Insights into ERA Seminar on Privacy and Data Protection with a Specific Focus on "Balance between Data Retention for Law Enforcement Purposes and Right to Privacy" (Conference Report)

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Introduction:

On 9-11 December 2020, ERA – the Academy of European Law – organized an online seminar on "Privacy and Data Protection: Recent ECtHR & CJEU Case Law". The core of the seminar was to provide an update on the case law developed by the European Court of Human Rights (ECtHR) and by the Court of Justice of the European Union (CJEU) with relevance for privacy and data protection law since 2019. The key issues discussed were the distinction between the right to privacy and data protection in the jurisprudence of the ECtHR and CJEU, the impact of the jurisprudence on international data transfers, notions of 'essence of fundamental rights' 'personal data processing', 'valid consent' and so on.

Day 1: Personal Data Protection and right to privacy

Gloria González Fuster (Research Professor, Vrije Universiteit Brussel (VUB), Brussels) presented on the essence of the fundamental rights to privacy and data protection in the existing legal framework with a specific focus on the European Convention on Human Rights (Art. 8 of ECHR) and the Charter of Fundamental Rights of the EU (Art. 7, Art. 8)

Article 8 of the Convention (ECHR) guarantees the right to respect private and family life. In contrast, Art 52(1) EU Charter recognizes the respect for the essence of the rights and freedoms guaranteed by the Charter. Both are similar, but not identical. This can be validated from the following points:

- As per Art 8 (2) ECHR – there shall be no interference with the exercise of this right except such as in accordance with the law, whereas Art 52 (1) states that any limitation to the exercise of right and freedoms recognized by the Charter must be provided for by law.
- The Art 8 (2) ECHR stresses the necessity in a democratic society to exercise such an interference, whereas Art 52(1) of the EU Charter is subject to the principle of proportionality.
- Respect for the essence of rights and freedoms is mentioned in Art 52 (1) but not mentioned in Art 8 (2).
- Also, Art 8 (2) states that the interference to the right must be only allowed in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others. At the same time, Article 52 (1) states that any limitations to rights must meet objectives of general interest recognized by the Union or the need to protect others' rights and freedoms.

In the Joined Cases C?293/12 and C?594/12, *Digital Rights Ireland*; the Court addressed the interferences to the rights guaranteed under Articles 7 and 8 caused by the Data Retention Directive. An assessment was carried out as to whether the interferences to the Charter rights were justified as per Article 52(1) of the Charter. In order to be justified, three conditions under Article 52(1) must be fulfilled. The interference must be provided for by law, and there must be

respect for the essence of the rights, and it must be subject to the principle of proportionality. Certain limitations to the exercise of such interference/ infringement must be genuinely necessary to meet objectives of general interest. The Directive does not permit the acquisition of data and requires the Member States to ensure that 'appropriate technical and organizational measures are adopted against accidental or unlawful destruction, accidental loss or alteration of data' and thus, respects the essence of the right to privacy and data protection. The Directive also satisfied the objective of general interest as the main aim of the Directive was to fight against serious crime, and it was also proportional to its aim of need for data retention to fight against serious crimes. However, even though the Directive satisfied these three criteria, it did not set out clear safeguards for protecting the retained data, and therefore it was held to be invalid.

It is pertinent to note here that the ECHR does not contain any express requirement to protect the 'essence' of fundamental rights, whereas the Charter does. However, with regard to Art 8 of the ECHR, it aims to prohibit interference or destruction of any rights or freedoms with respect for private and family life. This can be possibly interpreted so as to protect the essence of the fundamental right of private and family life. This is because a prohibition of the destruction of any right would mean affecting the core of the right or compromising the essence of the right.

Gloria, also examined Article 7 of the Charter, which guarantees a right to respect for private and family life, home and communications, and Article 8, which not only distinguishes data protection from privacy but also lays down some specific guarantees in paragraphs 2 and 3, namely that personal data must be processed fairly for specified purposes. She analyzed these Charter provisions concerning the Regulation (EU) 2016/679 (GDPR). GDPR creates three-fold provisions by imposing obligations on the data controllers, providing rights to data subjects, and creating provision for supervision by data protection authorities.

She also addressed the balance between the right to privacy and the processing

of personal data of an individual on one hand and the right to information of the public on the other. Concerning this, she highlighted the interesting decision in C-131/12, *Google Spain*, wherein it was stated that an interference with a right guaranteed under Article 7 and 8 of the Charter could be justified depending on the nature and sensitivity of the information at issue and with regard to the potential interest of the internet users in having access to that information. A fair balance must be sought between the two rights. This may also depend on the role played by the data subject in public.

It was also discussed in the judgments C-507/17, *Google v CNIL*; and Case C-136/17 that a data subject should have a "right to be forgotten" where the retention of such data infringes the Directive 95/46 and the GDPR. However, the further retention of the personal data shall only be lawful where it is necessary for exercising the right of freedom of expression and information. The ruling was on the geographical reach of a right to be forgotten. It was held that it is not applicable beyond the EU, meaning that Google or other search engine operators are not under an obligation to apply the 'right to be forgotten' globally.

In the next half of the day, Roland Klages, Legal Secretary, Chambers of First Advocate General Szpunar, Court of Justice of the European Union, Luxembourg, presented on the topic: "The concept of consent to the processing of personal data". He started with a brief introduction of GDPR and stated that there is no judgment on GDPR alone as it has been introduced and implemented recently, but there are judgments based on the interpretation of Directive 95/46 and the GDPR simultaneously. He commented on the composition of the ECJ, which sits in the panel of 3,5, 15 (Grand Chamber), or 27 (Plenum) judges. The Grand Chamber comprises a President, vice-president, 3 presidents of a 5th chamber, rapporteur, another 9 judges, appointed based on re-established lists (see Article 27 ECJ RP).

He discussed the following cases in detail:

C – 673/17 (*Planet49*): Article 6(1) (a) GDPR states that the processing of data is lawful only if the data subject has given consent to the processing of personal data for one or more specific purposes. "Consent" of the data subject means any freely given, specific, informed, and unambiguous indication of the data subject's

wishes by which he or she, by a statement or by clear affirmative action, signifies agreement to the processing of personal data relating to him or her.[1] This clearly indicates that consent is valid only if it comes from the active behavior of the user as it indicates the wishes of the data subjects. A consent given in the form of a pre-selected checkbox on a website does not amount to active behavior. It also does not fulfill the requirement of unambiguity. Another important aspect of the ruling was that it does not matter if the information stored or retrieved consists of personal data or not. Article 5(3) of Directive 2002/58/ EC (Directive on privacy and electronic communications)protects the user from interference with their private sphere, regardless of whether or not that interference involves personal or other data. Hence, in this case, the storage of cookies at issue amounts to the processing of personal data. Further, it is also important that the user is able to determine the consequence of the consent given and is well informed. However, in this case, the question of whether consent is deemed to be freely given if it is agreed to sell data as consideration for participation in a lottery is left unanswered.

Similarly, in case C -61/19 (Orange Romania), it was held that a data subject must, by active behavior, give his or her consent to the processing of his or her personal data, and it is upto the data controller, i.e., Orange România to prove this. The case concerns contracts containing a clause stating that the data subject has been informed about the collection and storage of a copy of his or her identification document with the identification function and has consented thereto. He also discussed other cases such as case C-496/17, Deutsche Post, and C- 507/17, Google (discussed earlier), demonstrating that consent is a central concept to GDPR.

Day 2: "Retention of personal data for law enforcement purposes."

On the next day, Kirill Belogubets, Magister Juris (Oxford University), case lawyer at the Registry of the European Court of Human Rights (ECtHR), started with a

presentation on the topic**:**

“Retention of personal data for combating crime.”

Kirill Belogubets discussed the case of *PN v. Germany*. No. 74440/17 regarding the processing of personal identification of data in the context of criminal proceedings. In this case, a German citizen was suspected of buying a stolen bicycle. Authorities collected an extensive amount of data such as photographs, fingerprints, palm prints, and suspect descriptions. It must be noted here that with regard to the right to respect for private life under Article 8 of the ECHR, the interference must be justified and fulfill the test of proportionality, legitimacy, and necessity. The authorities expounded on the likelihood that the offender may offend again. Therefore, in the interest of national security, public security, and prevention of disorder and criminal offenses, it is essential to collect and store data to enable tracing of future offenses and protect the rights of future potential victims. Thus, the collection and storage of data in the present case struck a fair balance between the competing public and private interests and therefore fell within the respondent State’s margin of appreciation.

With respect to margin of appreciation, the case of *Gaughran v. The United Kingdom*, no. 45245/15was also discussed. This case pertains to the period of retention of DNA profiles, fingerprints, and photographs for use in pending proceedings. The Court considered storing important data such as DNA samples only of those convicted of recordable offences, namely an offense that is punishable by a term of imprisonment. Having said that, there was a need for the State to ensure that certain safeguards were present and effective, especially in the nature of judicial review for the convicted person whose biometric data and photographs were retained indefinitely.

However, it has been highlighted that the legal framework on the retention of DNA material was not very precise. It does not specifically relate to data

regarding DNA profiles and there is no specific time limit for the retention of DNA data. Similarly, the applicant has no avenue to seek deletion because of the absence of continued necessity, age, personality, or time elapsed. This has been laid down in the case of *Trajkovski and Chipovski v. North Macedonia*, nos. 53205/13 and 63320/13.

Mass Collection and Retention of Communications data

In the next half, Anna Buchta, Head of Unit "Policy & Consultation", European Data Protection Supervisor, Brussels brought the discussion on Article 7 and 8 of the Charter and Article 8 of the Convention along with the concept of 'essence' of fundamental rights, back to the table. With regard to this discussion, she described the case C-362/14 *Maximilian Schrems v DPC*, which highlights that 'any legislation permitting the public authorities to have access on a generalized basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter.' In this context, EU member states must recognize the confidentiality of communication as a distinct legal right. In this case, it was the first time where a Directive was invalidated due to non-confirmation with the ECHR. It was laid down that the safe harbor principles issued under the Commission Decision 2000/520, **pursuant to** Directive 95/46/EC does not comply with its Article 25(6), which ensures a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order. The Decision 2000/520 does not state that the United States, infact, 'ensures' an adequate level of protection by reason of its domestic law or its international commitments.

Traffic and Location data

She also commented on the indefinite retention of data, which might lead to a feeling of constant surveillance leading to interference with freedom of expression in light of CJEU cases C-203/15 and C-698/15 *Sverige and Watson*. In these cases, the Court agreed that under Article 15(1) of the Directive 2002/58 / EC, data retention could be justified to combat serious crime, national security, protecting the constitutional, social, economic, or political situation of the country

and preventing terrorism. However, this must only be done if it is limited to what is strictly necessary, regarding categories of data, means of communication affected, persons concerned, and retention period. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the transmission of a communication without prejudice to paragraphs 2, 3, and 5 of this Article 6 and Article 15(1) of the Directive. This was reiterated in C-623/17 *Privacy International.* It must be noted here that these data can be retained only if there is evidence that these data constitute an identifiable link, at least an indirect one, to criminal activities. Data with regard to the geographical location again requires objective factors. It must be retained if there exists a risk of criminal activities in such areas. These locations may correspond to places that are vulnerable to the commission of serious offenses, for instance, areas that receive a large number of people, such as airports, train stations, toll-booth areas, etc.

The Court differentiated between generalized and targeted retention of data. Real-time collection and indeterminate storage of **electronic communications surveillance involving** traffic and location data of specific individuals constitute targeted retention. In this context, the case of C?511/18, C?512/18 and C?520/18, *La Quadrature du Net and Others* were also relied upon, with a focus on the following findings:

Targeted real-time collection of traffic and location data by electronic communication providers that concerns exclusively one or more persons constitutes a serious interference that is allowed where:

- Real-time collection of traffic and location data is limited to persons in respect of whom there is a valid reason to suspect that they are directly or indirectly involved in terrorist activities. With regard to persons falling outside of that category, they may only be the subject of non-real-time access.
- A court or an administrative authority must pass an order after prior review, allowing such real-time collection. This must be authorized only within the limits of what is strictly necessary. In cases of duly justified

urgency, the review must take place within a short time.

- A decision authorizing the real-time collection of traffic and location data must be based on objective criteria provided for in the national legislation, which must clearly define the circumstances and conditions under which such collection may be authorized.
- The competent national authorities undertaking real-time collection of traffic and location data must notify the persons concerned, in accordance with the applicable national procedures.

Last but not least, the EU Commission as well as the CJEU have started looking at the national laws of data retention and specifically inclined to define national security in manner so as to increase their own role in the area. However, data retention schemes are divergent across the Member States. It is essential to create clearer and more precise rules at the European level to enable the Courts to develop the best ways to strike a balance between the interactions of privacy rights with the need to tackle serious crime. The different legal rules in the area of data retention restricted cooperation between competent authorities in cross-border cases and affected law enforcement efforts. For instance, some Member States have specified retention periods, whereas some do not, a fact from which conflict-of-laws problems may arise. While some Member States for example Luxembourg precisely define 'access to data', there are Member States, which do not. This was pointed out by the EU Council in the conclusion of the data retention reflection process in May 2019, wherein it was emphasized that there is a need for a harmonised framework for data retention at EU level to remedy the fragmentation of national data retention practices.

Day 3: Data Protection in the Global Data Economy

The discussion of the third day started with a presentation by Professor Herwig Hofmann, Professor of European and Transnational Public Law, the University of Luxembourg on the well-known *Schrems*cases namely, C-362/14, *Schrems I*;

C-498/16, *Schrems vs Facebook;* and C-311/18, *Schrems II;*which involves transatlantic data transfer and violation of Article 7 and 8 of the Charter. In the clash between the right to privacy of the EU and surveillance of the US, the CJEU was convinced that *any* privacy agreements could not keep the personal data of EU citizens safe from surveillance in the US, so long as it is processed in the US under the country's current laws. The guidelines in the US for mass surveillance did not fit in the EU. Therefore, privacy shield could not be maintained.

He also highlighted that international trade in today's times involves the operation of standard contractual terms created to transfer data from one point to another. Every company uses a cloud service for the storage of data, which amounts to its processing. It is inevitable to ensure transparency from cloud services. The companies using cloud services must require transparency from cloud services and confirm how the cloud service will use the data, where would the data be stored or transferred.

In the last panel of the seminar Jörg Wimmers, Partner at TaylorWessing, Hamburg, spoke about the balance between **Data protection and copyright.**

The case discussed in detail was C-264/19 *Constantin Film Verleih GmbH***,** which was about the prosecution of the user who unlawfully uploaded a film on YouTube, i.e., without the copyright holder's permission. In this regard, it was held that the operator of the website is bound only to provide information about the postal address of the infringer and not the IP address, email addresses, and telephone numbers. The usual meaning of the term 'address' under the Directive 2004/48 (Directive on the enforcement of Intellectual Property rights) refers only to the postal address, i.e., the place of a given person's permanent address or habitual residence. In this context, he also commented on the extent of the right to information guaranteed under Article 8 of the said Directive 2004/48. This was done by highlighting various cases, namely, C-580/13, *Coty* and C-516/17, *Spiegel Online*, noting that Article 8 does not refer to that user's email address and phone number, or to the IP address used for uploading those files or that used when the user last accessed his account. However, Article 8 seeks to reconcile the right to information of the rightholder/ intellectual property holder and the user's right to privacy.

Conclusion:

To conclude, the online seminar was a total package with regard to providing a compilation of recent cases of the ECtHR and CJEU on data protection and the right to privacy. A plethora of subjects, such as the balance between data protection and intellectual property rights, privacy and data retention, and respect for the essence of fundamental rights to privacy, were discussed in detail. The data retention provision established by the new Directive on Privacy and Electronic Communications may be an exception to the general rule of data protection, but in the current world of Internet Service providers and telecommunication companies, it may not be easy to ensure that these companies store all data of their subscribers. Also, it is important to ensure that data retained for the purpose of crime prevention does not fall into the hands of cybercriminals, thereby making their jobs easier.

[1] Article 4 No.11 GDPR

Call for papers – Minor's right to information in European civil actions: Improving children's right to information in cross-border civil cases

The right of children to receive adequate information in civil proceedings involving them represents a cornerstone of child participation, as well as a

fundamental right of the child. The contact of children with the judicial system represents one of the most delicate situations where the child's best interests and wellbeing should be of special attention. In particular, the child should receive information before, during and after the judicial proceedings, in order to have a better understanding of the situation and to be prepared either for his or her audition by the judicial authority, or for the final decision that will be taken. This aspect – as an important component of the child's fundamental rights – should acquire (and is acquiring) importance also within the European Union, more and more oriented towards the creation of a child-friendly justice. It is a current reality that the implementation of the fundamental rights of the child influences the correct application of the EU instruments in the field of judicial cooperation in civil matters.

However, the transposition of the principles and standards set at the international and regional level are not always easy to implement at the local level: despite the acknowledgement that the availability and accessibility of information is the crucial starting point for a child-friendly justice, more efforts are still to be done to effectively grant this right. International standards need to find their way into policies, legislation and daily practice.

The MiRI project (co-funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 83160) is undertaking a research on seven member States on children's right to information in cross-border civil proceedings. The project consortium wishes to invite researchers in the field of private international family law to submit abstracts for an upcoming edited volume on the topic.

The abstract should focus on one or more of the following topics:

- The right of the child to receive adequate information in civil proceedings (such as parental responsibility, international child abduction, maintenance, etc.) as an autonomous and fundamental right: the reconstruction of rules, principles and standards of international law.
- The fundamental rights of the child in the European Union: the autonomous relevance of the right of the child to be informed in civil proceedings concerning him or her and its relevance for the creation of a EU child-friendly justice.
- The relevance of children's right to information for the EU instruments in

the field of judicial cooperation in civil matters (such as Regulation EC No. 2201/2003 and its recast Regulation EU No. 2019/1111, with reference to parental responsibility and international child abduction; Regulation EC No. 4/2009): how international human rights standards should influence the correct application of the aforementioned instruments? Are there common best practices in this regard among EU member States? What should be done in order to build those common best practices?

- Rules, case law and practices currently existing in EU member States as concerns the fundamental right of the child to be informed in civil proceedings.

Abstracts should be no longer than 500 words and should be submitted by **15th March 2021** to **francesca.maoli@edu.unige.it**

The selection criteria will be based 1) on the relevance of the analysis in the field of EU judicial cooperation in civil matters, 2) quality of the contribution and 3) its originality. Those whose abstract will be accepted, will be notified by **30th March 2021** and will be asked to submit the full draft of the chapter (approx. between 8000-12000 words) by **30th June 2021**.

Contributions will be subject to blind peer-review prior publishing. Selected authors will also be invited to present their findings during the final conference of the MiRI project in June-July 2021. More information about this event will be distributed after acceptance of the abstract.

Cross-Border Families under Covid-19: Call for Papers

The Minerva Center for Human Rights at Tel Aviv University will host an international socio-legal (zoom-) workshop on 22-23 June 2021 to explore the impact of the Covid-19 crisis and its regulation on cross-border families:

Cross-border families (also known as transnational and globordered families) are a growing and diverse phenomenon. People around the globe create bi-national spousal relations, are assisted by cross-border reproduction services, or by a migrant care worker who provides care for a dependent family member. Likewise, families become cross-bordered when one of the parents relocates, with or without the child, or when a parent abducts the child. In addition, increasing rates of forced or voluntary migration create more and more cross-border families, with different characteristics and needs. While some kinds of cross-border families have attracted the attention of legal scholarship, other kinds are still neglected, and much is yet to be studied and discussed regarding the challenges embedded in the attempt to secure the right to family life in the age of globalization.

The global Covid-19 crisis provides more, and alarming, evidence of the socio-legal vulnerabilities of cross-border families. For example, bi-national couples are separated for long periods of time; intended parents are unable to collect their baby from the country of the surrogate; and families assisted by a migrant care worker, the workers, and their left behind families, are entangled in new complex relations of power and dependency. Likewise, the right to heath is at risk when a family member is denied treatment because of partial citizenship status, and questions such as the enforcement of child support across borders are even harder to address than in more peaceful times.

Crises, such as the Covid-19 pandemic, are often a methodological opportunity for socio-legal research. In many cases, a major social crisis shakes habitualization, and opens up taken for granted social scripts to individual and collective reflection. Likewise, such a crisis involves risk regulation and, in the current case, also *plague governance*—involving intense emergency regulative changes made by different nation-states that might both reveal and challenge deeply shared norms regarding familial rights and national interests. Hence, our current era lends itself more readily than stable, routinized periods to the investigation of current regulation, and the imagining of options for new regulation regarding cross-border families.

On **22-23 June 2021**, we plan an international socio-legal workshop that will explore the impact of the Covid-19 crisis and its regulation on cross-border families. We hope to explore the ways Covid-19 restrictions affect cross-border families, and the role of the law, in different countries, in shaping this impact and

in challenging it.

The questions during the workshop might include, but are not limited to:

- How does the Covid-19 crisis affect cross-border families?
- How do legal Covid-19 restrictions affect cross-border families?
- Did national jurisdictions adapted their substantial and procedural laws to meet the challenges faced by cross-border families during the pandemic?
- What can be learned from comparing different jurisdictions in their response to cross-border families' needs during the pandemic?
- What can be learned about the interrelations between globalization, borders, families, and the law, from this crisis?
- What are the lessons to be learned from the pandemic on how can national, regional and international law be developed to better protect the rights of cross-border families, and those involved in their creation and everyday familial doing, in times of crisis and in more stable times?

Confirmed *Keynote* Speaker: Prof. Yuko Nishitani, Kyoto Univiertys Law School

The workshop will be conducted via Zoom, and is sponsored by the Minerva Center for Human Rights at Tel Aviv University. It will be open to the public, and hopefully, will set the foundations for further multinational research and collaboration.

We will give serious consideration to all high-quality relevant research, from any discipline. Work in progress is welcome, as long as the presentation holds new findings or insights and not only declaration of intent. Faculty members as well as independent researchers and advanced research students are welcome to submit.

The screening process for the workshop will include two phases:

Phase I – Abstract:

Abstracts should include:

- An overview of the main question and arguments of your contribution (up to 500 words)
- Key words
- Contact details [author(s), affiliation (including institute and department), and e-mail address]

- Short bio of author/s (up to 250 words, each)

Abstracts must be in English and be submitted to this email address: eynatm@media-authority.com

Deadline for submission: **28 February 2021.**

Phase II – Summary:

Those who's abstract will be accepted, will be notified by **31 March 2021** and will be asked to submit a 3-pages summary of their paper by **20 April 2021**. Accepted papers will be presented at the workshop. Presenters are expected to take part in all the workshop's sessions.

Academic Organizers:

Prof. Daphna Hacker, Law Faculty and Gender Studies Program, Tel Aviv University; Prof. Paul Beaumont, Law Faculty, University of Stirling; Prof. Katharina Boele-Woelki, Bucerius Law School, Hamburg; Prof. Sylvie Fogiel-Bijaoui, The College of Management Academic Studies; Dr. Imen Gallala-Arndt, Max Planck Institute for Social Anthropology; Dr. Sharon Shakargy, Faculty of Law, Hebrew University; Prof. Zvi Triger, Law School, The College of Management Academic Studies

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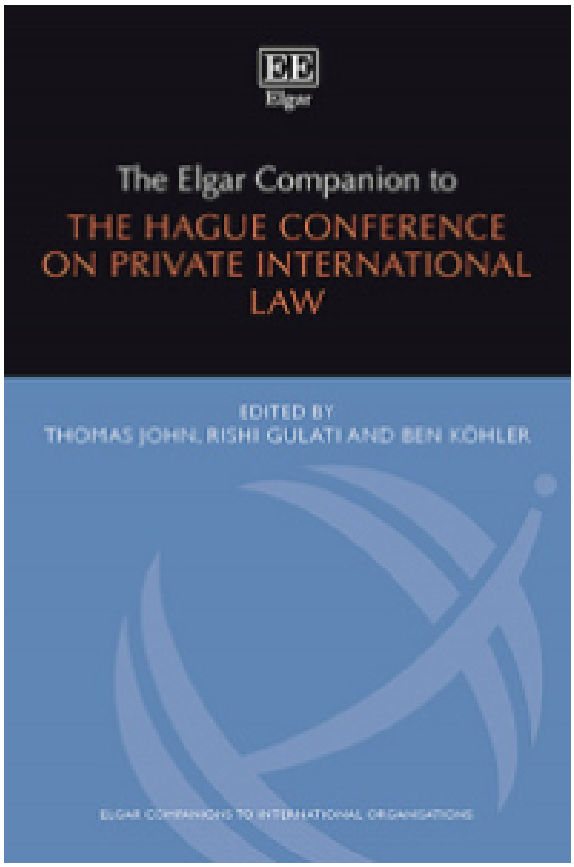
Introduction to the Elgar Companion to the Hague Conference on Private International Law (HCCH) — Part

II

This entry is the second of two parts that provide an introduction to the Elgar Companion to the Hague Conference on Private International Law (HCCH). It outlines the editors' reflections on the 35 Chapters, drawing out some of the key themes that emerged from the Companion, including the HCCH's contribution to access to justice and multilateralism. Together, Parts I and II offer readers an overview of the structure of the Companion (Part I, published on Conflict-of Laws on 8 December 2o2o) as well as of the core themes as they emerged from the 35 Chapters (Part II).



Both parts are based on, and draw from, the Editors' Introduction to the Elgar Companion to the HCCH, which Elgar kindly permitted.

General reflections

The contributions in the Companion chronicle the evolution of the HCCH in the last 127 years and provide a deep insight into the operation and workings of the Organisation. In addition, they critically assess the past and current work of the HCCH, as well as providing impetus for possible future directions. The editors Thomas John, Rishi Gulati and Ben Koehler encouraged the authors to use the

Companion as a platform for critical reflections and assessments – their familiarity with the HCCH, the Organisation's work, but also its mandate and capacity, ensures the great value of each individual contribution.

The Companion can be of much interest in three particular ways.

First, it is an academic contribution that provides considered expositions on current and future legal issues in private international law in general. The selection of authors, which are drawn from different regions and legal backgrounds, allowed considering topics from a number of different perspectives. The quality of the contributions will result in the Companion serving a most useful source in the substantive development of private international law. It also will constitute a useful resource for States, judges, legal practitioners, academics, and other public and private international organisations engaged in advancing private international law, not only in terms of gaining an understanding of existing HCCH instruments, but also in their efforts towards legislative and policy reform.

Second, the Companion aims to provide considerable and thorough insight into the workings of the organisation itself, and thus serve well as a comprehensive practical guide to the HCCH. This will appeal to those who wish to gain a better understanding of the HCCH as an Organisation regardless of their familiarity with it. It may also benefit those who have been working with the Organisation for some time and wish to broaden or deepen their understanding further.

Finally, in addition to highlighting the successes of the HCCH, the aim has also been to critically analyse the organisation and its work. Much work has been done by the HCCH, but more is required, and the 35 Chapters reveal four underlying themes.

Theme I: Private international law and access to justice

The first underlying theme that can be observed throughout all contributions is how access to justice values increasingly underpin private international law. Just some examples include the call for enhanced access to documents in multiple languages; better use of technology to improve legal cooperation across borders; the need to enhance access to justice for consumers and international tourists; the impact of the right to a fair trial on access to justice for the employees of international organisations such as the HCCH; the bearing of fair trial rights on civil jurisdiction, such as through the doctrine of *forum non conveniens*; and

ensuring access to justice for vulnerable sections of society.

In all those instances, access to justice is an important value, and in its various manifestations, starts to underpin and shape the development of private international law. This is a positive development. Private international law ought to be more than mere technical rules but should be driven by underlying tangible values that have great practical importance. Access to justice is a laudable tangible value, recognised in Sustainable Development Goal 16 of the UN. Private international law, and in particular the HCCH, could play a significant role in providing and strengthening access to justice at an international level. And there is some indication that the Organisation appreciates that it indeed can play this role, hinting at it in its most recent HCCH Strategic Plan 2019 – 2020. However, its appreciation is limited and mentioned only in the context of the HCCH's non-normative work.[1] Based on the discussions in the Companion, it seems that the HCCH could – and should – pursue a comprehensive access to justice agenda across its entire normative and non-normative work programme with much more vigour than is currently the case.

Theme II: the interaction between public and private international law

Another theme underpinning the Companion's contributions is the increased interaction between public and private international law. This theme is discernible in many Chapters, including in those that deal with civil jurisdiction. It transpires that this area is one where public and private international law can especially inform each other. While this interaction is now subject to increased academic scrutiny, the same does not seem to be the case in practice. Thus, it seems important, that the HCCH pays more attention to public international law developments when pursuing its projects, especially in the sphere of the further work on the Judgments Project. Equally, such increased attention to the public realm could mean that the public realm is likely to return the favour, which is equally needed.

Moreover, the interaction between HCCH instruments and human rights treaties, such as the UNCRC and UNCRPD, was evident. With many HCCH international family law instruments concerned with child protection and the protection of other vulnerable persons, this interaction is hardly surprising. But clear interrelationships exist in other spheres as well. For example, modern work environments, which are radically shifting through remote work technology and

flexible workplace, the HCCH could also work towards greater cooperation with other international organisations, such as the ILO, to assist in developing international labour standards that better protect the rights of weaker parties, including the rules on civil jurisdiction in employment cases.

Theme III: Hard and soft law instruments

A third theme that emerged was the HCCH's willingness to adopt soft law instruments as opposed to only facilitate the negotiation of binding international agreements or HCCH Conventions. There is no better example of this than the adoption of the 2015 Choice of Law Principles, which promote party autonomy.

With party autonomy perhaps now constituting a recognised connecting factor in private international law, as is also evident with the adoption of the 2005 Choice of Court Convention underpinned by this same connecting factor, the HCCH has no doubt made an important stride to embrace the potential of soft law instruments to achieve international consensus. Following the adoption of the 2019 Judgments Convention, which was decades in the making, and only successfully negotiated after the failures of the past were recognised, rectified, and compromises made, perhaps soft law instruments could be pursued with greater energy by the HCCH. Ultimately, it will be the experience of the 2015 Choice of Law Principles that will dictate whether more soft law instruments are negotiated under the umbrella of the HCCH.

Theme IV: multilateralism

A fourth theme that emerged is perhaps more subtle: multilateralism. The Companion recalls that the founder of the HCCH, T M C Asser, conceived the first Conference in 1893 not only as a platform which develops unified rules of private international law, but also as a forum in which experts come together and develop these rules in a peaceful and professional setting. This goal has not changed, and multilateral expertise is combined to forge innovative legal solutions to the vexed challenges of a globalized world. And these solutions are adopted by consensus, the decision-making technique which lies at the very heart of the HCCH.

When dealing with the Organisation, it is important to appreciate that it decides on every aspect of its work programme and budget by reaching to the furthest extent possible consensus among its Members.[2] This consensus-based approach has been chosen not without reason. While much effort may be exerted to achieve

consensus, and achieving it may take longer, consensus-based decision making ensures the maximum buy-in of the Members in the outcomes produced by the HCCH. This buy-in becomes very clear in the Organisation's premier decision-making bodies, the Diplomatic Sessions, which adopt the HCCH's multilateral Conventions; the Council on General Affairs and Policy (CGAP), the "engine room" which determines the Organisation's annual work programme; and the Council of Diplomatic Representative (CDR), which takes important financial and budgetary decisions. A common saying in all bodies, but also in Working and Experts' Groups, is: nothing is agreed, until everything is agreed; and everything is agreed by consensus.[3]

This consensus-based approach to the multilateral work of the HCCH has been highly successful for the Organisation. It ensured that the development of private international law rules remained based on expertise and enjoys significant buy-in. But the HCCH is unlikely to be immune from the challenges to building consensus as experienced by other international organisations. Therefore, it will remain important for the HCCH to constantly review and, if necessary, to adapt its consensus-based approach to decision-making. This will be paramount so that the HCCH continues Asser's vision that a peaceful and professional forum develops multilaterally unified private international law.

Final remarks

Overall, and despite some regions not yet as connected to the HCCH as they perhaps should be, the HCCH is now a global organisation for the unification of private international law. It is the world organisation for legal cooperation. It is 127 years old and going strong. The HCCH is highly relevant and important in an increasingly internationalised world. It is no doubt an organisation with a bright future. At a time when we are witnessing a pushback against multilateralism, the HCCH is an admirable example of the value of international cooperation and how international organisations can improve the day-to-day lives of people and enhance certainty and predictability for cross-border trade and commerce.

However, as the Companion makes apparent, while much has been done, more is required. The editors hope that the Companion will be a contribution to the understanding of the HCCH and the development of the Organisation as well as of

private international law.

[1] A possible connection of the non-normative work of the HCCH is not a strategic priority of the HCCH *per se* but is mentioned in the Context to Strategic Priority 2. See HCCH, *Strategic Plan of the HCCH 2019 – 2022* (2019) 5, <https://assets.hcch.net/docs/bb7129a9-abee-46c9-ab65-7da398e51856.pdf> accessed 30 April 2020.

[2] See Statute of the HCCH, Article 8(2) and Rules of Procedure of the HCCH, Rule II.H.3, available <https://www.hcch.net/en/governance/rules-of-procedure>.

[3] The Rules of Procedure of the HCCH have rules to support voting both at meetings, i.e. at Diplomatic Sessions, CGAP and CDR, as well as by distance. See Rules of Procedure of the HCCH, Rule II.H.4 and Rule II.I.6, available <https://www.hcch.net/en/governance/rules-of-procedure>. To the Editors' knowledge, the HCCH has never taken a decision by vote at a meeting.

European Commission Rome II Study

The British Institute of International and Comparative Law (BIICL) (in consortium with Civic Consulting) has been selected by the European Commission to conduct a study supporting the preparation of a report on the application of the Rome II Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (JUST/2019/JCOO/FW/CIVI/0167).

The study assesses the 10-year application of the Rome II Regulation in the Member States and will support the Commission in the future review of the Regulation. It analyses all areas covered and looks into specific, cutting-edge questions, such as cross-border corporate violations of businesses against human rights and the potential impact of the development of artificial intelligence.

To gather views of practitioners and academics from all Member States,

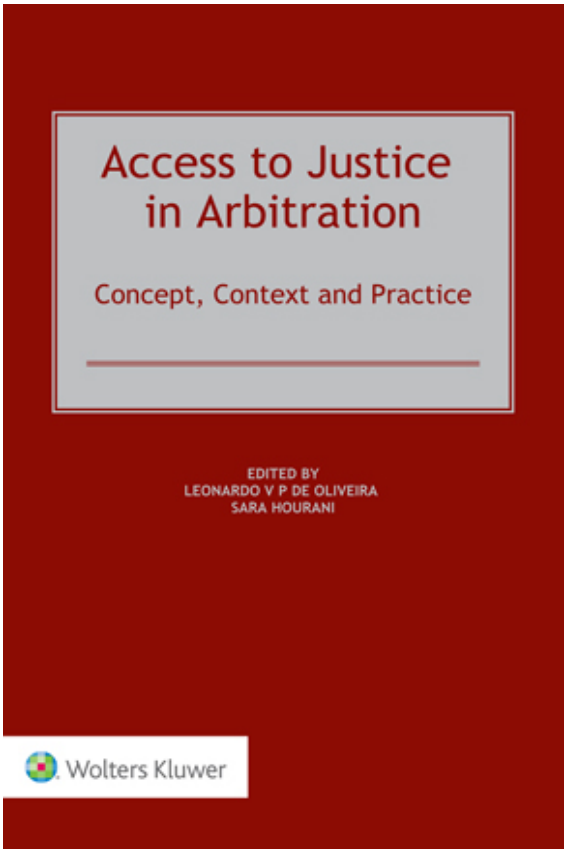
BIICL conducts a survey which is available here: https://www.surveymonkey.com/r/JLWQ8XQ

Please contribute your experience to the study, if you have a particular expertise in the Rome II Regulation, or in one of the above-mentioned areas – namely cross-border torts related to artificial intelligence, corporate abuses against human rights, or defamation.
BIICL invites interested colleagues from all Member States to participate in the survey, but seeks in particular more contributions from: Bulgaria, Croatia, Cyprus, Finland, Luxembourg, Romania and Slovenia.

Deadline: December 31st, 2020

More information about the Study is available on BIICL's website (https://www.biicl.org/projects/com-study-on-the-rome-ii-regulation).

Out now: Leonardo de Oliveira/Sara Hourani (eds.), Access to Justice in Arbitration



Access to justice is not a new topic. Since Mauro Cappelletti and Bryant Garth's survey of different methods to promote access to justice was published (Access to Justice. A World Survey (Giueffre SIJTHOFF 1978), making access to justice cheaper and effective has become a legal policy (see for instance The Right Honourable the Lord Woolf report on Access to Justice, 1996). One of Cappelletti and Garth's ideas was that there were three waves of access to justice. The third wave, called 'The Access to Justice Approach', stated that arbitration would play a significant role in fomenting access to justice. The idea was that people would seek alternatives to the regular court system. Arbitration has grown exponentially since the publication of Cappelletti and Garth's work, reaching disputes that were traditionally only decided by courts. The guarantee of adequate access to justice is now generating questions about the impact of this expansion. For purely commercial arbitration, such as one between two multinational companies represented by multinational law firms, waiving some rights of access to justice might not create a problem to the fairness in the arbitral procedure. However, in a dispute in which the inequality of bargaining power is evident, for arbitration to be fair and a trustworthy sustainable dispute resolution method, waiving rights to access to justice might not be the best way forward.

With the above ideas in mind, this book aims at presenting a collection of studies about access to justice in arbitration to present, for the first time, in one single title, an analysis of the role access to justice plays in arbitration. The book makes a unique contribution to the current international research and practice of arbitration as it looks at the conceptual contribution to the notion of access to justice in arbitration; and it provides a picture of how access to justice works in various types of arbitration. In five parts, the book will show the concerns about access to justice in arbitration, how they are materialised in a practical scenario and finally, how it is applied in arbitral institutions.

The book's first part brings a conceptual contribution to the notion of access to justice in arbitration and deals with theoretical and conceptual gaps in this area. Leonardo V.P. de Oliveira starts with a conceptual analysis of access to justice and how it should be applied in arbitration. Clotilde Fortier looks at consent as the central part of arbitration and how it relates to access to justice. Joao Ilhão Moreira examines if arbitration can provide a fair, independent and accessible dispute resolution mechanism outside large contractual disputes and Ramona Elisabeta Cirlig assesses the interaction between courts and arbitral tribunals as a guarantor of access to justice.

The second part of the book discusses two specific points in investment disputes. Berk Dermikol looks at the possibility of bringing an autonomous claim based on the NYC in investment treaty arbitration as a form of access to justice. Crina Baltag evaluates the issue of access to justice and non-disputing parties – amici curiae– in investment law and arbitration.

In the third part, access to justice in specific types of disputes submitted to arbitration is scrutinised. Carolina Morandi presents a case study of access to justice in labour and employment arbitration in light of the Brazilian and the US experiences. Ian Blackshaw looks at how sports disputes submitted to CAS have been dealing with the question of access to justice. Johanna Hoekstra and Aysem Diker Vanberg examine access to justice with regards to competition law in the EU with a view to determine whether arbitration can lower barriers. Lastly, Youseph Farah addresses the use of unilaterally binding arbitration as a mechanism to improve access to justice in business-related human rights violations.

Part four reports on two aspects of technology and access to justice. Mirèze

Philippe looks at ODR as a method to guarantee access to justice whilst Sara Hourani investigates how Blockchain-based arbitration can be used to improve access to justice.

Lastly, the book presents the view of how two arbitral institutions deal with the question of costs and access to justice, and how the rules of one arbitral institution provide access to justice guarantees. Aislinn O'Connell assesses access to justice under WIPO's Arbitration Rules whilst Christine Sim examines costs at SIAC and Duarte Henriques and Avani Agarwal do the same in relation to ICSID.

Principles of Treaty Interpretation – Does Vienna Wait for You?

AMEDIP: The programme of its XLIII Seminar is now available

The programme of the XLIII Seminar of the *Mexican Academy of Private International and Comparative Law* (AMEDIP) is now available here. As previously announced, the XLIII Seminar will take place on **19-20 November 2020** for the first time online.

Among the topics to be discussed are the 1996 HCCH Child Protection Convention, the 1980 HCCH Child Abduction Convention, the 2019 HCCH Judgments Convention, the 2005 HCCH Choice of Court Convention, the HCCH Guide to Good Practice on the Use of Video-link, Human rights and PIL, the brand-new T-MEC / US-Mexico-Canada Agreement (USMCA), digital justice,

COVID-19, and alternative dispute resolution.

The meeting will be held via Zoom.

Access details:

https://us02web.zoom.us/j/5554563931?pwd=WE9uemJpeWpXQUo1elRPVjRMV0tvdz09
ID: 555 456 3931
Password: 00000

It will also be transmitted live via AMEDIP's Facebook page.

Participation is free of charge. The language of the seminar will be Spanish.

For more information, see AMEDIP's website.

Out now: RabelsZ 4/2020

Issue 4 of RabelsZ is now available online and in print. It contains the following articles:

MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT, Die Frühehe im Rechtsvergleich: Praxis, Sachrecht, Kollisionsrecht (Early Marriage in Comparative Law: Practice, Substantive Law, Choice of Law), pp. 705–785

> *Early marriage is a global and ancient phenomenon; its frequency worldwide, but especially in Europe, has declined only in recent decades. Often, early marriage results from precarious situations of poverty, a lack of opportunities and education, and external threats, for example in refugee situations. However the concepts and perceptions of marriage, family, identities, and values in different societies are diverse, as the comparison of regulations and the practice of early marriage in over 40 jurisdictions shows. Even if early marriage appears generally undesirable, for some minors the alternatives are even worse. Some countries set fixed ages for marriage; others use flexible criteria such as physical or mental maturity to determine a threshold for marriage. All, however, until very recently provided for the possibility of dispensation. In Western countries, such dispensations have rarely been sought in the last decades and have consequently been abolished in some jurisdictions; elsewhere they still matter. Also, most countries bestow some legal effects to marriages entered into in violation of age requirements in the name of a favor matrimonii.*
>
> *Early marriage has an international dimension when married couples cross borders. Generally, private international law around the world treats marriages celebrated by foreigners in their country of origin as valid if they comply with the respective foreign law. Such application is subject to a case-specific public policy exception with regard to age requirements, provided the marriage has some relation to the forum. Recent reforms in some countries, Germany*

included, have replaced this flexible public policy exception with a strict extension of the lex fori to foreign marriages, holding them to the same requirements as domestic marriages and thereby disabling both a case-by-case analysis of interests and the subsequent remediation of a violation of the forum's age requirements. As a consequence, parties to a marriage celebrated abroad can be treated as unmarried, meaning they derive no rights and protection from their marriage, and their marriage may be limping – valid in one country, invalid in another.

The extension of domestic age requirements to foreign marriage without exception, as done in German private international law, is problematic in view of both European and German constitutional law. The refusal to recognize early marriages celebrated abroad can violate the European freedom of movement. It can violate the right to marriage and family (Art. 6 Grundgesetz) and the child's best interests. It can violate acquired rights. It can also violate the right to equality (Art. 3 Grundgesetz) if no distinction is made between the protection of marriages validly entered into abroad and the prevention of marriages in Germany. Such violations may not be justifiable: The German rules are not always able to achieve their aims, not always necessary compared with milder measures existing in foreign laws, and not always proportional.

Edwin Cameron and Leo Boonzaier, Venturing beyond Formalism: The Constitutional Court of South Africa's Equality Jurisprudence, pp. 786–840

[Excerpt taken from the introduction]: After long years of rightful ostracism under apartheid, great enthusiasm, worldwide, embraced South Africa's reintegration into the international community in 1994. The political elite preponderantly responsible for the Constitution, the legal profession, and the first democratic government under President Nelson Mandela were committed to recognisablyliberal principles, founded on democratic constitutionalism and human rights.

This contribution is an expanded version of a keynote lecture given by Justice Edwin Cameron at the 37th Congress of the Gesellschaft für Rechtsvergleichung at the University of Greifswald on 19 September 2019.

Chris Thomale, Gerichtsstands– und Rechtswahl im Kapitalmarktdeliktsrecht

(Choice-of-court and Choice-of-law Agreements in International Capital Market Tort Law), pp. 841–863

The treatment of antifraud provisions in international securities litigation is a salient topic of both European capital markets law and European private international law. The article sets the stage by identifying the applicable sources of international jurisdiction in this area as well as the situations in which a conflict of laws may arise. It then moves on to give a rough and ready interpretation of these rules, notably construing the "place where the damage occurred", according to both Art. 7 Nr. 2 Brussel Ibis Regulation and Art. 4(1) Rome II Regulation, as being equivalent to the market where a financial instrument is listed or is intended to be listed. However, as the article sets out in due course, this still leaves plenty of reasonable opportunity for a contractual choice of court or choice of law. This is why the article's main focus is on creating a possibility to utilize choice-of-court and choice-of-law agreements. This is feasible either in the issuer's charter or, notably in the case of bonds, in the prospectus accompanying the issuance of a given financial instrument. The article shows that both arrangements satisfy the elements of Art. 25 Brussel Ibis Regulation on choice-of-court agreements and Art. 14(1) lit. b Rome II Regulation on ex ante choice-of-law agreements.

Moritz Hennemann, Wettbewerb der Datenschutzrechtsordnungen – Zur Rezeption der Datenschutz-Grundverordnung (The Competition Between Data Protection Laws – The Reception of theGeneral Data Protection Regulation), pp. 864–895

The General Data Protection Regulation (GDPR) has granted the European Union an excellent position in the "competition" between data protection laws. This competition goes along with a gradual convergence of data protection laws worldwide, initiated and promoted by the European Union. In this competition, the European Union benefits not only from the so-called Brussels Effect (Bradford), but also from distinct legal instruments: The GDPR rules on the scope of application and on data transfer to non-EU countries are of legal importance in this competition, and the adequacy decision under Art. 45 GDPR creates further de facto leverage for negotiations on free trade agreements with non-EU countries. The European Union has already been able to use this tool as a catalyst for European data protection law approaches. The European Union

should, however, refrain from "abusing" its strong position and not press for extensive "copies" of the GDPR worldwide – and thereby create legislative lock-in-effects. Alternative regulatory approaches – potentially even more innovative and appropriate – are to be evaluated carefully by means of a functional and/or contextual comparative approach.

Chris Thomale on the EP Draft Report on Corporate Due Diligence

Professor Chris Thomale, University of Vienna and Roma Tre University, has kindly provided us with his thoughts on the recent EP Draft Report on corporate due diligence and corporate accountability.

In recent years, debate on Corporate Social Responsibility (CSR) has picked up speed, finally reaching the EU. The Draft Report first and foremost contains a draft Directive on corporate due diligence and corporate accountability, which seems a logical step ahead from the status quo developed since 2014, which so far only consists of reporting obligations (see the Non-Financial Reporting Directive) and sector specific due diligence (see the Regulations on Timber and Conflict Minerals). The date itself speaks volumes: Precisely, to the very day (!), 8 years after the devastating fire in the factory of Ali Enterprises in Pakistan, which attracted much international attention through its follow-up litigation against the KiK company in Germany, the EU is taking the initiative to coordinate Member State national action plans as required under the Ruggie Principles. Much could be said about this new Directive in terms of company law and business law: The balancing exercise of on the one hand, assuring effective transparency of due diligence strategies and, on the other hand, avoiding overregulation in particular with regard to SMEs still appears somewhat rough and ready and hence should

see some refinement in due course. The same applies to the private enforcement of those due diligence duties: By leaving the availability and degree of private enforcement entirely to the Member States (Art. 20), the Directive seems to gloss over one of the most pressing topics of comparative legal debate. The question of availability, conditions and extent of private liability imposed on parent companies for human rights violations committed in their value chains abroad, must be addressed by the EU eventually.

To this forum, however, the private international implications of the Draft Report would appear even more important:

As regards the conflicts of laws solution, the proposed Art. 6a Rome II Regulation seeks to make available, at the claimant's choice, several substantive laws as conveniently summarized by Geert van Calster in the terms of lex loci damni, lex loci delicti commissi, lex loci incorporationis and lex loci activitatis. Despite my continuous call for a choice between the first two de regulatione lata, to be reached by applying a purposive reading of Art. 4 para 1 and 3 Rome II (see JZ 2017 and ZGR 2017), the latter two, lex loci incorporationis and lex loci activitatis, seem very odd to me. *First*, they are supported, to my humble knowledge, by no existing Private International Law Code or judicial practice. *Second*, the lex loci incorporationis has no convincing rationale, why it should in any way be connected with the legal *relationship* as created by the corporate perpetrator's tort. Lex loci activitatis is excessively vague and will create threshold questions as well as legal uncertainty. *Third*, I would most emphatically concur with Jan von Hein's opinion of a quadrupled choice being excessive and impractical in and of itself.

The solution proposed in terms of international jurisdiction, I will readily admit, looks puzzling to me. I fail to see, which cases the proposed Art. 8 para 5 Brussels Ibis Regulation is supposed to cover: As far as international jurisdiction is awarded to the courts of the "Member State where it has its domicile", this adds nothing to Art. 4, 63 Brussels Ibis Regulation. In fact, it will create unnecessary confusion as to whether this venue of general jurisdiction is good even when there is no "damage caused in a third country [which] can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship." Thus, we are left with the courts of "a Member State […] in which [the undertaking] operates." As already pointed out, this term itself will trigger a lot of controversy regarding certain threshold issues. But there is more: Oftentimes this

locus activitatis will coincide with the locus delicti commissi, e.g., when claimants want to rely on an omission of oversight by the European parent company. In that case, Art. 7 No. 2 Brussels Ibis Regulation offers a venue at the very place, i.e. both in terms of international and local jurisdiction, where that omission was committed. How does the new rule relate to the old one? And, again, which cases exactly are supposed to be captured by this provision? In my view, this is a phantom paragraph that, if anything, can only do harm to the fragile semantic and systematic architecture built up by the Brussels Ibis Regulation and CJEU case law.

The same seems true of the proposed Art. 26a Brussels Ibis: *First*, there is no evident need for such a *forum necessitatis*, rendering Member State courts competent to hear foreign-cubed cases with no connection to the EU whatsoever. To the contrary, recent development of the US Alien Torts Statute point in the opposite direction. *Second*, the EU might be overreaching its legislative jurisdiction: Brussels Ibis Regulation is based on the EU's competence to legislate on judicial cooperation in civil matters (Art. 81 para 2 TFEU). Such a global long-arm statute may not be covered by that competence, if it is legal at all under the public international confines incumbent upon civil jurisdiction (for details, see here). *Third*, it will be virtually anybody's guess what a court seized with a politicised and likely emotional case like the ones we are talking about will deem a "reasonable" Third State venue. In fact, this would be a forum non conveniens test with inverted colours, i.e. the very test the CJEU, in 2005, deemed irreconcilable with the exigencies of foreseeability and legal certainty within the Brussels Ibis Regulation.