Reinhold Greimer, Menschenrechte im internationalen Zivilverfahrensrecht, in: Aktuelle Probleme des Menschenrechtsschutzes, Berichte DGVR Bd. 33, Heidelberg 1994

Summary

Human Rights in International Procedural Law

I. Basic problems

1. The European Community's deficit in fundamental rights as potential risk of liability for the Contracting States in the fulfilment of their responsibilities under the public international law of the European Convention on Human Rights (ECHR), if their courts are obliged to submit to and are bound by the interpretative rulings of the European Court of Justice

   Even if the European Court of Justice has long endeavoured, and now because of the Maastricht Treaty is obliged, to develop fundamental rights according to the constitutional traditions of the European States and the ECHR, it is still hypothetically possible that the national courts, because of a binding interpretative ruling of the European Court of Justice, might pass judgements incompatible with the principles of the ECHR. With its so-called "As long as" decision of February 9th, 1990, the Commission of the ECHR restricted only the *competence of cognizance* of the Strasbourg institutions of human rights in the sense of a "*self restraint*". In this matter a conflict between the Convention and European Community law is still possible. Even the accession of the European Economic Community to the ECHR (which is at present not possible) or the unreserved acceptance by the EEC of the human rights catalogue of the ECHR would not put a definitive end to this problem, because divergent interpretations could, and probably would, remain as long as the decisions of one court of justice were not binding upon the other.

2. Delimitations to the reservations in procedural matters, which the customary public international law relating to aliens' rights aims to guarantee

   The public international law relating to aliens' rights guarantees a minimum of judicial protection and fair trial, but only for aliens, and with a fundamental distinction from the international human rights protection: *the individual is only an object of the standard protective procedures relating to aliens*. The claim to rights in compliance with minimum standards according to public international law can only be invoked by the State of which the concerned individual is a national. The State can effectively dispose over this right without having to ask the person concerned, not to mention having to obtain his consent. Even if the State renounces the right to a fair trial for its citizen, the procedural right of the defendant, based on Art. 6 I of the ECHR (enforceable, in conformity with Art. 25 ff.) remains regarded.

II. The international dimension of the right of free access to court

1. Security for costs to be posted by foreign plaintiffs (aliens and persons without nationality)

   It is incompatible with the principle of the equality before the law conforming to Art. 14 ECHR that advance deposit of judicial costs should be imposed on foreign plaintiffs only.

2. Right to personal appearance before the court

   This right must be fundamentally affirmed at least for the defendant, who is unable to choose the country where the proceedings are conducted.

3. Capacity to be party to judicial proceedings

   The guarantee of the right of aliens and persons without nationality to be a party in a law-suit is based on Art. 6 I ECHR, which guarantees free access to court to everyone.

4. Right of immunity

   If a State invokes immunity before foreign courts for itself and its institutions in the context of public international law, it must open a forum before its own courts and ensure effective legal and judicial protection by its own courts.

5. International competence – Jurisdiction

a) The margin of appreciation of the Convention (plaintiff's right to sue and defendant's right to a fair trial)

   The ECHR accords considerable margin of appreciation to the Contracting States. Nevertheless, it defines a rudimentary framework within which the Contracting States are bound to open or to prohibit a forum.

   The international obligation to appear before a court of justice outside one's State of legal domicile ("internationale Gerichtspflichtigkeit") is not unlimited. On the other hand the Convention does not establish a right not to be sued abroad. It rather describes situations in which the Convention claims to create the possibility of enforcing the plaintiff's right outside the defendant's State of legal domicile. It is, for example, unreasonable to force the victim of a street accident to follow the person responsible to his State of residence in order to obtain redress.

b) Proceedings between aliens

   A forum must be opened for proceedings which take place *solely between aliens*, for example divorce proceedings between aliens having a genuine link to the country of jurisdiction. Art. 6 I ECHR guarantees judicial protection to aliens also if there exists a sufficient connection to the forum State. National courts are not permitted to transfer aliens to the courts of their home states (native countries).

c) General and abstract standardization of questions of jurisdiction

Art. 6 I ECHR guarantees a *court based on law*. It is in accord with the Convention when the national legislature *standardizes* the judicial sphere (scope of jurisdiction of the domestic courts) in a general and abstract way, without defining individual cases. The common law doctrine of forum (non) conveniens is incompatible with the ECHR.

d) Déni de justice au forum prorogatum or the ineffectiveness of the agreed-upon court of arbitration

Art. 6 I ECHR prohibits binding the parties to an agreement conferring exclusive jurisdiction upon the courts of a foreign state or upon an arbitration court, if the forum prorogatum or the agreed-upon court of arbitration is unable to fulfill the task of jurisdiction assigned to it.

6. Non-consideration of exceptio litispendentiae internationalis

Art. 6 I ECHR also sets a limit to the obligation that the lis alibi pendens abroad has to be taken into consideration. This obligation might basically be imperative in regard to human rights, as it aims to prevent an unreasonable multiplication of the *onus to conduct a suit in one and the same cause of action*. The refusal of the national courts to decide on the merits can only be accepted if the court which is seised first conducts the proceeding within a reasonable period of time and thus guarantees an effective judicial protection.

III. The basic rule of expediting proceedings according to Convention law

An acceptable delay can occur in law-suits of international character for the reason that the court must obtain complicated legal expertise and the evidence, for example the interrogation of witnesses, must be taken by legal assistance of foreign judicial authorities.

The obligation of the national courts to consult the European Court of Justice for interpretation (Art. 177 EEC Treaty, Art. 150 Euratom Treaty, as well as the 1971 Protocol of interpretation of the Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters and the European Convention on the Law Applicable to Contractual Obligations), i.e. the obligatory procedure to obtain interpretative rulings of the European Court of Justice, leads to a significant delay in the proceedings. However, this is compatible with the Convention – at least in normal cases, if the European Court of Justice gives its rulings within a reasonable period of time.

IV. The guarantee of the right to be heard as a principal element of every fair trial

Regarding proceedings of international character, it is very often necessary to effect service abroad, especially during the *institution of the*

proceedings. In this regard *divergencies might occur between the right to a fair trial and the right of sovereignty* of the State in which the service abroad must be executed.

In this case human rights very often fall by the wayside, especially in cases where international law governing services abroad subtly applies *fictions* in order to avoid infringements of sovereignty. According to the fiction of § 175 of the German Code of Civil Procedure (ZPO) the service of delivery by mail (notifications or communications shall be deemed to have been made, when [constructive] service by depositing the document [writ] at local post office within the forum state) is purely national (domestic). This has an unpleasant and in the light of Art. 6 I ECHR an alarming consequence: if a judgment by default is passed, the *time-limit for opposition* is – as in purely domestic proceedings – only 2 weeks, a time-limit which usually is far too short to ensure an *effective legal defence*. This is of a very problematic nature in relation to the right to a fair trial. More suitable is the proposition – which is contrary to the opinion of the German Supreme Court of Justice (Bundesgerichtshof) – that the time-limit should be set individually by the judge, according to § 274 III 3, § 339 II German Code of Civil Procedure (ZPO).

Systems of service, like the German system defined by § 199 ZPO, which demand an official service (to be regarded as a *sovereign act*) for the institution of the proceedings, assume *international cooperation in matters of services abroad*. Still, this cooperation is not assured by customary public international law. This raises the question, however, whether Art. 6 I ECHR does not oblige the Contracting States to cooperate in matters of service abroad in order to safeguard the receiver's human right to be heard.

V. *Judgment by default against a defendant with unknown residence or if the service abroad has failed*

The right of the defendant to be heard should not be regarded as absolute. It is rather necessary to balance this right against the plaintiff's right to sue ("Justizgewährungsanspruch"), which is also guaranteed by Art. 6 I ECHR.

The following proposal (which is influenced by Art. 15 II of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters) seems to be a fair and reasonable solution: *service by public notification (substituted service by publication at the court noticeboard) after (at the latest) six months according at the same time a generous possibility of application for reinstatement of trial.*

VI. The right to evidence

The right to take evidence is an essential element of a fair trial. This right is also guaranteed by Art. 6 I ECHR for civil proceedings – even if Art. 6 III ECHR relates only to criminal proceedings (including adhesive proceedings relating to the victim's claims of redress before the criminal court = damage claim linked with criminal proceeding).

The taking of evidence by judicial assistance abroad should not infringe unnecessarily upon the *party's right to interrogate the witnesses*. Art. 6 ECHR guarantees also the *party's right to be personally heard in audience* during the taking of evidence effected by courts or other authorities of legal assistance. Therefore, the parties and their legal agents are entitled to enter the country. It is not sufficient to give the parties the possibility of interrogating the witnesses only in writing.

VII. Obligations of the States to recognize foreign decisions

The substantial human rights laws also have a *procedural annex*.

Thus, Art. 12 ECHR guarantees the freedom to marry even after divorce abroad of the previous marriage. Therefore, it must be acknowledged that, according to the principles of human rights, the States have the obligation to recognize judgments in divorce, even if they have been passed by Non-Contracting States. Art. 8 ECHR must be interpreted in a similar way concerning the recognition of *foreign adoptions* and *sex modifications* according to the *law relating to transsexuals*.

It is questionable whether outside the protection of the respective human rights, Art. 6 I ECHR leads in general to the *obligation to recognize foreign decisions*.

This is affirmed by the argument that, otherwise, the right to sue, according to Art. 6 I ECHR, would be *territorially* limited in a way that the plaintiff would have to fight for his right anew in every Contracting State.

On the other hand, Art. 6 I ECHR prohibits recognizing foreign decisions without reservation and examination. In particular, the right to be heard must be enforced during the stage of recognition.

In this case, it depends upon the attitude of the aggrieved party (who pretends to be violated in his human rights) during the procedure in the first state. If the party has failed to rectify procedural faults during the first proceedings by engaging all rights of appeal and of legal remedy at his disposal, a foreclosure is, according to Convention law, not only allowed, but probably even required.