an impact on the Member States’ national *substantive* family law.

As a result, the European legislator and the Court of Justice’s interference as such and their manner of interference gain not only support but also encounter resistance. Interference by the European legislator *as such* had already been criticised by the Netherlands on the basis of the subsidiarity principle at the time of the preparation of the future Rome III Regulation, which will replace the current Brussels II bis Regulation.⁵⁶ From a substantive perspective, the developments that have occurred to date were already criticised in the legal literature, for example by Meusen with respect to the Brussels II bis Regulation in the light of the current

⁵⁴ See my previous contribution. See also e.g. V. Van Den Eeckhout, ‘Communitarization of Private International Law: Tendencies to “liberalise” International Family Law’, *tijdschrift@ ipr.be* (www.ipr.be) 2004, issue 3, pp. 52-70. As for the human rights impulses affecting PIL, particularly, towards more flexible recognition, see the recent *Wagner* case before the ECHR (European Court of Human Rights) 28 June 2007, application no. 76240/01, concerning the recognition in Luxembourg of an adoption in Peru, and where Articles 8 and 14 of the ECHR were cited).

⁵⁵ See also my previous contribution.

⁵⁶ See footnote 9 above.

status quo – a situation where the European legislator has not as yet issued any unified applicable law rules concerning divorce.⁵⁷ The following interesting passage⁵⁸ in Meeusen’s paper is worth quoting in full, considering the possible reference points with themes relevant to the Refgov project: “Still, mutual trust essentially rests upon accepted equivalency of the legal systems involved. The very strict regime of mutual recognition now obliges Member States to accept the content of family law decisions originating in other Member States as if they were indifferent to the substantive outcome of these cases. Of course, this obligation is very important in order to achieve international mobility. Mutual recognition obviously has advantages, and the aim of international cooperation – also in the European context – should indeed be to take away as much burdens of cross-border activity as possible. The stability and permanence of personal status, once it has been validly acquired, benefit from a smooth recognition process which doesn’t question the substantive law applied nor imposes many indirect jurisdictional controls. But at what price? Doesn’t one put the car before the horse? Shouldn’t one first try to find some European common ground, certainly with regard to the applicable choice-of-law rules, and maybe also with regard to substantive family law, before insisting with so much force on the free circulation of all Member State judgements ? With regard to divorce e.g., a certain convergence can be discerned, but significant differences remain between the Member States’s divorce laws. The Commission explains this by different factors, such as different family policies and cultural values. In other words and in spite of the alleged indifference, substance still seems to matter. And it is illusory to think that this will be less so in an enlarged European Union. Without common choice-of-law rules, and with the public policy exception reserved for only some of the most extreme cases of divergence, Brussels II bis (and future legislation according to the same model) radically liberalizes international family law in a somewhat hidden way, while Member States are at the same time unable to reach agreement on common substantive principles and rules of family law. (...) In fact, only harmonization at the level of conflicts law, combined with a proper use of the public policy exception (where the Member States would have some more room of manoeuvre, while still being in line with the traditional restrictive approach of their courts vis-à-vis the public policy exception), could contribute to maintaining the consistency of the European approach to international family law.” Even though Meeusen argues, now that Brussels II bis has been issued as a regulation, in favour of more far-reaching regulation by the European legislator in the field of applicable law rules concerning divorce, he is at the same time in favour of allowing the Member States wider discretion whether or not to recognise a divorce granted by a foreign court, by invoking the plea of international public order. Meeusen recognizes that this may impede the free movement of persons, but he thinks it conceivable that under certain circumstances there are legitimate interests for it.

At present, however, the regulation of European international family law and the review of national international family law attach great value to the encouragement of the free movement of persons.⁵⁹ As the regulation of international family law is dominated by

⁵⁷ J. Meeusen, ‘Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?’, *European Journal of Migration and Law* 2007, Volume 9, Number 3, pp. 287-305.

⁵⁸ P. 303

⁵⁹ Even with respect to children who did not exercise their rights of free movement of persons in the past, as in the *Garcia Avello* case (ECJ *Garcia Avello*, 2 October 2003, case C-148/02). As for the manner in which the Court dealt with people’s dual nationality in this case and its explosive effects on further developments in European international family law (where, particularly in the *Garcia Avello* case, the children had both Belgian nationality and Spanish nationality, without having exercised the right to the free movement of persons

economic considerations, ‘modern’ trends in international family law, for example with respect to choice of law, are increasingly supported. This development is supported by the manner in which the Court of Justice applied the *non-discrimination principle* in the *Garcia Avello* case.⁶⁰ The manner in which an objective like ‘access to justice’, which is pursued by Europe, is honoured in the regulation of international jurisdiction law supports ‘liberalist’ trends: the application of jurisdiction rules in respect of divorce in the Brussels II bis Regulation often means that several European forums⁶¹ turn out to have jurisdiction; the parties – or one of them – may then ‘forum shop’, *also* with a view to the divorce law to be applied by the court addressed – and any further regulations, such as maintenance.⁶² This is because there are no unified applicable law rules in respect of divorce as yet, as stated above, and from this perspective, the specific court that is addressed matters a great deal in terms of the divorce law to be applied and, possibly, related matters.

Those engaged in the preparation of the ‘Rome III’ Regulation, which will replace the Brussels II bis Regulation in due course, pointed out the adverse effects of these shopping possibilities permitted by Brussels II bis at the present juncture: in particular, if one party tries to gain an advantage from this shopping possibility, this is perceived as being too disadvantageous to the opposing party – the ‘weaker’ party in the proceedings. This is because, considering the *lis pendens* rules included in the Brussels II bis Regulation, the respondent is forced to join the proceedings the claimant has started in the court this claimant considers the most advantageous.

Partly on the basis of these concerns about the weaker party, the Rome III Regulation will include not only procedural PIL rules (as is now the case in Brussels II bis) but also unified

themselves), see, *inter alia*, P. Foubert, note to ECJ *Garcia Avello*, SEW 2005, 139-143. Incidentally, the opinion rendered in this case mentioned the exercise of the free movement of persons by the children’s father, see also no. 65 of the opinion: ‘It also, however, affects those in the position of Mr Garcia Avello, since it is their surname, formed according to the law of their nationality, which is being passed on to their children in a form inappropriate to the way in which it was itself formed. The refusal to allow Mr Garcia Avello’s surname to be passed on in accordance with its method of formation is a consequence of his exercise of the right of freedom of movement since, had he not exercised that right, the situation in which the refusal was made would not have arisen. The existence of an administrative practice leading systematically to such a refusal is thus likely to render the exercise of that right less attractive.’ As for the treatment of the multiple nationality issue, see also *infra*.

⁶⁰ This point is also made in M. Bogdan, ‘The EC Treaty and the Use of Nationality and Habitual Residence as connecting Factor in International Family Law’, in *International Family Law for the European Union*, J. Meeusen et al. (ed.), Antwerp: Intersentia 2006.

⁶¹ But not without limitation – see also the recent decision in *Sundelind Lopez* (C-68/07), in which it was stated with respect to the grounds of jurisdiction in Brussels II bis (in no. 26 of the decision): ‘(...) grounds of jurisdiction laid down in that regulation, grounds which, according to Recital 12 in the preamble to Regulation No 1347/2000, are based on the rule that there must be a real link between the party concerned and the Member State exercising jurisdiction’; on this subject, see also V. Van Den Eeckhout, ‘*Het Hof van Justitie als steun en toeverlaat in tijden van europeanisatie van het internationaal privaatrecht? Mogelijkheden tot aanspreken van een Europese echtscheidingsrechter na de uitspraak Sundelind Lopez*’ [‘The Court of Justice as Anchor in Times of Europeanization of International Private Law? Possibilities of Addressing a European Divorce Court after the *Sundelind Lopez* Decision’], *NTER* 2008, pp. 84-9. About the desirability to address a specific European divorce court, see also T. M. de Boer, ‘The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law’, in K. Boele-Woelki and T. Sverdrup (ed.), *European Challenges in Contemporary Family Law*, Intersentia, pp. 321-341. In addition, Brussels II bis may give rise to a situation where none of the European courts are competent. The future ‘Rome III’ Regulation (that will amend and replace the current Brussels II bis Regulation, as pointed out above) will provide for solutions to this.

⁶² See, for example, the Maastricht District Court decision dated 29 March 2006, *NIPR* 2006/114.

PIL rules concerning applicable law: under the new Regulation, it will no longer make any difference where in Europe proceedings are commenced in terms of applicable law.

And this is how, based on concerns about the legal position of allegedly ‘weak parties’, the European legislator has nevertheless put a brake on liberalism in private international law, in this case, by unifying applicable law rules.⁶³

Incidentally, it was already suggested in the legal literature, in the context of the question how exactly these unified applicable law rules should be devised, to argue from the perspective of the protection of the weaker party in the action – but some respond by claiming that it cannot be clearly determined who should be considered weaker party in this context.⁶⁴

In all likelihood, the final version of the Rome III Regulation will include – in addition to the new choice of forum option in the jurisdiction rules – a choice of law option, which means that parties *together* will have the opportunity to choose the law most ‘advantageous’ to them within the terms of the choice of law provision. In this respect, the Rome III regulation will also breathe the spirit of liberalism in the field of divorce.

This liberalist trend in international family law affects not only European legislation but also the case law of the Court of Justice, particularly with respect to the international law of names. The following ground in the new opinion in the *Grunkin-Paul* case,⁶⁵ particularly in number 86, is remarkable, however: “As regards circumstances which might justify a refusal of recognition or transcription in a particular case, the possibilities are varied. Clearly, it would seem justifiable to refuse to register a surname which was in some way ridiculous or offensive. If national law totally precluded the possibility of siblings bearing different surnames, it could perhaps be justifiable to refuse to register a name that would give rise to such a situation. *It might also be justifiable to refuse to recognize a name given in accordance with the law of another Member State to which a child is connected by birth but not nationality, if the place of birth is shown to have been chosen simply in order to circumvent the rules of the Member State of nationality, without there being any other real connection with that place*” (italics *vide*). In footnote 47 it is added: “To allow such a justification would, admittedly, involve some tension with the Court’s judgment in *Zhu and Chen* (cited in footnote 32), at paragraph 34 et seq. of which it rejected an argument that it was not possible to rely on nationality of a Member State acquired by virtue of a place of birth deliberately chosen for that sole purpose. However, the Court’s reasoning there was based on the right of

⁶³ See the recent Justice and Home Affairs Council Session (5-6 June 2008): Jurisdiction and applicable law in matrimonial matters (Rome III): ‘The conflict-of-law rules of the proposal aim at ensuring that, wherever the spouses lodge their request for divorce, the courts of any Member State would normally apply the same substantive law (avoiding of ‘forum shopping’).

⁶⁴ See, in particular, T. M. de Boer, ‘The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law’, in K. Boele-Woelki and T. Sverdrup (ed.), *European Challenges in Contemporary Family Law*, Antwerp: Intersentia, pp. 321-341, where he writes on p. 336: ‘The principal of functional allocation, calling for the application of the law of the weaker party’s social environment, cannot be resorted to either, because it is impossible to mark either husband or wife as the weaker party’, by way of reply to what he advances in footnote 38 himself: ‘At the CEFL conference in Oslo, someone suggested to me that a respondent opposing the divorce should be considered the weaker party. I cannot quite see why a respondent in divorce proceedings would be more in need of protection than any other party acting as a defendant. Carried to its extreme, this suggestion implies that any lawsuit should be governed by the defendant’s personal law.’

⁶⁵ See case C-353/06: Opinion of 24 April 2008.

each Member State to lay down the conditions for *acquisition* of nationality, and did not concern the *use* of nationality or any other criterion *as a connecting factor* for purposes of private international law. See also Case C-370/90 Singh (1992) ECR I-4265, paragraph 24, and the case-law cited there.” This appears to spark off a further debate on shopping and fraud.

One of the questions arising in this debate is to what extent Europe will force the Member States to accept the claims of citizens or undertakings for the applicability of rules favourable to or desired by them, or will allow the Member States to deny such claims. To what extent will Member States be able in the future to offer resistance to ‘liberalising’ trends in PIL and be permitted to adhere to national PIL rules that are usually more restrictive? After the *Garcia Avello*⁶⁶ decision, both Belgium⁶⁶ and the Netherlands implemented only minor amendments to their international law of names in an attempt to resist pressure from Europe.⁶⁷ Both countries amended the relevant legislation only to a limited extent.

In this context, Dutch *national case law* is remarkable: some Dutch courts believed that in ‘European situations’ they should go further than the Dutch legislator,⁶⁸ but other courts refrained from doing so in the case at hand, because they felt that the case concerned a ‘non-European situation’.⁶⁹ This brings us to the issue of how to *tailor* the PIL rules applied to ‘non-European cases’ to the manner in which the Court of Justice applies rules to ‘European cases’.

III.B.3.b. A Discussion of International Company Law – Some Parallels and Some More General Remarks about Shopping Possibilities

The advice rendered by the Governmental Expert Committee on Private International Law [*Nederlandse Staatscommissie IPR*] concerning *Garcia Avello*⁷⁰ warned against a development towards a division in the PIL of the Member States as a result of the above-mentioned Court of Justice decisions, in which context, the Governmental Expert Committee also cited case law in the field of international company law. In this context, the

⁶⁶ See the comment by W. Pintens to the Belgian PIL Code in J. Erauw et al. (ed.), *Het Wetboek Internationaal Privaatrecht becommentarieerd*, Antwerp: Intersentia 2006, in which Pintens points out the importance of the cultural aspect of the regulation of the international law of names, as an argument in favour of checking Europe’s too far-reaching ‘economically inspired’ interference.

⁶⁷ Even though it must be also pointed out in this context that there is often a lack of clarity and controversy about the extent to which national PIL rules should be amended in the wake of an adverse ruling. See also the advice rendered by the Governmental Expert Committee concerning *Garcia Avello* (cf. *supra*), in which context advice had been requested on the consequences of the *Garcia Avello* case for Dutch private international law, and the Governmental Expert Committee took the following ground: ‘The contours of the potentially more far-reaching Community law developments in respect of PIL and international family law in particular are still insufficiently clear to be able to successfully work on such amendments of Dutch PIL as may be required or desirable.’

⁶⁸ See the decision rendered by the ’s Hertogenbosch Court of Appeal of 27 January 2004, *IPR 2004*, no. 106, where the ‘name improvement’ of a Dutch-Spanish child was allowed.

⁶⁹ See the decision rendered by the District Court of The Hague dated 12 July 2004, *NIPR 2004*, no. 321, in respect of the request for improvement of a Dutch-Russian child’s birth certificate. Incidentally, the amendment the legislator made in the Netherlands to the Name Change Decree [*Besluit Naamswijziging*] does not distinguish between Dutch people with another EU nationality and Dutch people who are also third country nationals.

⁷⁰ Available at www.justitie.nl

Governmental Expert Committee stated, *inter alia*: ‘The literature (...) has revealed a profound study of potential consequences, whether desirable or not, to be linked to the fundamental freedoms of the EC, for the PIL of the Member States and for that of the EC. It has been repeatedly suggested that PIL should be made subservient to the – dynamic – main features of Community Law, causing a division in the PIL of the Member States to a certain – or rather uncertain – extent: ‘an internal market conflict of laws’, of which the domain is limited by EC law, and anything that remains in addition to it.’ In my opinion, the ‘division’ that the Governmental Expert Committee mentions should be interpreted such that, on the one hand, there is PIL that Europe has interfered with in a usually liberalising sense, and on the other hand, there is PIL that has not been affected in this way and that Member States may organise as they see fit – and which they do not always bring in line with the manner in which Europe deals with ‘European cases’. By 2008, this division is manifest in Dutch court decisions concerning the international law of names⁷¹ as well as in Dutch international company legislation: the Companies Formally Registered Abroad Act [*Wet FormeelBuitenlandse Vennootschappen*], which had been held to be inconsistent with EC law by the Court of Justice in the *Inspire* case, was not repealed at a later date – the Act was declared non-applicable to ‘European’ companies, but it still applies to non-European companies.

For *European* cases, international company law is going through a process of liberalisation under pressure from the Court of Justice, and the same applies to international family law. The Court of Justice has already neutralised attempts by Member States, such the Netherlands, to take measures against companies that try to gain an advantage by formally registering their official seat abroad for the purpose being subject to foreign company law, and to prevent situations of ‘abuse’.⁷² In the introduction⁷³, I already pointed out that the legal literature is critical about these kinds of shopping possibilities and possibilities for parties to ‘escape’ specific rules, created or enforced by the Court of Justice itself;⁷⁴ for example, the question is raised, as pointed out above, whether or not the price is too high in some cases – for example, because this process may trigger a race to the bottom and reduce the level of protection of third party interests.

⁷¹ Compare the judgment rendered by the ’s Hertogenbosch Court of Appeal as against that of the Hague District Court.

⁷² See only the judgment by the Court in the C-196/04 case, 12 December 2006, *Cadbury Schweppes* concerning an absolutely artificial construction. Compare the remarks in respect of fictive constructions in the aforementioned quotation from the new conclusion in the *Grunkin-Paul* case. For recent developments in respect of the interference by the Court of Justice with international company law, see, for example, the conclusion in the *Cartesio* case 22/5/2008, no C-210/03.

⁷³ See Pinheiro (above, footnote 5).

⁷⁴ I can also add that quite recently the European legislator itself offered the possibility of establishing a ‘Societas Europeanea’, a ‘European model’ as it were. In fact, since parties may now choose this European model, this gives parties even more options. Cf., *mutatis mutandis*, the arguments advanced in the context of international family law in favour of creating ‘optional ‘European family law’ (on this subject, see particularly the proposal in this field by the German professor Nina Dethloff, which can be found among the replies to the Green Paper (namely among the ‘replies’, the reaction from the University of Bonn) http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm

For a reaction to this proposal, see the ‘impact assessment’ of April 2006, available at http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm op p. 82). Cf. also *infra*, in international contract law, the developments concerning a ‘European Civil Code’, which the parties could declare applicable in a specific case.

III.B.3.c. Positive/Negative Assessment of Shopping Possibilities, Increasing Liberalism in International Family Law, with, Ultimately, Repercussions on the Substantive Family Law of Member States – the Normative Question

Over the past few years, legal scholars have conducted a broad debate on the ‘shopping’ possibilities that may originate from PIL, both as a result of national and European developments in jurisdiction, applicable law and recognition rules.⁷⁵ It seems that recent developments in European PIL support the trend to allow such possibilities to a significant degree, rather than curb it. ‘Own choice’ or ‘shopping’ possibilities may be provided directly – for example, by offering a choice of law – or indirectly – for example, by leaving open the option of initiating proceedings before more than one court, even in situations where it is possible to predict that the various courts may arrive at different final decisions,⁷⁶ and by always recognising these final decisions all the same.

It is not always easy to indicate the extent to which the relevant dynamics in the field of shopping, liberalisation etc. should be assessed positively or negatively. To the extent that these dynamics improve or reduce human rights protection, this may, of course, be assessed unambiguously from the perspective of human rights protection. But more often it concerns broader concepts, such as ‘the protection of weaker parties’ – in which case, there is sometimes a debate on who is to be regarded as a weaker party – and a great many interests are involved.

In this context, there is a normative element, certainly in international family law, because not everybody considers ‘liberal, modern family law’ to be necessarily ‘better’ family law.

⁷⁵ See, *inter alia*, L. G. Radicati di Brozolo, « *Mondialisation, juridiction, arbitrage: vers des règles d’application semi-nécessaire?* » *RCDIP* 2003, part 1, pp. 1-36 ; A. Nuyts, « *Forum Shopping et abus de forum shopping dans l’espace judiciaire européen* », in *Mélanges John Kirkpatrick*, to be consulted in *Global Jurist Advances* 2003, Volume 3, Issue 1 as well). See also H. Muir-Watt and L. G. Radiati di Brozolo, « *Party Autonomy and Mandatory Rules in a Global World* », *Global Jurist Advances* 2004, Volume 4, Issue 1, pp. 1-4. See also, with respect to developments in America, but, by analogy, the foregoing is applicable to Europe as well: R. Wai, ‘*Transnational Liftoff and Juridical Touch-down: the Regulatory Function of Private International Law in an Era of Globalization*’, *Columbia Journal of Transnational law* 2002, pp. 209-273.

⁷⁶ As for the shopping possibilities arising from the current regulation of international divorce law (in a situation where there are no applicable law rules), see *supra*. As for the shopping possibilities arising from the applicability of Rome II – through anticipating the effect of ‘mandatory rules’ (or, possibly, through anticipating the possibilities created by optional PIL), see *supra* too. The Rome I Regulation provides the European court with the possibilities for applying both national and foreign mandatory rules (article 9 of the Rome I Regulation, *cfr.* Article 7 of the Rome Convention 1980 – the Rome Convention 1980 provided the possibility for Contracting States to reserve the right not to apply the provisions of article 7(1)), but it should be recognised that there is a greater chance that the court will apply the mandatory rules of the forum itself than those of a foreign country. As for the possibilities arising from registering a corporate seat under the articles of association in a foreign country, see also *supra* (as pointed out above, De Schutter and Francq’s analysis of the proposal for the Services Directive linked the Court of Justice’s case law in this field with possibilities for companies to gain a competitive advantage in the field of terms and conditions of employment). See also, in this context, in international competence, about possibilities to start proceedings in one Member State or another, e.g. ECJ *Gasser* 9 December 2003, C-116/02. And see also, in this context, more in general, the special position of the United Kingdom, Ireland and Denmark in the process of Communitarization of PIL, resulting in the situation that different PIL-rules are in force in EU-countries.

III.C. PIL in Interaction with Other Branches of Law and the European Legislator

III.C.1. International Family Law in Interaction with Other Branches of Law: a ‘World to Win’ in European Interference?

To the extent that international family law of a liberal nature is assessed positively, it should be recognized that there is ‘a world to win’ if Europe also became involved in legislation where international family law shows areas of overlap with other branches of law – for example, the law concerning aliens or labour law.

As I pointed out in my first contribution,⁷⁷ Europe adopts a restrained and cautious attitude in this area, however: as I already pointed there, Europe claims that it wants to refrain from indirectly forcing specific developments that meet with a great deal of resistance in Member States for the time being, for example, by including specific definitions of family-law concepts in legislation concerning rights of residence.

In addition, the problem of PIL legislation in relation to legislation that essentially concerns a different legal area may also arise when we address the question to what extent Europe forces Member States to apply PIL rules *at all* if, for example, a family law issue must be settled in the context of a lawsuit that relates to a question of social legislation or residence rights.⁷⁸

Incidentally, the question whether or not PIL rules should be applied was addressed in a pregnant manner in cases brought before the Court of Justice, where the Court faced the question to what extent a national government is free to apply PIL rules in multiple nationality situations – both in family law issues and non-family law issues.⁷⁹ This case law shows that through the ‘switch’ of interaction with multiple nationality, a case can be put on a specific track, which may affect the outcome of the case to a considerable extent; the manner

⁷⁷ In this context, I discussed, *inter alia*, the problem of ‘giving substance to specific concepts used in EU legislation in a well-defined manner.’

⁷⁸ As for the Dutch situation, in cases concerning a labour law issue, and the question whether PIL rules could be ignored in that respect, see, for example, V. Van Den Eeckhout, ‘Uw kinderen zijn uw kinderen niet ... in de zin van artikel 7 AKW’, *Tijdschrift voor Familie- en Jeugdrecht*, 2001, issue 6, pp. 171-176, and, in connection with the new case law of the Netherlands Central Appeals Tribunal in this field, V. Van Den Eeckhout, ‘Erkenbaarheid van een ‘erkenning’ in sociaalrechtelijke context: redeneren aan de hand van *ipr* of *los van ipr*?’’, *NIPR* 2006, pp. 7-10.

⁷⁹ The national position in this area is – if it falls within the scope – reviewed by the Court of Justice. As for the Court of Justice’s case law in this area, see, *inter alia*, the following cases: *Micheletti* (ECJ 7 July 1992, C-369/90), *Mesbah* (ECJ 11 November 1999, C-179/989), *Devred* (ECJ 14 December 1979, C-257/78), *Gilly*, (ECJ 12 May 1998, C-336/96) *Garcia Avello* (ECJ 2 October 2003, C-148/02), and *El Yousfi* (ECJ 17 April 2007, C-276/06 (*El Yousfi* order), USZ 2007/214. At present, the Court’s case law is not being interpreted uniformly at national level and it stirs up controversy; as for Dutch case law at national level, see *inter alia*, the Council of State decision dated 29 March 2006, *JV* 2006/172, note C. Groenendijk *v. District Court of The Hague*, 18 October 2006, *JV* 2006/462, note by P. Boeles (with respect to interaction with situations involving multiple nationality in the context of the application of the Family Reunification Directive), Council of State decision dated 31 July 2006, *JV* 2006/355, note by C. Groenendijk (with respect to a plea based on the association agreement EEC – Turkey), Central Appeals Tribunal decision dated 22 August 2001, *LJN* AD 5020 with respect to social security law. As for the Court’s case law with respect to the interaction with multiple nationality prior to the *Garcia Avello* case and in the *Garcia Avello* case itself, see P. Lagarde, note to *Garcia Avello* dated 2 October 2003, *Revue Critique de Droit International Privé* 2004, pp. 192-202, who talks about the Court’s ‘functional’ connecting. As for the interaction with the multiple nationality issue in European PIL legislation itself, see also the following recent decision: OJ C-168/08, 21 June 2008.

in which Europe has ‘directed’ and ‘channelled’ these cases and its future position in this field are therefore crucial.

III.C.2. European Interference in the Regulation of PIL in Interaction with the Unification of Substantive Law, Particularly, International Contract Law

Questions concerning PIL in interaction with other branches of law have arisen in the discipline of international contract law as well. In recent years, Europe has been working on the unification of international contract law – by means of the conversion of the Rome Convention 1980 (the European Convention on the Law Applicable to Contractual Obligations) into the ‘Rome I’ Regulation – as well as the unification of substantive contract law – by means of the project of creating a European Civil Code.⁸⁰ The conversion of the Rome Convention 1980 into a regulation has by now been completed,⁸¹ whilst the project to create a European Civil Code is still in full swing.⁸² This latter project is progressing steadily, but even so, there are many question marks. I will confine myself to some remarks about discussions the project has sparked off in terms of fear of ‘social dumping’ – a situation of reduced protection. This is because even though the creation of a European Civil Code apparently intends to offer parties an *additional* system of civil law only, which will not replace national legal systems – accordingly, the provisions designed to protect weaker parties incorporated into national legal systems could remain effective as such – it is still feared, insofar as the ECC for which parties may choose⁸³ offers hardly any protection to the ‘weaker party’ in the contract, that the level of protection for the weaker party will decrease if parties ‘choose’ this ECC. If reference is made to a ‘weaker party’, this means the consumer first of all.⁸⁴

⁸⁰ As for both dynamics, see, *inter alia*, the recent publication by A. Fiorini, ‘The Codification of Private International Law in Europe: could the Community learn from the experience of Mixed Jurisdictions?’, available at www.ejcl.org, May 2008 (where he also states the following on the subject of the Common Frame of Reference: ‘Once the material harmonisation process is complete, there could perhaps be a case for the suppression of private international law within Europe: the material rapprochement would be such that the remaining differences, if any, would be easy to accept on the basis of a full faith and credit type clause’). See also the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation COM(2002)654 final, under 1.6.

⁸¹ See Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L177/6, 4.7.2008.

⁸² In my earlier contribution, I briefly commented on the unification and harmonisation of substantive law as a result of the creation of a ‘Common Frame of Reference’ or an ‘Optional instrument’.

⁸³ It is remarkable that in the final version of the Rome I Regulation (contrary to the Proposal for the Regulation), no explicit reference is made to this kind of choice of law option. See Recitals 13 and 14 of the Preamble to Rome I.

⁸⁴ A topic for discussion is the extent to which not only consumers but also medium-sized undertakings should enjoy protection. Traditionally, PIL considers not only the consumer but also the employee to be a structurally weaker party. Labour law was excluded from the scope of application of the Communication from the Commission on European Contract Law of 11 July 2001 (see COM(2001)398 def, no. 14). The above discussions do not concern the substance of labour law as such, but it is certainly conceivable that there are parallel labour law issues, because PIL considers consumers as well as employees structurally weaker parties, for example, and the theme of consumer protection is relevant to the discussion. As far as labour law is concerned, it is worth mentioning the European Labour Law Network, which was set up recently. See the information to be found at www.elln.eu. The main activity of this initiative (particularly: ‘The development of general rules and principles of European labour law – on the basis of law studies in the different EU Member States – by using a restatement approach (...)’, according to the website) is modest if it viewed from the perspective of unification of

Viewed from the PIL perspective, questions arise about the applicability of mandatory rules and provisions of the ‘normally’ applicable law if the ECC is applicable pursuant to a choice of law that has been made. It is feared that ‘social dumping’ would occur if, on the one hand, PIL provisions in respect of mandatory rules or provisions were no longer applicable, while, on the other hand, the ECC itself included insufficient protective provisions, for example, if it created a protection level that incorporated only the weakest protection level now existing in the Member States.⁸⁵ In this respect, the relationship between the ECC and provisions from the Rome Convention 1980 or the Rome I Regulation has not crystallized as yet.

As a matter of fact, the problem of the applicability of unified substantive law in international relationships, partly in relation to the Rome Convention 1980, emerged in the past in the context of the analysis of the applicability of European directives in the field of consumer law: in areas where the European legislator was already active in the field of consumer law by issuing directives, these directives usually include a PIL provision, although the PIL provision is usually unclear.⁸⁶ Legal commentators have already complained that quite often this process paradoxically results in a larger diversity of conflict-of-law rules in the Member States rather than the intended harmonisation of conflict-of-law rules and that as a result of Community interference, the unification achieved by the Rome Convention 1980 is being eroded.⁸⁷ For the purposes of this contribution, the question arises whether this ‘erosion’ is limited to the unification process and/or whether current developments especially erode the level of protection for weaker parties. In terms of the achievement of the ECC project: could the ECC be at the expense of the body of PIL in the field of protection of the weaker party?

Certainly if a choice of law is made in favour of a non-European legal system, questions arise about the protection of the weaker party in terms of the manner in which PIL rules interact with unified rules of substantive law. The *Ingmar* judgment showed this as well. In the *Ingmar* judgment⁸⁸ the Court of Justice faced the question of the applicability of a European directive that did not include any PIL rules, in a situation in which American law had been chosen. The *Ingmar* judgment concerns the legal position of the commercial agent, but in the legal literature, it is usually considered from the perspective of the legal protection of

law trends, but this initiative may stimulate other developments, which will make PIL relevant in this context as well.

⁸⁵ See also, for example, J. Rutgers, ‘An Optional Instrument and Social Dumping’, *ERCL* 2006, pp.199-212 and H. Heiss and N. Downes, ‘Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective’, *ERPL* 2005, pp. 693-712. See also, very briefly, the Green Paper on the Conversion of the Rome Convention of 1980, under no 1.6.

⁸⁶ See S. Francq, *L’applicabilité du droit communautaire dérivé au regard des méthodes du droit international privé*, Brussels: Bruylant 2005.

⁸⁷ See J. Meeusen, ‘EVO, oneerlijke bedingen, verkoop op afstand, timesharing’, in *XXVIste post- universitaire cyclus Willy Delva, Overeenkomstenrecht 1999-2000*, Gandaius, Kluwer, pp. 434-435, with a reference to the contribution by D. Martiny, in *ZeUP* 1997, the title of which already referred to ‘erosion’. In this context, see also, *inter alia*, Recital 40 of the Preamble to the Rome I Regulation, as well as the ‘Review clause’ as included in Article 27(1)(b) of Rome I.

⁸⁸ ECJ, *Ingmar* 9 November 2000, case C-381/98, *NJ* 2005/332, footnote by T. M. de Boer and *Rechtskundig Weekblad* 2001-2002, pp. 756-757, footnote by J. Meeusen. In this context, see also my first contribution, which described the discussion in the legal literature about whether or not the Court used a PIL construction in this respect, and whether the interest of ‘weaker party protection’, or that of a ‘fair market’ was relevant in this case. In this context see also, by analogy, *supra* footnote 21.

employees.⁸⁹ In its judgment, the Court holds that Articles 17 and 18 of the Agency Directive,⁹⁰ under which the agent has specific rights after the termination of the agency contract, must be applied if the agent has performed his activities in a Member State, while the principal is established in a third country and the contract is governed by the law of this country in accordance with a clause included in it. The articles of the Agency Directive override the law of a non-European country chosen by the parties: in this case, the private law harmonized in a directive prevailed over the law designated by a conflict-of-law rule, which was in favour of the commercial agent, ‘the weaker party’ in this case. Legal scholars face a tough job when it comes to interpreting the meaning of the judgment for the analysis of the relationship between harmonised private law in European directives and PIL. In general, the increase in the number of rules included in sectoral instruments that affect applicable law raise questions about the relationship with classical PIL rules. In the ‘Green Paper on the Conversion of the Rome Convention of 1980’, it was proposed, as one of the possible solutions to the ‘problem’, to include a provision in Rome I designed to safeguard the application of the Community minimum standard if all or some elements of the contract are connected with the Community.⁹¹ In the final version of the Rome I Regulation, Article 3(4) provides as follows: ‘Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties’ choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community Law, where appropriate as implemented in the Member States of the forum, which cannot be derogated from by agreement.’ This could ensure a ‘European minimum’.

The foregoing may be linked to an observation made by Muir Watt⁹², where she refers to ‘requirements of collective welfare within the internal market’, and deals with the regulation by a central authority by means of ‘harmonised substantive rules’ and points out the following: ‘Whereas they take the form of minimum standards for internal market transactions, they are also projected into the world market in the form of internationally mandatory rules in cases where the European legislator has decided that the connection with the Community is sufficient to justify its interest. In both instances, they are designed to provide effective regulatory frameworks within which party choice can operate effectively.’ This, too, shows to what extent PIL rules can be decisive in ensuring ‘welfare’, both in an intra-Community European context and in a broader perspective.

IV. Conclusion. Europe as Regulator: Opportunities and Risks? A struggle for PIL, a struggle in PIL, a struggle with PIL

In this contribution, I analysed the subject matter in an exploratory fashion. As a follow-up on my first contribution, I have tried to show where and how regulation of PIL can ‘make a difference’ when it comes to promoting human rights in Europe. This difference may sometimes arise in a rather veiled and indirect manner, but the consequences are usually far-reaching. Regulation of PIL is definitely relevant in one way or another. With respect to the

⁸⁹ See, for example, also, briefly, A.A.H. van Hoek, ‘*Het toepasselijk recht op arbeidsovereenkomsten – een reactie op het Groenboek EVO*’, *Sociaal recht* 2003, pp. 365-379.

⁹⁰ Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

⁹¹ See the Green Paper on the Conversion of the Convention of Rome of 1980, under 3.1.2.

⁹² H. Muir-Watt in her contribution to the *European Journal of Comparative Law*, text and in footnotes 34 and 35.

regulation of PIL, both the possibilities and limitations associated with regulation at national level and the possibilities and limitations of supranational regulation by the European institutions should be taken into consideration. It turns out that the European legislator and the Court of Justice may fulfil their task of regulating PIL in different ways. The question whether PIL should be regulated at European level, and if so, how, has a variety of answers, depending on the subject matter and the interests involved, but it is definitely advisable to be *aware* of the dynamics and tensions in this area.

It turns out that regulation of PIL at European level sometimes allows the extrapolation – at European level – of the national PIL system that provides most human rights guarantees and/or protects weaker parties in the best manner. For example, a victim of international environmental pollution enjoys a higher level of protection at European level than at the Dutch national level. European-level regulation of PIL sometimes turns out to call a halt to social dumping mechanisms, for instance – see, for example, the effect of the Posted Workers Directive. Viewed from this perspective, the European legislator may be a guardian angel, a support and a ‘problem solver’ of excesses that unregulated competition may give rise to.

But European-level regulation of PIL may also show the dark side of the picture; it may even function as an evil genius and lie at the root of the problem. In particular, interference by European institutions may involve the risk of creating a ‘race-to-the-bottom’ mechanism and kick-starting a process of liberalisation that may dismantle national protection and defence mechanisms. Besides, to the extent that the European regulation of PIL disputes involving a ‘weaker party’ is effected at the level of the ‘lowest common denominator’ of the Member States, there is a risk that the weaker party’s position will decline rather than improve.

Hence, a European ‘regulator’ with ‘two faces’, a Janus face as it were. The possibilities of promoting human rights that European-level regulation of PIL offers are promising. But when viewed from the perspective of the protection of human rights and weak parties, there are also risks. In this context, I distinguish two different types of risks in particular, connected with the dynamics of current European-level regulation of PIL. First, there is the risk, as mentioned above, that European interference might give rise to ‘excesses’. In that case, the process of Europeanization may cause the Member States to ‘learn from one another’ in a negative manner. National-level achievements in specific Member States might then have to be given up: lifting regulation to European rather than national level may mean that priorities other than national priorities will crystallise. In addition, there is a risk that national-level rules developed in specific Member States, which, essentially, should not be considered worthy of imitation, are extrapolated to the European level – in this hypothesis, the European legislator would ‘learn’ from regulation at national level in a negative way, in particular, through the extrapolation of national procedures to the European level.⁹³ By analogy, reference may be made to developments in European migration law, where there are attempts to extrapolate restrictive national residence regulations of a questionable standard to the European level.

⁹³ Possibly, defence mechanisms in respect of the ‘external element’, which were previously part of national PIL, may also be extrapolated to the European level in this way – resulting in ‘Fortress Europe’! See on this issue also V. Van Den Eeckhout, ‘Communitarization of International Family Law as seen from a Dutch perspective: what is new? A prospective analysis’, in A. Nuyts and N. Watté (ed.), *International civil litigation in Europe and Relations with Third States*, Brussels: Bruylant 2005, pp. 509-561.

Then there is the risk of a division in the PIL of the Member States: insofar as European interference could be assessed positively, there is the risk that the Member States will not translate this positive development into their regulation of non-European cases. For example, I pointed out in the second chapter that the manner in which Dutch public authorities deal with PIL disputes involving third-country nationals weakens rather than strengthens the latter's legal position, whereas in a European context – as far as European citizens are concerned – international family law appears to be a driving force behind more rights. In this field, it appears that the dynamics may be in stark contrast with each other. The underlying political policy choices differ.

Many of the matters mentioned above involve legal policy choices⁹⁴ and some of these matters are hard to assess in terms of normative implications. The foregoing also shows that on the basis of the legal policy choice and the normative judgment made, PIL may sometimes be a suitable instrument for fighting a battle 'with' PIL: attempts may be made to use PIL for legal policy objectives. In this contribution, I have illustrated at various points to what extent PIL may be used for the purposes of these legal policy objectives through technical-legal means, or to what extent a specific 'choice' may be made or implemented by resolving PIL issues.

Let me conclude by saying that by 2008, the battle fought in the context of PIL is not only a battle *for* PIL – the very topical question which institutions are best equipped to regulate PIL issues – but also a battle *in* PIL – the ongoing debate on how PIL issues themselves may or should be regulated substantively. Finally, in some areas, the fight against environmental pollution, social dumping, for example, and the discussions held in this context, there is also a battle *with* PIL. To conclude, I express the hope that in the future PIL will be used as a weapon in the battle *against* injustice and *for* enforcing a higher level of human rights protection.

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⁹⁴ Incidentally, these may often be 'presented' in various manners, see, e.g., footnotes 21 and 88 above.