Private International Law in an Era of Globalisation.

"Neutral" Private International Law!? I could be brown, I could be blue, I could be violet sky*

Abstract:

In times of (discussions about) globalisation, due attention must be given to the operation of rules of private international law. Examination of the ongoing developments in private international law itself and in private international law in its interaction with other disciplines from the perspective of "protection of weak parties" and "protection of planetary common goods" allows carrying out the analysis to which current developments invite.

* Cfr. the lyrics of Grace Kelly, Mika (cfr. also my previous NJBlog "I could be brown, I could be blue, I could be violet sky. Over een paradigmaverschuiving in het internationaal privaatrecht", NJBlog 28 April 2016 (http://njb.nl/blog/i-could-be-brown-i-could-be-blue-i-could-be.19621.lynkx, referred to in footnote 5)

The role and task of PIL in times of globalisation

In times of (discussion about) globalisation due attention must be paid to the operation of rules of Private International Law. In this respect the following must be recognised: the discipline of Private International Law is concerned with the regulation of legal relationships of private law that take place within an international context, in particular by providing an answer to the three classical subquestions of PIL (the two more procedural PIL questions of international jurisdiction on the one hand, and recognition and enforcement on the other, and the subquestion of the law to be applied to the legal relationship). The way in which those subquestions are answered can have far-reaching consequences. It appears, for instance, that a specific enactment and handling of PIL rules, as well as the level (supranational or national) at which those rules are formulated can in its impact have more liberalising or more regulating effects – facilitating or complicating in this respect the protection of weak parties/human rights/environment[1] -, PIL rules appear to be able to facilitate access to justice or present a hurdle, etc. etc.

The point is now that PIL – in any event PIL of continental origin – has the reputation of being by nature a "neutral" field of law: under the impulse of the German legal scholar Von Savigny PIL was set up in continental Europe in the 19th century as a neutral and apolitical abstract reference system. At this moment too "neutrality" is still the paradigm that predominates in continental PIL.

By now, however, "modern" tendencies have also found acceptance in PIL. The "protection principle", for instance, is seen as one of those modern tendencies that do not "blindly" follow a particular legal system; where relevant, PIL intends to offer a special (PIL) protection to parties that are considered "weak" in PIL, such as employees and consumers. Other modern tendencies, including tendencies which purposefully try to achieve a specific goal – and whereby the dogma of neutrality is abandoned –, have also entered PIL in several instances. Hence, sometimes, the ancient neutral Von Savigny PIL method is not (or no longer) automatically applied, the Von Savigny dogmatics is not (or no longer) automatically followed. The recent process of the Europeanisation of PIL – set in motion by the 1997 treaty of Amsterdam –, whereby ever more PIL rules are produced by European authorities, is

[1] V. Van Den Eeckhout, "Competing norms and European private international law. Sequel to "Promoting Human Rights within the Union: the Role of European Private International Law"", REFGOV-paper FR20, 2008, 36 p., available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1259334. Recently, van Hoek (A.A.H. van Hoek, "Internationaal privaatrecht in/en de interne markt – het blijft tobben", editorial NIPR 2016, issue 2, 225) wrote about the European context, with reference to Saydé: "In een paper uit 2010 beschrijft Saydé hoe het Hof van Justitie op fundamenteel verschillende wijze invulling geeft aan de vraag wat de goede werking van de interne markt vereist.(A. Saydé, 'One Law, Two Competitions: An Enquiry into the Contradictions of Free Movement Law', Cambridge Yearbook of European Legal Studies 2010/2011, p. 365-413). Hij onderscheidt een stroming waarin partijautonomie, rechtsverscheidenheid en regulatory competition voorop staan van een stroming waarin juist regulatory neutrality wordt beoogd middels harmonisatie, beperking van de partijautonomie en aansluiting bij het recht van de afzetmarkt (level playing field). Deze twee voorkeuren leiden tot drastisch verschillende invullingen van c.q. interferenties met het conflictenrecht. (…) Bij gebreke van een heldere Europese keuze tussen deze twee modellen blijft het dus tobben voor het IPR."

commonly even presented as a real revolution in PIL, now that PIL has been focusing on the realisation of "European" objectives (is being made into an "instrument" for such realisation).[2]

But in any event, whether neutral PIL or modern PIL is at issue, and whether it concerns PIL of European or non-European origin, by 2017 it is ever more recognised that PIL actually *plays* a specific role – and can in no way be called "neutral" in its *impact.*

When discussing future developments in PIL, some are in favour of assigning a more regulating role to PIL; Muir-Watt already called upon PIL to abandon the "conceit" of neutrality and "harness its tools to the protection of the planetary commons."[3] "*Despite the contemporary turn to law within the global governance debate, private international law remains remarkably silent before the increasingly unequal distribution of wealth and power in the world. By leaving such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets, levels of environmental pollution, the status of sovereign debt, the confiscation of natural resources, the use and misuse of development aid, the plight of migrating populations, and many more. (…) it does mean that private international law as the constitution of private transnational governance needs to abandon the conceit of political neutrality – to the extent that neutrality is understood as an apology or a screen that prevents it from dealing head-on with the global expression of non-state power-, and harness its tools to the protection of the planetary commons*", according to Muir-Watt within the framework of the Paris "PILAGG" (Private International Law as Global Governance) programme.

Recently Van Loon[4] concluded his inaugural lecture at the Hague Academy of International Law with "*In the end, private international law faces a two-fold challenge in light of globalisation: to remove outdated and parochial obstacles to productive, positive, global transnational activity, and to protect weaker parties and vital public interests, including*

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[2] See. e.g. J. Meeusen, "Instrumentalisation of private international law in the European Union: towards a European conflicts revolution?", European journal of migration and law 2007, p. 287-305; cfr. A. Mills, "The Identities of Private International Law. Lessons from the US and EU Revolutions", Duke Journal of Comparative and International Law, 2013, p. 445-475. See also on the "Europeanness" of rules of European PIL, the upcoming conference of 2 and 3 March 2018 in Berlin (http://conflictoflaws.net/2017/save-the-date-conference-on-the-europeanness-of-european-private-international-law-1-3-march-2018-berlin/).

[3] H. Muir-Watt, "Private International Law Beyond the Schism", Transnational Legal Theory 2011, p. 347-327. On the "regulatory function" of PIL, see e.g. recently also the work of U. Grusic; see also e.g. the references in his recent paper "Contractual networks in European Private International Law", International and Comparative Law Quarterly 2016 65 (3), p. 581-614, on p. 12 in footnote 22. On PIL and *social justice*, Grusic wrote in The European Private International Law of Employment, Cambridge University Press 2015, p. 5: "*Surprisingly, however, the importance of the European private international law of employment is matched by the apparent lack of interest in this legal discipline by many of those interested in the role of European private law in general in achieving social justice.*" On PIL and social justice, see also V. Van Den Eeckhout, "The role of private international law in achieving social justice" Leiden law blog February 26, 2013 (available at http://leidenlawblog.nl/articles/the-role-of-private-international-law-in-achieving-social-justice) and several recent NJBlogs (http://njb.nl/zoekresultaten.115.lynkx?q=eeckhout&submit=Zoeken), including further references there – i.a. to the work of H. Muir-Watt and R. Wai.

[4] H. van Loon, The Global Horizon of Private International Law, Collected Courses of the Hague Academy of International Law 2016, Volume 380.

common goods – and so to play its part in building a sustainable future for humanity and for the planet."

Be this as it may, in times of globalisation the question arises in any case how PIL rules – whereby currently a process of Europeanisation of PIL rules is taking place – must be (further) shaped with regard to the future, how they could or should be questioned, which possibilities/restrictions/complications also exist for PIL if PIL and PIL interests are in competition with various other interests, concerns and principles: to what extent can and may PIL's attitude (still) be "neutral" in future?

A shifting paradigm? A need for (more) theoretical analysis

As regards current developments I myself already dared to speak of a shifting paradigm[5], certainly now that ever more openly attempts are made to model PIL rules for specific policy objectives that sometimes lie outside of PIL[6] – implying that an overt "instrumentalisation" of PIL is taking place.

As I also already stated, many legal scholars may now probably state that it surely is by no means exceptional that legal rules are "instrumentalised" – indeed, it possibly can be stated that it concerns here a fairly common phenomenon. However, for the discipline of Private International Law it most certainly is a startling phenomenon. After all, as already mentioned above, *neutrality* is still the prevailing paradigm in the PIL discipline. *Instrumentalisation* of PIL runs counter to that so-called neutrality and most certainly raises questions in that respect.

It might however still be suggested that all this does not concern a "new phenomenon" in PIL in the sense that what now openly happens within PIL and with PIL formerly in fact also already happened, but in a more implicit and hidden manner. Hence, in that sense the "phenomenon" might already be going on for a long time (or even have always been present) – in that sense

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[5] V. Van Den Eeckhout, "Van Den Eeckhout, I could be brown, I could be blue, I could be violet sky. Over een paradigmaverschuiving in het internationaal privaatrecht", NJBlog 28 april 2016 (http://njb.nl/blog/i-could-be-brown-i-could-be-blue-i-could-be.19621.lynkx). See also the references there to the work of R. Michaels, A. Mills, H. Muir-Watt and R. Wai.

[6] Particularly illustrative are developments in the interaction between PIL and migration law. See on this theme previous publications such as V. Van Den Eeckhout, "Internationaal privaatrecht en migratierecht. De evolutie van een tweesporenbeleid", Nemesis 2002, p 75-88, and several subsequent papers (most of them are available at https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=919707), including an analysis of the emergence of a double track policy – to which the Europeanisation of PIL has contributed). See also the work of P. Wautelet including recently e.g. P. Wautelet, "Familles sans frontières: le droit international privé des familles entre libéralisme et rigueur" in Actualités de droit des familles, D. Pire (ed.), Larcier, Commission Université Palais vol. 163, 2016, p. 123-188. See also the remarks in the "Terms of reference PIL and migration Annex II Directorate-General for Internal Policies of the Union etc IP/C/JURI/FWC/2015-002 Invitation to tender Private International Law in a context of increasing international mobility. Challenges and potential" and, on the theme of the interaction, the recent study of several experts for the European Parliament "Private International Law in a context of increasing international mobility. Challenges and potential" (12-06-2017), available at, i.a., http://conflictoflaws.net/2017/private-international-law-the-current-migratory-context-workshop-20-june-2017/ and http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)583157 .

no "new" phenomenon.[7] But, in any case - thus I also already argued - , current dynamical developments are certainly new in the sense that they now, whether or not new as regards the facts, also take place openly, which changes the thinking about PIL, and asks for an assessment – a well-reasoned rejection or theoretical substantiation and justification. For this purpose a broad analysis of ongoing developments in PIL itself and in PIL's functioning in interaction with other disciplines is needed.

Such an analysis may actually be theoretical, but in its impact the results of such an analysis can have very concrete and far-reaching consequences.

Two hot topics/case studies, illustrative for the importance/role of PIL in a globalising society and the questions that arise in that respect

The importance of the way in which PIL is regulated, is currently coming to the fore especially sharply when studying such themes as intra-European posting and socially responsible international entrepreneurship. One of these themes takes place in a European context, the other in a global context. In both themes, which are hot topics at present, heated discussions and rapid developments are currently taking place, whereby the role of PIL is by now duly recognised.[8]

In both themes many interests and various legal principles play a role. For instance, in discussions about the regulation of international posting within Europe arguments are currently put forward in respect of the need to offer (more) protection to mobile employees – as well as arguments on avoiding "social dumping", in respect of the protection of local employees and local businesses against "unfair competition" from outside, eventually resulting in tendencies of/calls for protectionism[9], versus respect for European fundamental

[7] See also D. Coester-Waltjen in her opening speech ""Totgesagte leben länger"- gilt das auch für das klassische IPR?" at the recent conference "Politik und Internationales Privatrecht (?)" (see http://conflictoflaws.net/2017/conference-report-first-german-conference-for-young-scholars-in-private-international-law/ and https://www.jura.uni-bonn.de/institut-fuer-deutsches-europaeisches-und-internationales-familienrecht/ipr-tagung/).

[8] On both, see recently two PowperPointpresentations, available at https://www.slideshare.net/vvde/powerpointslidesharepremierepartiegeplaatst (including references to papers of M. Ho-Dac and J. Icard in Revue d l'Union Européenne 2016 nr. 595) and https://www.slideshare.net/vvde/powerpointslidesharedeuxiemepartie - on this second theme, see also G. Van Calster, "Finding SHELLter. The High Court on CSR and applicable law in Okpabi", Gavclaw 30 January 2017 (https://gavclaw.com/2017/01/30/finding-shelter-the-high-court-on-csr-and-applicable-law-in-okpabi/), E. Aristova, "Suing TNCs in the English courts: the challenge of jurisdiction", conflictoflaws.net 1 February 2017 (http://conflictoflaws.net/2017/suing-tncs-in-the-english-courts-the-challenge-of-jurisdiction/) and L. Roorda, "Okpabi v. Shell: a setback for business and human rights?", Ucall blog 13 February 2017 (http://blog.ucall.nl/index.php/2017/02/okpabi-v-shell-a-setback-for-business-and-human-rights/).

[9] On the resemblances/differences between them and for some remarks about the chances of success in a judicial proceeding before the Court of Justice, see i.a. L. Merrett, "Posted workers in Europe from a Private International Law perspective"Cambridge Yearbook of European Legal Studies 2010-2011 vol 13 p 219 – 244 (written before the Judgement Unamar – on Unamar see infra, footnote 15); M. Fornasier and M. Torga, "The Posting of Workers: Perspective of the Sending State", Europäische Zeitschrift für Arbeitsrecht 2013, 6, 356-365; P.C. Vas Nunes, "Social dumping. Europese Hof slaat linksaf", Arbeid & Onderneming 2015, p. 45-56 (annotation

freedoms, in particular the free movement of services. In such discussions and areas of tension PIL has to find its place.

An analysis of this theme from the perspective of PIL naturally starts with advancing the principle that in PIL the employee whose legal relationship takes place in an international context enjoys special protection. But, as will rapidly become clear when further analysing these issues, further study is required on how this protection principle should exactly be worked out, and also how it can be expressed in relation to other principles inside and outside of PIL – including the European fundamental freedoms.

In this respect, just as the theme of socially responsible international entrepreneurship, the theme is illustrative as a case study for exposing areas of tension and discussions that currently go hand in hand with questioning the role of PIL.

Viewed more broadly and more abstractly: analysis of the role of PIL in a globalising society, from the perspective of the protection of weak parties and planetary common goods

Viewed and formulated more broadly and more abstractly, PIL's role in a globalising society is at issue here. Ongoing developments in PIL itself and in PIL in relation to various other disciplines demand such a study, and it to go further and to be set up more broadly than concretely studying the two above-mentioned hot topics – which are however illustrative for the effect of the way in which PIL rules are enacted and applied, and also for selecting the level at which PIL rules are made and the technique used in that respect – including the alignment between several instruments. [10]

The current process of the Europeanisation of PIL – which, as already indicated above, is presented as a "revolution" – compels to reflection, as is being emphasised already for several years in the literature.[11] All kinds of issues and areas of tension present themselves. Well then, the study of ongoing developments from the perspective of and through the lens of "PIL protection of weak parties" (including employees, but in no way limited to employees) and "protection of planetary common goods" in this process of the Europeanisation of PIL allows to look into current dynamics down to the essence of the issues and areas of tension involved

with ECJ 12 Februari 2015, case C-396/13), L. van Bochove, "Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law", Erasmus Law Review 2014, 7 (3), 147-156.

[10] See e.g. S.F.G. Rammeloo, "Europees IPR in transitie. Een pleidooi voor een betere afstemming tussen IPR en overig (secundair) Gemeenschapsrecht" in O. Vonk, S. Rutten, J. Smits, S. van Erp, T. Hartlief and C. Schwarz (eds.), Grootboek: Opstellen aangeboden aan Prof. Mr. Gerard-René de Groot ter gelegenheid van zijn afscheid als hoogleraar rechtsvergelijking en internationaal privaatrecht aan de Universiteit Maastricht, Deventer Kluwer 2016, p. 323-334 and, previously S.F.G. Rammeloo, "European private international law: Quo vadis? A methodological journey from Maastricht to Amsterdam, Lisbon and further – Future challenges" in M.D. Visser and A.P. van der Mei (eds.), The Treaty on European Union 1993-2013: reflections from Maastricht, Cambridge Intersentia 2013, p. 337-353; see also very recently on the Posting Directive F. van Overbeeke, "The Commission's proposal to amend the Posting of Workers Directive and private international law implications", NIPR 2017, issue. 2, p. 178-194.

[11] Cfr. supra, footnote 2. Cfr. the upcoming conference of March 2018, mentioned there.

in them, and at the same time allows to analyse the current dynamics, issues and areas of tension sufficiently broadly – in a sufficiently broad context.

A study from the perspective of "PIL protection of weak parties" is especially attractive, certainly since the answer to the question who must or can enjoy protection in PIL, to what extent and how, has not yet been fully crystallized, neither as regards procedural PIL, nor as regards PIL rules of applicable law, and following from there a comparison can be made with the "ordinary"/"other" PIL rules. The vision to be followed in PIL in respect of protection still seems to be questioned and to be in development.[12] For instance, the ruling of the Court of Justice in the Schlecker[13] case in respect of the law applicable to employment contracts – a subject matter in which a "weak party" according to PIL standards (in particular the employee) indeed very clearly exists – raises questions on the precise manner in which the Court wants to offer protection to employees through PIL and in that context questions arise about the relation between PIL rules and European fundamental freedoms (including the free movement of persons and services)[14]; similarly in the past years the Court of Justice has delivered a number of much debated judgements in respect of the legal status of commercial agents (in particular Ingmar and Unamar[15]) in which the problem of the minimum harmonisation in European directives was at issue and consequently also the question arose of the relation between PIL rules and techniques of (minimum) harmonisation, in this case via European directives, of substantive law – directives which also aim at a certain extent of protection and at the same time also intend to achieve/assure "undistorted competition" (within Europe)[16]; and in addition in the past years questions have been raised about the extent in which in a European PIL instrument such as the Brussels I bis regulation international rules of jurisdiction can/must be included with regard to non-European defendants, in proceedings that are instituted/attempted to be instituted in Europe by European or non-

[12] On several aspects, see e.g. the work of V. Lazic (including e.g. "Procedural Justice for Weaker Parties in Cross-border Litigation under the EU Regulatory Scheme", Utrecht Law Review 2014, 10 (4), p. 100-117) and L. van Bochove (L. van Bochove, "Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law", Erasmus Law Review 2014, 7 (3), 147-156 and, previously, with X.E. Kramer, L. Van Bochove and X.E. Kramer (2010), "Opgelegde bescherming in het Europese internationaal privaatrecht. Van waardeneutraal verwijzingssysteem tot communautair beschermingsmechanisme" in F.G.M. Smeele and M.A. Verbrugh (red.). Opgelegde bescherming in het bedrijfsrecht. Ratio, methodiek en dynamiek van dwingendrechtelijke bescherming van kwetsbare belangen in het bedrijfsrecht, Den Haag: Boom Juridische Uitgevers 2010, p. 5-31). See also recently e.g. C. Drion, "Rechtsbescherming en internationaal privaatrecht", NJBlog 22 mei 2017, with further references.

[13] Judgement 12 September 2013 (C-64/12, Schlecker).

[14] See recently V. Van Den Eeckhout, "Toepasselijk arbeidsrecht bij langdurige detachering volgens het wijzigingsvoorstel voor de Detacheringsrichtlijn. Enkele beschouwingen vanuit ipr-perspectief", INT-AR Paper nr. 6, 2016, 16 p., https://www.tilburguniversity.edu/nl/over/schools/law/intar/ (INT-AR Paper 6) (in extended version (38 p.) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2786087).

[15] Judgements 9 November 2000 (C-381/98, Ingmar) and 17 November 2013 (C-184/12, Unamar).

[16] Cfr. supra footnotes 9, 10 and 12.

European claimants – what about access to justice[17] in this context? And also what about the relation between PIL and human rights?

A study from the perspective of "protection of planetary common goods" is also especially attractive, in particular if it is analysed how European PIL relates to the aim of combating international environmental pollution. Also here what about the relation between PIL and human rights?

In an analysis as indicated above the intention – at any rate the primary intention – is not so much to search in an application oriented way for "solutions", but to expose and analyse, in broader structures, the various bottlenecks, areas of tension and developments.

Following on the question whether there is a need for (special) PIL protection for certain parties/planetary common goods and if so, how that protection must be accomplished, there is in any case also the question of, where relevant, the *legal-technical* instruments to be used and the obstacles that may turn up in that respect – for instance via rules of applicable law and/or overriding mandatory rules?[18] By including special PIL rules in a European PIL regulation or in a specific (possibly purely market based) European directive[19], or in rules at yet another level than the European level? Also what about the relation between various instruments, as already pointed out above – such as between PIL regulations on the one hand and specific market based directives on the other – and the relation between PIL and substantive law, the place also of PIL in current debates on "transnational private law"[20]? And also what about possibly opposing developments in respect of intra-Community relations on the one hand and relations that do not take place in a purely Community context on the other?

In this way core questions in the current debate on the future of PIL, both as regards content and form, could be touched upon.

The study[21] of ongoing developments in PIL itself and in PIL in interaction with other disciplines (including especially European law, but also other disciplines, such as for instance labour law, the law of obligations (the latter both law of contracts and non-contractual liability law)) from

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[17] In particular access to justice of non-European plaintiffs in proceedings against either European or non-European defendants.

[18] Cfr., mutatis mutandis, about the creation of a "level playing field", V. Van Den Eeckhout, "The "Right" Way to Go in International Labour Law – And Beyond" (July 3, 2015), 14 p. – in particular footnote 38 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2626598).

[19] Cfr. already supra footnotes 9, 10 and 12.

[20] Cfr. recently H. Dagan and A. Dorfman, "Interpersonal Human Rights and Transnational Private Law" (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2860275 and https://www.eui.eu/events/detail?eventid=136418

[21] The method to be used for such research is on the one hand of a purely legal nature, in the sense that the classical legal sources (legislation, case law and doctrine) are studied. On the other hand, it involves at the same time interdisciplinary research, in the sense that PIL is not (only) studied on itself, but also in interaction with other legal domains – especially focused on, but not limited to European law.

the perspective of “protection of weak parties” and “protection of planetary common goods” allows to carry out the analysis that current developments need and demand.

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September 2017

This paper is an English, slightly extended version of the paper “Internationaal privaatrecht in tijden van globalisering. “Neutraal” internationaal privaatrecht!?” (written in Dutch, February 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2919080)