4

Vulnerability and Private International Law: Mapping a Normative Approach Towards Asymmetrical Substantive Equality

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I. Introduction

The first two decades of this century have already witnessed an increasing range of inequalities between individuals across borders. These inequalities have common aspects. There are a variety of reasons for inequality which manifest as vulnerability. The first reason is that inequality often arises from socio-legal or socio-economic challenges. Operating at the level of the individual, micro examples of inequality and vulnerability arise in a wide range of civil, commercial, private and family relationships including matters of private rights and status. Operating at the level of the state, macro examples of inequalities are the protection of the environment, the preservation of fundamental human rights, the stability and regulation of global markets (finance, food, fuel), and access to justice.[1] The second reason is that inequality is not restricted by geography, but is very frequently cross-jurisdictional in its scope and impact.[2] The third reason is that inequality increases parties' vulnerability by exposing them to greater risk of detriment or harm based on status or the context of a legal relationship.

[1] United Nations General Assembly, Seventy-fourth session, Agenda item 19(a), Sustainable development: implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development and of the United Nations Conference on Sustainable Development, Resolution Adopted by the General Assembly of 15 October 2019 74/4. Political declaration of the high-level political forum on sustainable development convened under the auspices of the General Assembly, para 20, p 4 available at: documents-dds-ny.un.org/doc/UNDOC/GEN/N19/318/21/PDF/N1931821.pdf?OpenElement.

[2] H Muir Watt, 'Jurisprudence Without Confines: Private International Law as Global Legal Pluralism' (2016) 5 *Cambridge International Law Journal* 388.

The consequences of inequality and vulnerability can be wide ranging, rendering norms and laws inappropriate and ineffective in theory and unjust, unconscionable[3] and manifestly unfair in practice.[4] Furthermore, these consequences magnify when inequality occurs across borders where different norms, laws and enforcement mechanisms apply directly or indirectly. This inequality-vulnerability spectrum presupposes two points. The first is the need to conceptualise and recognise vulnerability as a consequence of a normative, substantive or procedural inequality. The second is that the risk of vulnerability can result in harm or detriment to individuals in cross-border relationships and disputes arising from them.

Therefore, in order to mitigate against the risk of vulnerability, it is important to consider private international law's approach and response. At the policy level, we are reminded of Remien's point that it is 'the duty of the State to balance social or economic inequalities between its citizens or to make access to justice easier for those in particular need of it'.[5] At the legislative and pragmatic levels, the technique of private international law differs in the recognition of vulnerability in a wide range of cross-border situations. Some illustrative examples include jurisdiction for maintenance proceedings, the return of cultural objects,[6] rules of recognition to secure the prompt return of the abducted child,[7] proposals for protection of vulnerable adults,[8] mental health and capacity,[9] cross-border divorce,[10] cross-border succession,[11] delicts,[12] insolvency,[13] and jurisdiction and choice

[3] R Banu, 'Conflicting Justice in Conflict of Laws' (2020) 53 *Vanderbilt Journal of Transnational Law* 461.

[4] Case C-307/19 *Obala I lučice d.o.o v NLB Leasing d.o.o* [2021] ILPr 21, Opinion of AG Bobek, para 133.

[5] M Reimann, 'American Private Law and European Legal Unification: Can the United States be a Model?' (1996) 3 *Maastricht Journal of International and Comparative Law* 217.

[6] Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1 (Brussels I Recast) Art 7(4).

[7] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, entered into force 1 December 1983 (Hague Child Abduction Convention) Art 3.

[8] In 2022, the European Commission conducted an Open Consultation of the Hague Convention on the International Protection of Adults. In 2023, the European Commission issued a proposal for an EU Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Measures and Cooperation in Matters Relating to the Protection of Adults together with a Annex to the Regulation proposing that EU Member States adopt the Hague Convention on the International Protection of Adults 2000: COM (2023) 280 FINAL 2023/0619 (COD) 31.05.2023. See also P Beaumont and P McEleavy, *Anton's Private International Law*, 3rd edn (W Green, 2011) para 18.02.

[9] Mental Capacity Act 2005.

[10] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L343/10.

[11] Council Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, [2012] OJ L201/107.

[12] Council Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L199.

[13] Council Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast), [2015] OJ L141, Recitals 10, 11, 17.

of law rules to protect consumers, employees and insureds.[14] There is a broader question as to how far private international law recognises vulnerability through its techniques of characterisation, connecting factors, party autonomy, mandatory rules and public policy. However, to date, there has been little consideration of how vulnerability has been recognised and addressed through both the *theory and technique* of private international law. If vulnerability is not given due recognition through theory and technique of private international law, the purpose of private international law is diminished and its potential in responding to vulnerability is not fully realised.

The aim of this chapter is to consider the role of private international law in recognising and addressing the concept of vulnerability from the perspective of theory and practice (technique) by mapping a normative approach. Rather than framing a party, state or context *as vulnerable*, it is necessary to assess existing theoretical and technical approaches in private international law which support all three (party, state, context). The objective of this chapter is structured around three sections. Following this introductory section, the next section considers the concept of vulnerability. The third section reviews how the theory of private international law through appropriateness, conflicts justice, pragmatism and effectiveness engages with vulnerability. It then turns to consider the extent to which the 'universal'[15] concept of vulnerability operates through techniques of private international law. Finally, the fourth section of the chapter provides a response premised on Fredman's four 'pillars' of asymmetrical substantive equality.[16] Taken together, each of these pillars can be used to support private international law's role in dealing with vulnerability in cross-border cases. By applying asymmetrical substantive equality, the theory and technique of private international law will be better equipped in future to engage with the inherent risk of vulnerability in cross-border cases.

II. Vulnerability: Mapping the Concept and the Parties in Private International Law

The purpose of this section is to identify the concept of vulnerability and the parties affected in private international law. It will be considered how vulnerability arises in cross-border cases involving parties and states.

A. The Concept of Vulnerability

It is the role of norms and laws to underpin and enact rights and protections in the territorial jurisdiction. Where applicable, rules of recognition seek to recognise

[14] Regulation (EU) 1215/2012 (n 6) Arts 17–23.
[15] J Henning, *Law and the Relational Self* (Cambridge University Press, 2019).
[16] S Fredman, *Discrimination Law* (Oxford University Press, 2011).

and respect norms, law and judgments in other territorial jurisdictions. The shared objective is that the rule of law is respected and access to justice can occur regardless of individual status or territorial connection to a sovereign state. The concept of vulnerability connects to the broader relationship between public international law, human rights, and private international law.

Vulnerability has been categorised as legal, political, social or economic. It arises in a variety of circumstances and varies across different fields. In response, public international law deals with the issue of vulnerability through conventions which may recognise vulnerability to persons, states and in different contexts. The European Convention on Human Rights (ECHR) provides inalienable rights which engage with private international law; the right to a fair trial (Article 6), the right to respect for private and family life (Article 8), the right to freedom of expression (Article 10), the right to marry (Article 12), the right to an effective remedy (Article 13), and prohibition of discrimination (Article 14).[17]

Vulnerability is a universal concept.[18] Henning reminds us that '(W)e are all equally vulnerable in our human nature. We should all be seen as equally vulnerable'.[19] In addition, vulnerability can be both contextual[20] and particular. For example, the Opinion of the European Human Rights Agency on Business and Human Rights identifies 'persons in situations of vulnerability, such as women, persons with disabilities, indigenous people and children'.[21] An insight into the most recent scope of vulnerability – in the context of business and human rights – is through the recommendations of the Parliamentary Assembly of the Council of Europe. In 2019 it proposed to extend business and human rights to include 'gender-based human rights abuses … vulnerable population groups [and] whistle-blowers'.[22]

This chapter draws on Peroni and Timmer's concept of vulnerability, which is also from a human rights perspective. In their paper, the authors assessed the concept of vulnerability through international human rights law and European Court of Human Rights (ECtHR) jurisprudence. Peroni and Timmer explain that

[17] European Union Agency for Fundamental Rights, 'Improving access to remedy in the area of business and human rights at the EU level – FRA Opinion 1/2017' (10 April 2017), available at: fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf.

[18] M Neal, '"Not Gods but Animals": Human Dignity and Vulnerable Subjecthood' (2012) 33 *Liverpool Law Review* 177, 186–87.

[19] Henning (n 15).

[20] The European Law Institute's report also includes migrant workers, reflecting the consequences of serious human rights violations which they rightly identify as 'often more egregious, including harm to life and limb, property, or the environment'; European Law Institute, 'Report on Business and Human Rights: Access to Justice and Effective Remedies' (2022), available at: www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Business_and_Human_Rights.pdf, 31.

[21] FRA Opinion (n 17) 8.

[22] Council of Europe, Parliamentary Assembly, 'Human rights and business – what follow up to Committee of Ministers Recommendation CM/Rec (2016) 3?', Recommendation 2166, para 1.9, Resolution 2311, para 8.4.6, and Reply to Recommendation 15015, available: at pace.coe.int/en/files/28298.

vulnerability is 'not a label, but a layered concept'.[23] Vulnerability arises due to actual or potential harm to a natural or legal person or a state. In turn, vulnerability can be caused by the actions of a state, a third party or a combination of actions of both the third party and state. In order to engage further dialogue about the treatment and application of vulnerability in the theory and technique of private international law, this chapter takes a holistic approach. It follows Peroni, Timmer and Henning's 'universal' concept of vulnerability by considering the causes of vulnerability due to actions of the state, a third party or combination.

B. Who is a Vulnerable Party in Private International Law?

Having recognised that vulnerability is a universal and layered concept, three broad examples will be used to demonstrate a vulnerable party in private international law. First is vulnerability of a natural person. Vulnerability may arise as a result of a natural person's status, relationships or circumstances. Vulnerability can arise prior to or as a result of a cross-border dispute. Recognising the status or circumstances of parties as vulnerable can have important practical benefits. For example, the Hague Child Abduction Convention 1980,[24] the Hague Convention on the International Protection of Adults 2000,[25] and the EU Regulation on mutual recognition of protection measures in civil matters[26] recognise the concept of the abducted child, the status of the vulnerable adult and the protection of a person's 'life … integrity, liberty [and] security'[27] respectively.

Legal persons may also be subject to harms leading to inequality and vulnerability. Small and medium sized enterprises (SMEs) compete and operate at a commercial and competitive disadvantage to other legal entities such as corporations and limited liability partnerships. SMEs do not fall within the category of the traditional consumer. Unsecured creditors, such as employees and consumers, are also vulnerable to the actions of the debtor business.

Whilst it may be beneficial to recognise vulnerability to parties on a case-by-case basis, there is a tension in this general approach. It has been argued that rather than framing individuals or groups 'as' vulnerable – which may potentially subject individuals or groups to unwarranted or unnecessary 'stigma, stereotyping, humiliation or violence' – it is necessary to first identify those *at risk of vulnerability within* existing norms and laws. The effect of norms and laws may threaten, reduce or negate an individual's or group's status, protection, rights and remedies

[23] L Peroni and A Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11 *International Journal of Constitutional Law* 1056.

[24] Above (n 7).

[25] Convention of 13 January 2000 on the International Protection of Adults, entered into force 1 January 2009.

[26] Council Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, [2013] OJ L181/4.

[27] Regulation (EU) 606/2013, ibid, Recital 6. Words removed and added for syntax.

in comparison to other individuals or groups. The imbalance may result in an inequality. In turn, and in response to the risks to individual rights and protections, vulnerability 'within' norms and laws must become a greater part of discussions and debates in private international law than has occurred previously.

Second is vulnerability of a state. For example, the United Nations (UN) Sustainable Development Goals (SDG) Declaration 2015 states that if the aim of sustainable development is a 'just, equitable, tolerant, open and socially inclusive world' then to achieve this 'needs of the most vulnerable are met'.[28] The concept of vulnerability is at the heart of many global issues such as migration, human rights, access to essential services, access to justice and remedies. Two SDGs can be provided by way of short example. SDG 10 is concerned with reducing inequalities, and SDG 16 provides for securing peace, justice and strong institutions. The mixed technique of private international law has been shown to add value in discussions on 'remedies for human rights violations and environmental damage',[29] first through the combined influence of judicial authority and its increasing effect on cross-border commercial and family cases in a human rights context; second, legislative authority derived the relationship between the Hague Conference on Private International Law (HCCH) and its constituent members and other international organisations such as the United Nations and the United Nations Conference on Trade and Development (UNCTAD); and, third, policy orientation and priorities through shared pragmatic objectives in securing jurisdiction, choice of law and recognition of judgments.

Having identified the categories of vulnerable parties in private international law, the three causes of vulnerability can now be considered. These are actions of a state, the actions of a third party, or the actions of the state and third party in combination. The effect of these causes/sources will now be considered for each of the parties in the previous section. The purpose of this subsection is to illustrate how vulnerability is both universal in its reach and contextual in its impact.

C. Vulnerability of Natural Persons

The causes of vulnerability of natural persons will now be considered. The first cause of vulnerability to a natural person may be the actions of a state. The state's first order law and/or policy may result in inequality, imbalance, lack fitness for purpose or adequate protection for parties. In private international law terms, the imbalance may extend through the scope, interpretation or absence of a particular ground of jurisdiction, choice of law or enforcement of judgment.

One example of the actions of the state may be through its regulatory, legislative and/or judicial response to new and emerging activities. New technologies,

[28] UN General Assembly Resolution A/RES/70/1 of 21 October 2015, para 8.

[29] eg, European Law Institute Report (n 20) 43; and most recently, *Jalla v Shell International Trading and Shipping Co* [2021] EWCA Civ 1559.

such as artificial intelligence, smart contracts and blockchain, are good examples. These new technologies invite us to return to Kessedjian and Boele Woelki's two questions from the not too distant past.[30] These two questions are 'which court decides?' 'Which law applies?' These two key questions continue to resonate in disputes concerning artificial intelligence,[31] smart contracts,[32] blockchain and post Brexit approaches to data privacy. In international sales contracts, there is a continued tension between appropriateness of law,[33] conflicts justice and material justice in securing access to justice and consumer enforcement cooperation in different countries.

Another example may be where the state seeks to specifically protect parties through human rights and non-discrimination. In the context of human rights, the concern is the 'heightened vulnerability and marginalisation'[34] of vulnerable parties who have been subjected, and continue to be subjected, to serious 'business related human rights abuses'.[35] In the context of non-discrimination, a recent example is the recognition of foreign same and opposite sex civil partnerships. Another example is the role of choice of law in the international protection of adults. Schedule 9, paragraph 13 of the Mental Capacity Act (Northern Ireland) 2016 illustrates that 'where a protective measure is taken in one country, the conditions for implementation are governed by the law of the other country'.[36] The forum's mandatory rules may also override the parties' choice of state law. There should be alignment between the state's rules of recognition and its public policy. Whilst the state may or may not permit, by its own laws, legal relationships as same or opposite-sex civil partnership or marriage, surrogacy or adoption, the state of recognition should not use its public policy to deny recognition of such relationships.

The second cause of vulnerability to a natural person may be the actions of a third party. There may be a prior existing relationship or a degree of proximity between the parties. The prior existing relationship may be civil and commercial, in contract, tort or delict. One party might act in breach of an agreement on jurisdiction or choice of law. The relationship may instead be of a family or private nature, such as one between spouses, partners, parents, legal representatives and children.[37] The parties may be connected by virtue of proximity of the third-party actions, such as harm arising from business conduct and activities in the jurisdiction.

[30] K Boele-Woelki and K Kessedjian (eds), *Internet: Which Court Decides? Which Law Applies?* (Kluwer Law International, 1997).

[31] LE Gillies, 'Artificial Intelligence, International Private Law and the Application of Law: Which Court Decides? Which Law Applies?' on file with author.

[32] The Law Commission of England and Wales has recently undertaken a review of the application of smart contracts in English Law, see: www.lawcom.gov.uk/project/smart-contracts/.

[33] R Brownsword, *Law 3.0* (Routledge, 2020).

[34] European Law Institute Report (n 20) 8.

[35] ibid.

[36] Mental Capacity Act (Northern Ireland) 2016, sch 9, para 13.

[37] *In Re B (A Child) (Care Proceedings: Jurisdiction)* [2013] EWCA Civ 1434, [2014] 2 WLR 1384 [37].

The third cause of vulnerability to a natural person is where a combination of state and party activity results in vulnerability to that natural person. For example, tactical procedural remedies available in one state may be used by one party against another party. For example, a court may grant an anti-suit injunction to restrict commercial proceedings abroad.[38] A court may grant a freezing (Mareva) injunction to preserve proceedings in the forum, and to avoid the risk or threat of 'unjustified dissipation of assets'.[39] A court may grant a Hemain injunction in divorce proceedings[40] to prevent proceedings in the other state. The combination of state and third-party activity may cause vulnerability to the natural party in matters of jurisdiction (scope, exclusions, connecting factors), choice of law (validity) or in seeking to secure recognition and enforcement of a foreign judgment.

D. Vulnerability of Legal Persons

The causes of vulnerability of legal persons will now be considered. The first cause of vulnerability of a legal person is the action of the state. In jurisdictional terms, the application of the centre of main interests (COMI) is a double-edged concept. It supports the interests of creditors by distinguishing between main and secondary insolvency proceedings. However, the ability of a legal entity to change its seat/right of establishment on the basis of COMI may result in a commercial disadvantage, increase risk and vulnerability of third party 'local'[41] creditors.[42] For choice of law, the theory of establishment/incorporation determines if an entity in one country can change seat, or establish a branch, agency or subsidiary in another country. The theory of incorporation enables a legal entity to forum shop by moving seat, resulting in a corresponding risk to third-party creditors.[43]

The second cause of vulnerability of a legal person is through the actions of a third party. For example, the vulnerability will depend on the civil or commercial relationship between the parties. Jurisdiction and choice of law rules in contract and tort may be a consideration, including the mandatory rules of the forum if not the state concerned.

The third cause of vulnerability of a legal person is the combined action of a state and third party. For example, there may be a situation where the action of the state prefers to support, through its jurisdiction and choice of law rules, the

[38] Case C-159/02 *Turner v Grovit* [2005] 1 AC 101.

[39] *Fundo Soberano de Angol v Jose Filomeno dos Santos* [2018] EWHC 2199 (Comm) [86].

[40] *ER v FB* [2018] EWFC 18; *cf Lachaux v Lachaux* [2021] EWHC 1797 (QB), [2022] EMLR 2 [33] on the recognition of a foreign judgment despite a Hemain injunction having been granted against the foreign state.

[41] M Tsimplis, 'Modified Universalism and Cross-Border Insolvency of Shipping Companies' [2020] *Journal of Business Law* 345, 346.

[42] MT Epeoglou, 'The Recast European Insolvency Regulation: a missed opportunity for restructuring business in Europe' (2017) 6 *UCL Journal of Law and Jurisprudence* 31, 44.

[43] ibid, 44.

third party over the legal entity. There may be a connection between this cause of vulnerability and the treatment of the legal entity under its theory of incorporation of its choice of law rule for particular harms suffered by the legal entity such as in tort for breach of competition, anti-competitive practice, privacy and data protection, or environmental damage. Similar to the previous example, regulatory arbitrage may result in vulnerability of the legal entity to harm caused by the action – or inaction – of the state in addition to, or compared with, the other party.

E. Vulnerability of States

The three causes of vulnerability of states will now be considered. The first cause of vulnerability of states is through the actions of another state or group of states. The actions of a state may be legislative, judicial, constitutional or political. There is a broader connection between private and public international law. To begin with, three examples may illustrate the point.

The first example is the effect of external competence of supranational institutions on states. For example, the EU's external competence arose out of Article 65 of the Treaty of Amsterdam.[44] It has directly or indirectly influenced both the Europeanisation of private international law and the laws of EU (and non-EU) Member States since. One consequence of external competence has been where the European Union has 'leverag[ed]'[45] non-EU Member States to adjust to EU approaches. Writing prior to Brexit, Mills suggested that a supranational legal system such as the EU's may indirectly influence the relationship between the EU Member State and its relationship with non-EU Member states. The EU's recent decision refusing to approve the UK's request to join the Lugano Convention is a pertinent post Brexit example – consequence – of the (in)direct influence of the European Union on the United Kingdom as a non-EU Member State.[46]

The second example is the tension between the legitimacy of anti-suit injunctions in cross-border disputes and the principle of territoriality in international law. Dickinson has recently identified this as the 'interference paradox'.[47]

[44] J Basedow, 'The Communitarisation of the Conflict of Laws Under The Treaty of Amsterdam' (2000) 37 *Common Market Law Review* 687, 698–99; O Remien, 'European Private International Law, The European Community and its Emerging Area of Freedom, Security and Justice' (2001) 38 *Common Market Law Review* 53, 74–75; CT Kotuby Jr, 'External Competence of the European Community in the Hague Conference on Private International Law: Community Harmonization and Worldwide Unification' [2001] *Netherlands International Law Review* 1, 3–4 and 17–18; considered in the context of cross-border consumer protection beyond the EU in LE Gillies, *Electronic Consumer Contracts and International Private Law A Study of Electronic Consumer Contracts* (Ashgate, 2008) 59–62.

[45] A Mills, 'Private International Law and EU External Relations: Think Local, Act Local Global or Think Global, Act Local?' (2016) 65 *International & Comparative Law Quarterly* 541, 573.

[46] European Commission, 'Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention' COM(2021) 222 final.

[47] A Dickinson, 'The Interference Paradox' [2020] *Law Quarterly Review* 569, 574, considering the consequences of the English Court of Appeal decision in *SAS Institute Inc v World Programming Ltd* [2020] EWCA 599, [2020] 1 CLC 816.

The paradox is that whilst there may be a general justification for granting an anti-suit injunction, the recent Court of Appeal case *SAS Institute Inc v World Programming Ltd* highlights an overarching concern about 'improper interference with sovereignty'[48] of the foreign state. Dickinson's response is that the English court has two choices: continue with the existing approach in granting anti-suit injunctions, or grant them only if there is evidence of genuine risk of '"unwarranted" judicial interference' by the foreign system in English proceedings.[49]

The third example is the law of state immunity. The European Convention on State Immunity 1972, the State Immunity Act 1978, and the UN Jurisdictional Immunities Convention 2005 all apply a 'restrictive theory'[50] which uphold state immunity for (civil)[51] claims brought against it by other states. However, as the recent conflict in Ukraine demonstrates, this does not extend to criminal acts. Furthermore, any changes to the legal or political relationship a state has with another state or group of states, such as Brexit, may impact the policy[52] and legislative approach.

Turning now to the second cause of vulnerability of states. Here we can consider the actions of a third party. The third parties referred to here are multinational enterprises (MNEs) with a seat in one jurisdiction operating globally via subsidiaries, branches or agencies. The activities of the third party may impact the state on matters such as data protection, competition, environmental damage and so on. The state's jurisdiction and choice of law rules may be challenged by the regulatory arbitrage between state regulation and self-regulation. The consequence of regulatory arbitrage raises challenges not just for the state, but also its citizens. The example is the 'big five' MNEs in the technology sector which have been involved in litigation concerning, inter alia, abuse of a dominant position,[53] data protection,[54] privacy[55] and patent infringement[56] which has directly or indirectly impacted states and their citizens.

The third cause of vulnerability to a state is due to the combined action of another state and third party. This is similar to the discussion above, when a state, through *lis pendens*[57] or anti-suit injunction,[58] affects the sovereignty of another state.

[48] Dickinson, ibid, 574.

[49] ibid.

[50] Beaumont and McEleavy (n 8) para 6.13.

[51] s 16 of the State Immunity Act 1978 confirms that Part 1 of the Act, applicable to proceedings brought in the UK by or against other States, does not apply to criminal proceedings.

[52] At the time of writing, there is an ongoing debate about the future scope and terms of the EU–UK Northern Ireland Protocol and the corresponding risk of breach of international and trade law should the UK government decide to unilaterally vary it.

[53] Case T-167/08 *Microsoft Corp v European Commission* [2012] 5 CMLR 15.

[54] Case C-131/12 *Google Spain SL v Agencia Espanola de Proteccion de Datos* (AEPD) [2014] QB 1022.

[55] Case C -311/18 *Data Protection Commissioner v Facebook Ireland Ltd* [2021] 1 WLR 751; Case C-498/16 *Schrems v Facebook Ireland* [2018] 1 WLR 4343.

[56] *Samsung Electronics Co Ltd v Apple Retail UK Ltd* [2014] EWCA Civ 376.

[57] *West Tankers Inc v Allianz SpA (The Front Comor)* [2012] EWCA Civ 27, [2012] Bus LR 1701.

[58] *Turner* (n 38).

As above, it is also similar to where a state legitimises the actions of a third party which may impinge on another state.

The next section of the chapter considers the extent to which current theoretical approaches in private international law taken account of vulnerability in cross border cases.

III. Vulnerability and the Theory and Techniques of Private International Law

The theory of private international law is based, in broad terms, on four key concepts: appropriateness; conflicts justice; pragmatism; and effectiveness. The purpose of this section is to consider two things. First, is the extent to which the theoretical framework of private international law considers vulnerability of parties to cross-border disputes. Considering the concept of vulnerability in this way lends itself to the universal idea of vulnerability and balances the interests of vulnerable parties and states in cross-border disputes. The second part of this section broadly maps the techniques of private international law through consideration of selected techniques and examples.

A. Appropriateness

The first concept is appropriateness. Along with conflicts justice,[59] appropriateness is the principal basis upon which a court exerts its judicial authority in a cross-border case. One example which reflects the concept of appropriateness is the doctrine of *forum non conveniens*. Throughout the United Kingdom and common law jurisdictions, the doctrine has been used to determine whether another court is more appropriate to hear the dispute, in the interests of the parties and the ends of justice. However, is it evident that *forum conveniens* recognise and respond to inequalities and vulnerability and if so, how does it do so? The doctrine has increased in significance for a range of reasons. There has been application of the doctrine in determining whether a vulnerable person has been wrongfully removed from their habitual residence.[60] There has been recent consideration of the doctrine in relation to establishing jurisdiction for damages against business for human rights abuses.[61] In the United Kingdom, the European Union

[59] P Beaumont, '"Great Britain"' in J Fawcett (ed), *Reform and Development of Private International Law* (Oxford University Press, 2002) 208–09.

[60] *O (Court of Protection: Jurisdiction)* [2013] EWHC 3932 (COP), [2014] Fam 197.

[61] *Vedanda Resources Plc v Lungowe* [2019] UKSC 20, [2020] AC 1045, considered by M Cornaglia, 'Vedanta Resources Plc v Lungowe [2019] UKSC 20 (Case Comment)' [2019] *European Human Rights Law Review* 309, 315.

(Withdrawal Agreement) Act 2020 removed the EU system of civil and commercial jurisdiction after the end of the Brexit transition period, leaving questions of jurisdiction over EU and non-EU defendants to be determined by the Civil Procedure Rules (CPR)[62] for proceedings in England, Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 for proceedings in Scotland and *forum conveniens* in both cases. Arzandeh explains that the role of *forum conveniens* is twofold. First, it enables the court to assert its own jurisdictional competence, and second, it seeks to promote the state's 'jurisdictional values'.[63] *Forum non conveniens* may apply either in service out cases or where the defender seeks the court's discretion to sist/stay under section 49 of the Civil Jurisdiction and Judgments Act 1982. Arzandeh's historical analysis of the doctrine presents two broad points which provide an insight into the connection between appropriateness and vulnerability. The first point is that the traditional judicial application of the doctrine applied a broadly balanced approach. However, the second point made by Arzandeh is that a series of cases from *St Pierre* to *Spiliada* demonstrate that the doctrine was used to support a 'pro-plaintiff' stance,[64] favouring the English court over the foreign court and 'generat[ing] legal uncertainty and … economic inefficiency for litigants'.[65] Assessing the doctrine in this manner suggests a potential increased risk of vulnerability to litigants. Arzandeh concludes that in future it may be worth applying the doctrine 'on a more restrictive basis'[66] akin to what constitutes injustice under Article 6(1) ECHR.[67]

However, the pre-Brexit and post-Brexit jurisprudence of the UK courts has demonstrated that *forum conveniens* will continue to have a prominent role in determining whether UK courts are the appropriate place for the case against a foreign defender to be heard.[68] The doctrine continues to be considered across a wide spectrum of civil, commercial and private law disputes. For example, in *Stylianou v Toyoshima v Suncorp Metaway Insurance Ltd*,[69] the claimant had sustained substantial injury abroad and raised proceedings there. However, due to the seriousness of the injuries, she was unable to participate in proceedings abroad.

[62] *Brownlie v FS Cairo (Nile Plaza) LLC*; also known as *Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45, [2021] 3 WLR 1011; A Briggs and A Dickinson, 'Reframing Jurisdiction: A New Scheme?' 2022 41(4) CJQ 317.

[63] A Arzandeh, *Forum (Non) Conveniens in England Past, Present and Future* (Hart Publishing, 2018) 8.

[64] ibid, 140.

[65] ibid, 119.

[66] ibid, 109.

[67] ibid, 131.

[68] LE Gillies, 'Appropriate Adjustments Post Brexit: Residual Jurisdiction and Forum Conveniens in UK Courts' [2020] *Journal of Business Law* 161; see also L Merrett, 'International Employment Law Cases Post Brexit: Choice of Law, Territorial Scope, Jurisdiction and Enforcement' (2021) 50 *Industrial Law Journal* 343, 346.

[69] *Stylianou v Toyoshima v Suncorp Metaway Insurance Ltd* [2013] EWHC 2188.

She sought service out to bring proceedings in England. The specific feature of the case was that the extent of the claimant's injuries rendered her vulnerable and unable to continue litigation abroad and that seeking to commence proceedings in the English courts, after liability had been admitted, the court was satisfied that this was not an abuse of process.

The doctrine also has application in family law cases. *Forum conveniens* has recently been applied by the English High Court in a case concerning the acute welfare of a 'highly vulnerable' child who had been brought to the United Kingdom by her father.[70] After protracted proceedings, the English court established jurisdiction under Regulation EC 2201/2003 Brussels IIbis on the basis of the child's habitual residence in the United Kingdom. The English court ordered the child's return to the United States.

Forum conveniens was also considered by the English court in determining a father's application for a stay of English wardship proceedings, brought by the mother, in favour of the Singaporean court instead. As a consequence of previously attempting to remove the child from Singapore, the mother was detained and subsequently deported from Singapore. The English court said that it was appropriate to refuse the stay. In doing so it was permitted to account of the mother's 'perception of vulnerability … and … great concern' if the English proceedings were stayed.[71] A further example of *forum conveniens* and habitual residence arose in the case *Chai v Peng*.[72] In determining a party's habitual residence, the court took account of expert evidence which referred to the connection between the party's vulnerability and the need for the 'continuity of case … in his social environment'.[73]

B. Appropriateness and *Lis Pendens*

Another example which relates to appropriateness of jurisdiction is *lis pendens*. Where proceedings relating to the same subject matter are raised in different jurisdictions, the principle of *lis pendens* may enable the court first seised to take jurisdiction. For example, the current Brussels Ibis Regulation (EU 1215/2012) on jurisdiction in civil and commercial matters operates *lis pendens* on the 'principle of allocation'.[74] As *lis pendens* supports the concept of forum selection, this may be to the defender's detriment, increasing their risk of defending proceedings in a state which may assert jurisdiction on a 'first past the post' basis.[75]

[70] *Re X (Care Proceedings: Jurisdiction and Fact Finding* [2020] EWHC 2742, [2021] 2 FLR 449 [46].
[71] *MB v GK, KF, GG* [2015] EWHC 2192 (Fam), [2016] 2 FLR 132 [110].
[72] *Chai v Peng* [2014] EWHC 3518 (Fam), [2015] 2 FLR 424.
[73] ibid, [19].
[74] Gillies, 'Appropriate Adjustments Post Brexit' (n 68) 166.
[75] Beaumont and McEleavy (n 8) para 8.121.

The golden thread that runs between appropriateness, conflicts justice, pragmatism and effectiveness is the 'parties' conflict interests'.[76] Parties conflicts interests is addressed by conflicts justice *and* material justice, as the next section will consider.

C. Conflicts Justice

The second concept is conflicts justice. As readers will already be aware, conflicts justice is concerned with 'appropriateness'[77] through the 'application of the law of the proper state'.[78] Two points must be considered. The first is the parties' conflicts interest and the second is respect for material or substantive[79] justice.

By parties' conflicts interest, we mean that each party has their own, individual expectations of which court and law applies to their relationships and any disputes arising from them.[80] However, parties' knowledge of their substantive rights remains subjective, which may contribute towards increased vulnerability. Vonken provided an objective response that a party may be only expected to be aware of the 'essential principles of justice … of their own law'.[81] However, this response does not fully address a range of issues such as lack of information symmetry between the parties and the challenge of pleading and proving foreign law.[82] To ensure the appropriate application of state law, conflicts justice must take account of material[83] or substantive[84] justice.

Since private international law follows the first order rules of the state,[85] material justice must also be respected.[86] Material justice is focused on ensuring that

[76] APMJ Vonken, 'Balancing Processes in International Family Law, On the determination and weighing of interests in the conflicts of laws and the "openness" of the choice of law system' in TM De Boer, *Forty Years On: The Evolution of Post War Private International Law in Europe, Symposium in Celebration of the 40th Anniversary of the Centre of Foreign Law and Private International Law, University of Amsterdam*, 27 October 1989 (Kluwer, 1990) 171–73.

[77] SC Symeonides, 'Material Justice and Conflicts Justice in Choice of Law' in P Borchers and J Zekoll (eds), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K Juenger* (Transnational Publishers, 2001).

[78] ibid.

[79] R Michaels, 'Private International Law and the Quest for Universal Values' in F Ferrari and DP Fernández Arroyo (eds), *Private International Law Contemporary Challenges and Continuing Relevance* (Elgar, 2019).

[80] Vonken (n 76) 178.

[81] ibid.

[82] *Brownlie* (n 62).

[83] Symeonides, 'Material Justice and Conflicts Justice in Choice of Law' (n 77) 13–14.

[84] Michaels (n 79).

[85] HLA Hart, *The Concept of Law* (Clarendon Press, 1961); A Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009) 9–20.

[86] SC Symeonides (ed), *Private International Law at the End of the 20th Century: Progress or Regress?* (Kluwer Law International, 2000) 44–45.

the applicable law – and its *differences* compared with other substantive laws[87] – is identified. The purpose of this exercise is to ensure that the proper result – 'equal treatment'[88] of foreign and domestic law – is achieved. Symeonides' example that 'statutory choice of law rules'[89] which rely on connecting factors as techniques to link to the dispute to the relevant territory has proved correct. In EU private international law, connecting factors have been the principle 'methodological'[90] norm which set out – as well as limit/control – jurisdiction, choice of law and enforcement of judgments in furtherance of EU internal market objectives.

D. Pragmatism

The fourth concept is pragmatism. The purpose of pragmatism is to enable coherent, practical application of private international law.[91] Beaumont and McEleavy remind us that it is an 'anti-theor[etical]' construct in that it seeks to assess the operation of private international law with other jurisdictions, akin to comparative law.[92] For example, the English courts frequently consider 'pragmatism' as part of their assessment of the second limb in service out cases.[93] To that extent, pragmatism is about 'practicability and efficiency in doing justice in the present situation'.[94] Another valuable response to the theory of pragmatism is provided by Whincop and Keyes. These authors stated that 'pragmatism *means* policy'.[95] With this approach, the aims of pragmatism have been described as 'anti-foundational … forward looking … facilitating meaningful choice and action'.[96] Therefore, pragmatism is practical and policy orientated. To support a pragmatic approach, it is possible to implement 'choice influencing factors'[97] of legal certainty, predictability and uniformity. These three factors support the management of disputes as well as their avoidance. For example, choice of law for immovable property, *lex situs* regarded as an example of the 'principle of effectiveness'.[98]

[87] Banu (n 3) 521.

[88] Beaumont and McEleavy (n 8) para 2.95; M Bogdan, *Private International Law as Component of the Law of the Forum* (Martinus Nijhoff Publishers, Hague Academy of International Law, 2012) 80–81.

[89] Symeonides, *Private International Law at the End of the 20th Century* (n 86).

[90] C Semmelmann, 'The European Union's Economic Constitution under the Lisbon Treaty: Soul Searching Among Lawyers Shifts the Focus to Procedure' [2010] *European Law Review* 516, 532.

[91] MJ Whincop and M Keyes, *Policy and Pragmatism in the Conflict of Laws* (Ashgate, 2001).

[92] Beaumont and McEleavy (n 8) para 2.92.

[93] eg, as part of the assessment of evidence under the second limb to grant of service out under English Civil Procedure Rules: *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV Atlantic Tiburon 1, The* [2019] EWCA Civ 10, [2019] 1 WLR 3514 [78].

[94] Beaumont and McEleavy (n 8) para.2.96.

[95] Whincop and Keyes (n 91) 2.

[96] Whincop and Keyes (n 91) 2–3.

[97] Beaumont and McEleavy (n 8) para 2.71; P Hay, O Lando and RD Rotunda, 'Conflict of Laws as a Technique for Legal Integration' in M Capelletti, M Seccombe and J Weiler (eds), *Integration Through Law*, Vol 1, Book 2, (Walter de Gruyter, 1986) 194.

[98] Beaumont and McEleavy (n 8) para 21.19.

As a choice influencing factor, legal certainty is often used by institutions and legislators as both an aim and a justification of a proposed convention, instrument or other legislation. In private international law, the aim of legal certainty is to enable the court, or state law, with the closest or most appropriate territorial connection to a dispute to apply. Justification for a legislative measure may be to secure legal certainty in furtherance of a policy objective or a societal need, such as vulnerability of parties, states or a particular context. Predictability of result is intended to enable parties to ascertain with reasonable certainty which court has jurisdiction and crucially which law applies.[99]

Legal certainty and predictability of result are high-level aims, which may or may not be experienced by parties in practice. Furthermore, in the absence of recognition of vulnerable parties or states, rules on standing and applicable law may result in detriment to vulnerable parties. For example, the recent FRA Report explains that in claims against businesses for human rights violations, burden of proof, representation or legal standing and applicable law are three of the most significant barriers to access to justice. There is a general demand that an individual plaintiff demonstrates a causal link between the activity, the harm caused and the damage. Not all states permit collective proceedings for such claims. General choice of law rule based on the place of damage restricts those proceedings – and damages – to that place.[100]

Therefore, how should pragmatism recognise and respond to vulnerability arising from cross-border relationships? There are three points to be made here. The first is that a dialogue should begin as to how various aspects of vulnerability of parties and states have been recognised in cross-border disputes to date. This means that *policy has a role to play in agenda setting and practice has a role to play* in mapping the issues and contributing responses. However, to be meaningful – thus avoiding 'unbridled methodological pluralism'[101] – a dialogue should begin on recognition of vulnerability in private international law. In doing so, we can be (re)introduced to Vonken's question – 'should conflicts law respond, and if so to what extent, to the social changes reflected in the evolution of contemporary private law?'[102] We should be beyond that question by asking how private international law should, in tandem with public international law and human rights law, respond to social changes reflected through vulnerable persons and states.

This links to the third point, namely the pragmatic response. The objective of pragmatism is to support 'unification and harmonisation and coordination'.[103] It is submitted that the first step should be coordination as a means of facilitating

[99] This is to be contrasted with predictability of decision, when legal certainty is favoured over discretionary-based judicial decision-making.

[100] European Union Agency for Fundamental Rights, 'Business and Human Rights – Access to a Remedy' (Luxembourg, 2020) 6, 8–9 and 13–14, available at: fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf.

[101] Vonken (n 76) 172.

[102] ibid.

[103] Beaumont and McEleavy (n 8) para.2.97.

Whincop and Keyes' forward-thinking, choice and action. The previous points on appropriateness, conflicts justice, pragmatism and effectiveness can provide the theoretical framework. The second step is to identify how techniques in private international law engage with vulnerability. The next section of the chapter considers examples from a range of techniques from characterisation of a dispute through to choice of law. Then taking Beaumont and McEleavy's approach of 'practicality and simplicity',[104] the penultimate section of this chapter suggests a four-step approach based on asymmetric substantive equality – participation, transformation, redistribution and recognition. Such an approach would reflect the 'open character of the conflicts law system … accommodate various adaptations and differentiations [whilst containing] methodological pluralism within acceptable limits'.[105]

E. Techniques of Private International Law

The next section broadly considers some selected techniques of private international law in cross-border cases and the extent to which these techniques recognise and address vulnerability of parties in cross-border disputes. The selected techniques are characterisation, connecting factors, capacity and party autonomy.

i. Characterisation and Connecting Factors

Characterisation or classification is the first step in a private international law dispute. It is the general role of the *lex fori* to classify the 'true issue or issues thrown up by the claim and defence'.[106] This exercise applies an 'internationalist spirit'[107] to identifying the issue, rather than a purely national approach which may have the effect of restricting or excluding the claim. In that sense, characterisation has an important role to play in supporting the recognition of vulnerability relative to the parties, the state or the context of the dispute as outlined in section III.

Connecting factors are an important technique in private international law. Their primary purpose is to determine a party's personal law.[108] Their secondary purpose is to determine the relevant legal system for the purposes of either jurisdiction, choice or law or both. Broadly speaking, connecting factors may be traditional and 'doctrinal',[109] such as domicile or religion.[110] Alternatively,

[104] ibid, para 2.94.
[105] Vonken (n 76) 173.
[106] *Macmillan Inc v Bishopgate Trust (No.3)* [1996] 1 WLR 387 (CA) per LJ Auld at 407A-B, cited in *Fiona Trust and Holding Corp. v Privalov* [2010] EWHC 3199 [152].
[107] *Atlantic Telecom GmbH, Noter* 2004 SLT 1031, [31] (Lord Brodie), quoting *Macmillan Inc*, ibid, 407B.
[108] Beaumont and McEleavy (n 8) paras 7.01 and 7.03.
[109] ibid, para 7.03.
[110] ibid.

connecting factors may be policy-orientated and 'contemporary',[111] such as habitual residence and nationality. Whilst it is beyond the scope of this chapter to examine in detail the benefits and limitations of both categories, these connecting factors have an important role to play in supporting the exercise of individual rights across borders. This role is more so when there is a risk of vulnerability to parties and the connecting factor – habitual residence in particular – must be established.

ii. Connecting Factors and Capacity

There have been recent cases where the recognition of party vulnerability has arisen relative to the connecting factor applicable to disputes concerned with abducted children and vulnerable adults.

With regard to the Hague Convention on the Civil Aspects of International Child Abduction 1980, it is two of the four defences to return of the child to the court of their habitual residence that are relevant. The purpose of these two defences is concerned with the child's 'risk' of being returned and their 'objection' to return. Specifically, Article 13(c) is the defence that returning the child would place that child in grave risk (or otherwise subject them to an intolerable situation). Article 13(d) is the defence that the child has reached a degree of maturity and objects to return. As readers know, these are fact-specific tests so turn on the circumstances of each individual case. Vulnerability is neither a term of art in the Convention itself or the original official supporting documentation of the HCCH.[112] However, at the time of writing, a search of the HCCH's INCADAT database shows that in the period from 1990 to 2021 approximately 67 decisions from Contracting States referred to the concept of the vulnerable party or vulnerability in international child abduction. In view of the chapter's focus on vulnerability, and the reader's patience, it is prudent to focus on a few of the most recent examples from the UK courts. In *W v A*,[113] the Scottish Inner House of the Court of Session upheld an appeal against the return of a child to Poland. The Court was satisfied that a 'child-centric'[114] approach should have been followed by the court and once the 'gateway'[115] of the child's objection was met, the defence was established, and return should not have been ordered. In this case, the first instance court had erred in law by placing greater weight on the Polish court's

[111] ibid.

[112] E Perez-Vera, 'Explanatory Report on the Convention on the Civil Aspects of International Child Abduction' (HCCH) and 'Actes et Documents de la Quatorzième Session' (6–25 October 1980, HCCH), both available at: www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction.

[113] *W v A* [2020] CSIH 55, 2021 SLT 62.

[114] ibid, [10]–[11], citing Lady Hale in *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288.

[115] *W v A* (n 113) [11].

decision and its disregard by the reclaimer (appellant). In *Re V and W (Hague Return Order: Lithuania)*[116] the English court was satisfied that the child's prior vulnerability – anxiety – justified an order to refuse return to its former habitual residence. In *Re S*,[117] the court followed the basis for grave risk in *Re C* that there must be 'clear and compelling evidence of a grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return',[118] and was satisfied that there would be grave risk to the children and refused to order their separation and return. These very recent examples serve as illustrations that the defences are crucial to the effectiveness of the Convention on the one hand, the continued need to balance interests of parties and Contracting States on the other[119] and the recognition of the child – and on occasion the parent's – inherent and continuing vulnerability in such cases.

With regard to the Convention on the International Protection of Vulnerable Adults 2000, a range of cases highlight the relationship between the Convention's aims, habitual residence, *forum conveniens* and international comity of courts. In *Re MN* the question arose whether a foreign judgment could be enforced to enable a woman who lacked capacity to return to California.[120] The court held that the Mental Capacity Act 2005, Schedule 3, point 4 ensured that a person who lacked capacity had their best interests and affairs dealt with in the country of their habitual residence. The court held that party's habitual residence, and authority for its change, were key to the enquiry. The court held that the assessment of such authority should be according to California law.

The Hague Convention on the International Protection of Adults 2000 is applied in England through the provisions of Schedule 3 to the Mental Capacity Act 2005. There have been cases brought before the English courts which demonstrate how the court assesses, in the matter of a vulnerable adult, if there has been a change of habitual residence. In *O (Court of Protection: Jurisdiction)*, the question was whether a vulnerable adult who lacked capacity should be returned to England from Scotland.[121] The Scottish court had previously granted an interim welfare guardianship order on the basis of the adult's presence in the jurisdiction. The English court was asked to order the return of the adult to England. The English court confirmed that a change to habitual residence could be made on the basis of authority. Such authority could be justified on the grounds of necessity, provided the act was done in good faith and in the vulnerable person's best interests. On that basis, the English court held that the vulnerable adult was habitually resident in Scotland and that matters relating to welfare ought to be dealt with by the Scottish

[116] *Re V and W (Hague Return Order: Lithuania)* [2022] EWHC 739 (Fam).
[117] *Re S* [2020] EWHC 2940 (Fam).
[118] ibid.
[119] Perez-Vera (n 112) paras 9 and 41; *AD v SD* [2023] CSIH 17.
[120] *Re MN* [2010] EWHC 1926 (Fam).
[121] *O (Court of Protection: Jurisdiction)* [2013] EWHC 3932 (COP), [2014] Fam 197.

court. This approach was followed similarly in *AB v XS*.[122] The English court said it would be an 'inherent misuse of jurisdiction'[123] to order the return of a vulnerable adult who had been moved to Lebanon and had been habitually resident there for the past seven years. These two key issues, authority to change habitual residence on the grounds of necessity and integration as the test of habitual residence, were both considered in the case *In Re QD (Jurisdiction: Habitual Residence)*.[124] The English Court of Protection held that the vulnerable adult was integrated into life in Spain and therefore habitually resident there. The Court also held that there was no authority to remove the vulnerable adult to England on the basis of necessity. Instead, the Court held that the 'covert plan'[125] to remove the adult from Spain to England had been done 'by stealth'.[126]

These cases show two important points regarding the habitual residence of a vulnerable adult. The first point is that compared with cases involving children, there is no equivalent to the concept of parental responsibility for vulnerable adults. The second point is that the test for a change of habitual residence of a vulnerable adult is integration.[127] Both of them point to the need for future discussion on how private international law can build on existing protections for vulnerable adults, so as to be compatible with the best interests of the vulnerable adult and their human rights.

iii. Party Autonomy: Commercial Contracts

With regard to party autonomy, there appear to be differing opinions regarding its application to commercial and private law disputes. Most of the literature broadly accepts that parties should be entitled, as with any other terms which can be agreed, to select the jurisdiction and choice of law they see fit to meet their commercial and personal relationships.

From a policy perspective, the tension between vulnerability and jurisdiction can be summed up as occurring due to the overarching preference for party autonomy over protection; the category of cases excluded; where vulnerability is within the rule already versus where it is not; the risk of parallel proceedings and the criteria used to determine if the court can decline jurisdiction in favour of another foreign court.

In terms of the policy towards jurisdiction, vulnerability may manifest as 'litigation risk':[128] that is, the risk of legal proceedings occurring between parties to a commercial transaction. Whilst parties can manage litigation risk through

[122] *AB v XS* [2021] EWCOP 57, [2022] 4 WLR 13.
[123] ibid, [35] (Leiven J).
[124] *In Re QD (Jurisdiction: Habitual Residence)* [2019] EWCOP 56.
[125] ibid, [29].
[126] ibid.
[127] *AB v XS* (n 122) [27].
[128] R Fentiman, *International Commercial Litigation*, 2nd edn (Oxford University Press, 2015) 41.

party autonomy and negotiate contractual terms, there may be a continued – and elevated – transaction risk. These transaction risks are examples of universal vulnerabilities. We all recognise that (in no particular order) in the commercial context, regulatory compliance, competition/anti-competitive practices, inflation, pricing, energy costs, distribution, sustainability, environmental impact, and harms and employment rights are the most prevalent, universal concerns.

By comparison, the individual (natural person) in a private international law case is extremely limited in their ability to negotiate a choice of forum clause. The litigation risk may not be recognised (identified) or fully understood. These transaction risks are examples of the natural person/private consumer's universal vulnerabilities. The natural person's transactional risk ranges across regulatory compliance and arbitrage, the effect of competition on individual consumers/collective interests, sustainability and the environmental impact, pricing, data protection and privacy, remedies and dispute resolution.

One common example from the above is in the context of sustainable development. Kruger has recently reviewed UN SDG 10 – reducing inequalities – and proposes a mid-ground on party autonomy in this context. She accepts the party autonomy principle with two provisos: first, that 'the principle should not reinforce existing inequalities'; and second, that 'the rule should be tempered for vulnerable parties'.[129] Kruger presents an interesting conclusion that connecting factors might not be appropriate in the context of SDG 10. She also concedes that there should not be a departure (where it applies) from the *actor sequitur* principle and suggests that a *forum necessitasis* rule should be devised instead. These are most interesting points on how inequality should be part of debates concerning party autonomy in the context of SDG 10's aims. Whilst not all countries have an *actor sequitur* rule, a *forum necessitasis* rule may be feasible. However, *it* would need to be very specifically drafted for it to achieve the pragmatists' goal of political support and practical benefit.

In terms of the policy towards vulnerability, choice of law, or applicable law, fairs better. The Rome I Regulation EC 593/2008 for Contracts and Rome II Regulation EC 864/2007 for Non-Contractual Obligations – both instruments continue to apply in the United Kingdom post Brexit – are still intrinsically premised on party autonomy. The same concerns that occur with jurisdiction agreements apply to agreements on choice of law. There may be a lack of recognition of vulnerability within the choice of law rule which prohibits parties from selecting a non-state, religious or secular law. There may also be vulnerability in either enabling parties to modify their initial choice(s) or through the concept of *dépeçage* – or splitting – of the applicable law.

[129] T Kruger, 'The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law – SDG 10: Reduced Inequalities' (Intersentia Online, 25 November 2021), available at: www.intersentiaonline.com/publication/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p/12, para 5.2.

The same scope for recognition of vulnerability applies to consumer and employee contracts, and in specific delicts concerned with product liability, breach of competition and environmental damage. However, there may be scope for giving greater recognition to vulnerability through the operation of mandatory rules which cannot be derogated from by contract or where they are a mandatory law of the forum.

Choice of law rules for 'protected'[130] consumer contracts may reflect the vulnerable interests of consumers. However, these rules are narrowly drafted to protect only those parties to which the measure applies. For example, choice of law rules for consumers only applies to 'final, private consumers' and does not extend to SMEs who may be conceptually distinct but experience similar economic or legal vulnerabilities with consumers in practice.

Both EU Regulations on contractual and non-contractual obligations contain choice of law rules which apply mandatory rules irrespective of party choice. These rules enable the law of a third state or the forum to override party choice where that rule is mandatory in character. Mandatory rules tend to be restricted to the territory of the sovereign state and are characterised as a rule to meet the political, social or economic objectives of that state. There may be scope to further examine, define and interpret the concept of vulnerability within these rules when the EU Commission conducts their review of the operation of these Regulations.

iv. Party Autonomy: Family Matters

However, the literature shows that there are quite different opinions regarding the justification for party autonomy for cross-border family law disputes. Beaumont and McEleavy are of the view that forum shopping and the risk to vulnerable parties are two reasons which explain why party autonomy is not a principle suited to family law disputes.[131] Carruthers has also thoroughly questioned the role of party autonomy in the regulation of adult relationships. She invites us to consider the extent to which party autonomy should be used to support party 'privilege or right'[132] to 'self-determination' as a matter of policy and regulation[133] on the one hand, and 'within the limits prescribed by law'[134] on the other. In favouring choice of law in family law which have a 'sufficient[ly] appropriate … connection to the parties' should be permitted subject to the 'normal control of forum public policy'.[135]

[130] P Stone, *EU Private International Law*, 3rd edn (Edward Elgar, 2014) 125.
[131] Beaumont and McEleavy (n 8) para 7.12.
[132] J Carruthers, 'Party Autonomy in the Legal Regulation of Adult Relationships; What Place for Party Choice in Private International Law' (2012) 61 *International & Comparative Law Quarterly* 881, 883.
[133] ibid, 884.
[134] ibid.
[135] ibid, 912.

IV. Vulnerability in Private International Law: Recognition Through Asymmetrical Substantive Equality

As mentioned earlier, Fredman's asymmetrical substantive equality is premised around what this author terms as four 'pillars. These pillars are 'participation, transformation, redistribution and recognition'. By applying these pillars reflexively, there is potential for private international law to take greater account of vulnerability to parties, countries and contexts in future through asymmetrical substantive equality. This can be achieved through ensuring vulnerability is central to private international law policymaking, legislative drafting, the judicial reasoning of national and supranational courts, and practice.

A. Participation

The four pillars start with participation. Participation is understood to be a wide-ranging concept which begins with engaging private international law in the debate and towards the representation of vested interests. We must consider how private international law ensures effective representation of vulnerability through the theory and techniques of private international law explored in this chapter. The theoretical influences of appropriateness, conflicts justice, pragmatism and effectiveness must be tempered with the techniques of private international law – classification, connecting factor, capacity and party autonomy. This pillar is closely connected to the second pillar.

B. Transformation

Participation is closely connected to the second pillar of 'transformation'. Transformation should 'respect and accommodate difference, removing the detriment but not the difference itself'.[136] In legislative terms, this means ensuring policies – and the evidence contained in them – are designed to identify a detriment and deal with it. This may become more significant as the United Kingdom continues to develop its own policies and legislation in private international law post Brexit. Following the previous section, in private international law terms, this should entail revisiting the various theories and techniques considered in sections three and four.

[136] Fredman (n 16) 30.

C. Redistribution

The third concept is redistribution. Redistribution is intended to improve efficiencies and reduce detriment. In private international law terms, this would mean improving existing policy, legislative and judicial approaches to enable parties being prevented from participating in or securing any justice due to rules of substance and procedure, as outlined in sections two, three and four.

D. Recognition

The fourth concept is recognition. Recognition means the ability to 'promote and redress' the balance *within* the rule. This is aligned with private international law as a second order legal norm.

Recognition may operate at the level of the state – ie, giving recognition to the laws of the foreign legal system and judgments of the foreign court. Here we are reminded of Kegel's 'altruistic state' concerned with the 'just ordering of private life … seeking the best and fairest solutions for all'.[137] Here the balancing exercise is in respecting state sovereignty but including vulnerability when seeking to balance the interests of parties with little, or tenuous, prior connections to states. This links to another example of recognition.

Recognition may also operate at the level of the party, ie, recognition of the status of the party or their legal relationship and how the rule is designed to reflect – recognise – that status or relationship. In addition to the examples in section IV, good examples can be found in cross-border family law. The Civil Partnership Act 2004 and the subsequent Marriage and Civil Partnership Acts 2013 and 2014 in England and Scotland respectively enabled same-sex civil partnerships to be converted into marriages. Furthermore, the recent introduction of the Civil Partnership (Scotland) Act 2020, section 3, provides recognition of cross-border civil partnerships as overseas relationships between parties of different sex.[138]

V. Conclusion

The aim of this chapter was to consider the role of the theory and technique of private international law in recognising and addressing vulnerability. It proposed an approach which can contribute towards securing conflicts justice whilst recognising and addressing vulnerability in cross-border cases.

[137] G Kegel, *International Encyclopedia of International Law, Volume III/1 'Fundamental Approaches'* (Mohr Siebeck, 2011).

[138] Following the UK Supreme Court's decision in *R (on the application of Steinfield) v Secretary of State for Education* [2018] UKSC 32, [2020] AC 1.

The objective of this chapter was to begin more explicit dialogue between vulnerability and private international law by mapping a normative approach. Rather than framing a party, country or context as vulnerable, it was shown that it is necessary to assess existing theoretical and technical approaches in private international law which recognise the risk of vulnerability of natural persons, states and legal entities. The objective of this chapter considered the concept of vulnerability and reviewed the theory of private international law through appropriateness, effectiveness, conflicts justice and pragmatism. It then considered the extent to which the Henning's 'universal' concept of vulnerability operates through techniques of private international law. The final section of the chapter provided a response premised on Fredman's four 'pillars' of asymmetrical substantive equality. Taken together, each of these pillars can be used to support private international law's role in dealing with vulnerability in cross-border cases. By applying asymmetrical substantive equality, the theory and technique of private international law will be better equipped in future to engage with the inherent risks of vulnerability in cross-border cases.