ON THE DEVELOPMENT OF PRIVATE INTERNATIONAL LAW IN THE NETHERLANDS: FROM *ASSER'S* DAYS TO THE CODIFICATION OF DUTCH PRIVATE INTERNATIONAL LAW (1910-2010)

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1. 1910: HOPE AND IDEALISM

This special issue of *NILR* is dedicated to the Centenary of the Netherlands Society of International Law, established on 28 November 1910.[1] From a historic point of view, 1910 was not a very interesting year, apart from the outbreak of revolutions in Portugal and Mexico. The world was unaware of the atrocities yet to come during World War I. The final years of what is called the *Belle Époque* (1890-1914) were characterized by optimism, hope and idealism. It was in this spirit that the Netherlands Society of International Law was founded. The Netherlands Society was the first branch of the International Law Association (ILA) established in 1873. Thereafter, ILA branches opened in the United States (1921), Sweden (1922), Bulgaria (1924), Austria (1925) and in other European and non-European countries.[2] It is not surprising that the Netherlands Society was ILA's first international branch since the spirit of hope and cooperation, aimed at establishing a world community of international law, was particularly vivacious in the Netherlands; indeed the Hague Peace Conferences were hosted by the Netherlands in 1899 and 1907.[3] The famous Dutch international lawyer and scholar Tobias M.C. Asser played an important role in the realization of the Peace Conferences and the establishment of the Permanent Court of Arbitration, for which he was awarded the Nobel Peace Prize in 1911.[4] Asser, an internationalist *pur sang*, was also one of the founding fathers of the Hague Conference on Private International Law, which was established in 1893 (see section 2). Twenty years earlier, together with other famous international lawyers such as the Italian politician and scholar Pasquale S. Mancini and the Belgian professor of international law Gustave Rolin-Jaequemyns, Asser established the *Institut de Droit International* (Institute of International Law) in 1873. In October 1873, one month after the establishment of the Institute, the ILA was founded, originally named the *Association for the Reform and Codification of the Law of Nations*.[5] Promoting and codifying international law was its most important objective, as equally the Institute of International Law focussed on this codification. It can be

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1. A short overview of the history of the Netherlands Society was given by C.D. van Boeschoten in his opening speech on the occasion of the commemoration of the 75th anniversary of the Netherlands Society in 1985, *Zin en tegenzin in internationaal recht* (Inclination and Disinclination in International Law) (Deventer, Kluwer 1985) pp. 1-10.

2. Nowadays the ILA has some 45 branches all over the world, see *Report of the Seventy-Third Conference (Rio de Janeiro)* (2008) p. 75.

3. See on the 1907 Hague Peace Conference: A. Eyffinger, 'A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference', 54 *NILR* (2007) pp. 197-208; Y. Daudet, ed., *Topicality of the 1907 Hague Conference, the Second Peace Conference* (Leiden, Nijhoff 2008).

4. See on the life and work of Tobias M.C. Asser (28 April 1838-29 July 1913): C.C.A. Voskuil, 'Tobias Michael Carel Asser – 1838-1913', in C.C.A. Voskuil, et al., *The Moulding of International Law: Ten Dutch Proponents* (The Hague, T.M.C. Asser Instituut 1995) pp. 5-25.

5. See M. Bos, ed., *The Present State of International Law and Other Essays, written in honour of the Centenary Celebration of the International Law Association, 1873-1973* (Deventer, Kluwer 1973).

stated without exaggeration that Tobias Asser was probably the most influential Dutch international lawyer since Grotius, Ulrik Huber, and Paulus and Johannes Voet during the 17th Century. In the Netherlands the establishment of the Netherlands Society of International Law found fertile soil. Asser became one of the 32 (!) members of the first board of the Society, together with other international practitioners and scholars.

In the Netherlands a great interest is always taken in the development of international law (public as well as private). In 1910, the establishment of the Netherlands Society was a logical consequence of this interest. The Society focuses on both areas of law. In my contribution to this special issue some attention is paid to the development of private international law in the Netherlands during the hundred years of the Society's existence. The establishment of the Hague Conference on Private International Law is taken as a starting point (section 2), followed by a description of the role the Netherlands Society played in the development of Dutch private international law (section 3) and especially in its codification (section 4). In section 5 some final remarks are made.

2. THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

When the Society was founded in 1910, the Hague Conference already existed; not as an international institution or organisation, but as a meeting of government representatives and experts in the field of private international law. Tobias Asser's name is forever linked to the Hague Conference of which he was one of the most prominent initiators. Upon Asser's initiative, the first meeting of the Conference took place in The Hague on 12 September 1893. Asser was unanimously elected to preside over this first meeting which amounted to, as he mentioned in his opening speech, 'a dream come true'.[6] In his efforts, Asser was inspired by Pasquale Mancini, who previously had tried to convene foreign powers for a meeting on conflict of laws in civil and commercial matters without success.[7] Representatives of thirteen European countries, including the Netherlands, assembled in The Hague for discussions over matters of international procedural law, in particular the recognition of foreign judgments.[8] The conference lasted from 12 to

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6. *Actes de la Conférence de La Haye chargée de réglementer diverses matières de droit international privé, première partie* (The Hague, 1893) p. 26. See on the history of the Hague Conference also C.A.A. Voskuil, 'Preface: The Influence of the Hague Conference on Private International Law', 40 *NILR* (1993) pp. VII-XV.

7. See also M. Gutzwiller, 'Le développement historique du droit international privé' ('The historic development of private international law'), 29 *Recueil des Cours* (1929-IV) p. 365; E. Jayme, *Pasquale Stanislao Mancini, Internationales Privatrecht zwischen Risorgimento und praktischer Jurisprudenz* (Conflict of Laws between *Risorgimento* and practical Jurisprudence) (Ebelsbach, Rolf Gremer 1980).

8. The other European countries were Belgium, Denmark, Germany, France, Italy, Luxembourg, Austria-Hungary, Portugal, Spain, Romania, Russia and Switzerland. Norway and Sweden

27 September 1893 and was followed by a second session in 1894, which finally resulted in the 1896 Convention on certain matters of private international law. In 1900 the third Session was held, followed in 1904 by the fourth – all chaired by Asser. During the fourth Session the 1896 Convention was revised, which finally resulted in the 1905 Convention on Civil Procedure.[9] In the first decade of its existence the Hague Conference drafted several conventions not only on civil procedure but also on certain family matters.[10] Despite Asser's dedication and influence, only the 1905 Convention on Civil Procedure was successful.

In 1897, it was once again Asser who took another important initiative: the establishment of the Dutch Standing Government Committee on Private International Law. Asser became the Committee's first president, which he remained until his death in 1913. The Standing Committee was established by a Royal Decree of 20 February 1897 and had as its objective the preparation of measures to be taken in order to promote the codification of private international law.[11] In the Explanatory Memorandum to the widowed Queen regent, Emma, the Dutch Minister of Foreign Affairs, together with his Justice colleague, wrote that the Standing Committee had an important task in advising the Government about the measures to be taken in the ratification process of the Hague Convention of 1896. Furthermore, the Committee could advise the Government on the codification of private international law, 'awaiting the establishment of an international body, entrusted with the preparation of the said codification by diplomatic conferences and other means'. It appears from this Memorandum that the Committee's main task would be the preparation and promulgation of measures within the scope of an international codification to be achieved by an international organization. Asser's dream was certainly an *international* codification of private international

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were invited, but did not send a government representative, while the United Kingdom refused to cooperate.

9. The 1905 Convention was revised by the 1954 Convention on Civil Procedure; the 1954 Convention was revised by the 1965 Notification Convention and the 1970 Evidence Convention.

10. See the 1902 Marriage Convention, the 1902 Divorce and Separation Convention, the 1902 Convention on Guardianship of Minors, the 1905 Convention regarding the Effects of Marriage on the Rights and Duties of Spouses and the 1905 Convention on Deprivation of Civil Rights and Similar Measures of Protection. These conventions, drawn up in French, are now obsolete because most Contracting States, among which the Netherlands, have denounced them. Some conventions are still in force for Italy, Portugal and Romania (such as the 1905 Convention on the Effects of Marriage). The conventions can be found on the website of the Hague Conference on Private International Law (<www.hcch.net>).

11. *Staatscourant* (Government Gazette) (1897) no. 46. Further provisions on the Standing Committee in the Act of 14 February 1998, *Staatsblad* (Bulletin of Acts and Decrees of the Kingdom of the Netherlands) (1998) no. 208, came into force on 15 April 1998. See on the history of the Dutch Standing Committee: G.J.W. Steenhoff, *Honderd jaar Staatscommissie voor het Internationaal Privaatrecht* (Hundred Years of the Standing Government Committee on Private International Law) (The Hague, s.n. 1997); G.J.W. Steenhoff, *De Wetenschap van het Internationaal Privaatrecht in Nederland tussen 1862 en 1962* (The Science of Private International Law in the Netherlands between 1862 and 1962) (Zwolle, W.E.J. Tjeenk Willink 1994) pp. 115-116.

law and not a national one.[12] However, on the national level, measures had to be taken in order to ratify and implement the Hague conventions on private international law. The Dutch Standing Committee advised (and still advises) on these national implementation measures, but also played (and is still playing) an important role in the codification trend of private international law (see section 4).[13]

After Asser's death in 1913, Th. Heemskerk MP became chairman of the Dutch Standing Committee until 1918 when he was appointed Minister of Justice. Heemskerk was succeeded by D. Josephus Jitta, who was Asser's successor to the chair of private international law at the University of Amsterdam. In 1913 Jitta became, just as Asser had been, a member of the Dutch Council of State.[14] Josephus Jitta was also the first president of the Netherlands Society of International Law. In 1921 he presided over the 30th ILA conference, which was held (for the second time) in The Hague.

The incalculable importance of Tobias Asser cannot be overestimated, certainly not for his work in the Hague Conference. Due to his dedication, the Conference flourished during the first decade of its existence but after the Fourth Session decline became inevitable, due to World War I and its concurrent adverse effect on treaty-making. In 1925 and 1928 the Hague Conference assembled again on matters of insolvency, succession, and the recognition and enforcement of foreign judgments, but without much success.[15] In the following years the political situation in the world was once again an obstacle for concluding treaties. It would be 1951 before the Hague Conference would meet once again.[16] The Statute of the Conference was adopted during the Seventh Session on 31 October 1951 and came into force on 15 July 1955. The Conference was now acknowledged as an international organization, working on 'the progressive unification of the rules of private international law' (Art. 1 of the Statute) with, at that time, a special role for the Dutch Standing Committee acting as the governing body

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12. Steenhoff 1997, *supra* n. 11, p. 11.

13. For an overview of important advice by the Dutch Standing Committee, see E. Hennis and E.N. Frohn, eds., *Naar een afgewogen IPR, Geselecteerde Adviezen* (Towards a balanced PIL, Selected Pieces of Advice) (The Hague, T.M.C. Asser Institute 1995). Since 1997 the advice of the Standing Committee has been published on the website of the Dutch Ministry of Justice (<www.justitie.nl>).

14. See on the life and work of D. Josephus Jitta: G.J.W. Steenhoff, 'Het Universalisme van D. Josephus Jitta: IPR-methodenstrijd en unificatie-aspiraties tussen 1880 en 1925' ('Universalism of D. Josephus Jitta: Battle of Methods in Conflict of Laws and Aspirations for Unification between 1880 and 1925'), in D. Kokkini-Iatridou and F.W. Grosheide, *Eenvormig en vergelijkend privaatrecht* (Molengrafica) (Lelystad, Koninklijke Vermande 1989) pp. 3-74; G.J.W. Steenhoff, 'Daniël Josephus Jitta (1854-1924)', in Voskuil, et al., *supra* n. 4, pp. 237-273.

15. The work of the Fifth Session (1925) was elaborately discussed by J. Kosters, 'La Cinquième Conférence de Droit International Privé' ('The Fifth Conference on Private International Law'), 7 *Revue de droit international et de législation comparé* (1926) pp. 156-201, 245-280.

16. See A.V.M. Struycken, *Co-ordination and Co-operation in Respectful Disagreement, General Course on Private International Law, Hague Academy of International Law*, Collected Courses Volume 311 (Leiden, Martinus Nijhoff Publishers 2009) p. 207, with further references.

of the Conference.[17] It is for a large part due to the efforts of Matthijs H. van Hoogstraten (1913-1980), who became the first (Dutch) Secretary General of the Conference, that the Hague Conference was reborn and flourished in the years after World War II.[18]

For almost 54 years the Statute remained unchanged. During the Twentieth Session, the Statute was revised on 30 June 2005 and entered into force on 1 January 2007.[19] According to the revised Statute, the Council on General Affairs and Policy, composed of all Members, is charged with the operation of the Conference (Art. 4 of the Statute). Before the revision of the Statute it was already standard practice that the Special Commission on General Affairs decided on general matters concerning the operation of the Conference. The task of the Dutch Standing Committee is restricted to some formalities regarding the determination, convocation and presidency of the Sessions of the Conference (see Art. 4 of the Statute). Furthermore, the members of the Permanent Bureau of the Conference – the Secretary General and four Secretaries – must be appointed by the Dutch Government 'upon presentation by the Standing Government Committee' (Art. 5 of the Statute). These changes are not particularly earth-shaking. The most important change, however, is the possibility of a 'Regional Economic Integration Organisation' to become a Member of the Hague Conference (Art. 3 of the Statute). Such a 'Regional Economic Integration Organisation' means 'an international organisation that is constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters' (Art. 3(9) Statute). It is obvious that the European Union is such a 'Regional Economic Integration Organisation'. The European Community (now: European Union) became a Member of the Conference on 3 April 2007.[20] The individual Member States of the EU remain members of

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17. See on the special character of the Hague Conference as an international organization: G.W. Maas Geesteranus, 'De Haagse Conferentie: een internationale organisatie met een hybridische structuur' ('The Hague Conference; an international organization with a hybrid structure'), *Rechtsgeleerd Magazijn Themis* (1993) pp. 174-181.

18. Together with Professor Johannes Offerhaus, Chairman of the Dutch Standing Committee from 1952 to 1965. See on the role of M.H. van Hoogstraten: A.E. von Overbeck, 'Vingt-cinq ans d'apports néerlandais à la Conférence de La Haye de droit international privé' ('Twenty five years of Dutch contributions to the Hague Conference on Private International Law'), in *Quid Iuris* (Deventer, Kluwer 1977) pp. 113-120; G.A.L. Droz, 'La Conférence de La Haye de droit international privé en 1980. Évolution et perspectives' ('The Hague Conference on Private International Law. Evolution and Perspectives'), 168 *Recueil des Cours* (1980); G.A.L. Droz, in *Celebration of the Centenary of the Hague Conference on Private International Law* (The Hague, Permanent Bureau of the Conference 1993) pp. 30-34.

19. The Statute is to be found on the website of the Hague Conference (<www.hcch.net>) and in the *Recueil des Conventions/Collection of Conventions* (1951-2009). See also *Tractatenblad* (Official Journal of Treaties) (2005) no. 239.

20. See also A. Schulz, 'The Accession of the European Community to the Hague Conference on Private International Law', 56 *ICLQ* (2007) pp. 939-949; R. Wagner, 'Die Haager Konferenz für Internationales Privatrecht zehn Jahre nach der Vergemeinschaftung der Gesetzgebungskompe-

the Hague Conference and are still participating in its special commissions and diplomatic sessions. However, in these sessions the influence of the individual Member States of the EU has diminished, since, pursuant to the ERTA doctrine,[21] the EU speaks univocally by the Commission or by the Chair of the EU. During the special commissions and diplomatic sessions coordinating meetings by the EU Member States are held – mostly in the early morning hours preceding the meetings of the Hague Conference – in which the EU Member States and the Commission try to coordinate their mutual points of view in order to speak univocally. Where in past decades the Hague Conference was predominantly a meeting of professors of private international law, nowadays the meetings are mostly attended by civil servants representing their governments. The 'Hague Family' of private international law has grown from 13 states which were represented at the start of the Conference in 1893 to almost 70 (including the EU) in 2010.[22] At the same time the Conference changed from a more or less regional (in the beginning almost European) organization to a global one joining states all over the world.[23]

After World War II, the number of conventions concluded within the Hague Conference has also grown expansively from 6 conventions in the days of Tobias Asser to over 50 conventions nowadays. The Hague conventions concern various matters involving questions of private international law: from conventions on matters of family law to conventions on procedural law. Not only has the number of conventions changed, but also their character. Traditionally, the conventions dealt with one or two aspects of private international law concerning a certain matter, for instance the law applicable to maintenance obligations and the recognition and enforcement of maintenance decisions (see in this respect the Maintenance Conventions of 2 October 1973). Gradually, conventions were concluded in which international cooperation between central and judicial authorities became preponderant.[24] An important convention in this regard is the 1980 Convention on the Civil Aspects of International Child Abduction, which is now in force in more than 80 countries all over the world. Other examples are the 1993

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tenz in der justitiellen Zusammenarbeit in Zivilsachen – mit einem Rückblick auf die Verhandlungen zum Haager Gerichtsstandsübereinkommen' ('The Hague Conference on Private International Law: Ten Years of EC Competence with regard to Judicial Cooperation in Civil Matters'), 73 *RabelsZ* (2009) pp. 215-240.

21. ECJ Case 22/70, [1971] *ECR* 00263.

22. See the website of the Hague Conference (<www.hcch.net)). Recently the Kingdom of the Netherlands forwarded to the Permanent Bureau of the Hague Conference a proposal to admit the Republic of Mauritius as a Member of the Hague Conference. Mauritius will become the 70th Member.

23. Wagner, *supra* n. 20, p. 237, emphasizes that the 'marketing offensive' by the present Secretary General J.H.A. van Loon to transform the Hague Conference from a regional (European) into a global organization has been very successful. Another example of this globalisation of the Hague Conference is the conclusion of a Memorandum of Understanding with Mercosur on 7 May 2010.

24. Cooperation between Central Authorities already took place in the Service Convention of 15 November 1965 and the Evidence Convention of 18 March 1970.

Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption and the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The most recent convention in which international judicial cooperation has a prominent place is the 2007 Convention on the International Recovery of Child Support and other Forms of Family Maintenance, which is not yet in force.[25] Asser would certainly have welcomed this international judicial cooperation.

3. THE PRELIMINARY REPORTS OF THE NETHERLANDS SOCIETY

In 1910, the year of the establishment of the Netherlands Society, private international law was not the centre of interest in Dutch legal practice.[26] At that time case law mainly emanated from the lower Dutch courts concerning questions of private international law in family matters and in commercial matters.[27] Later on, case law became more important and, in 1935, at the occasion of its 25th anniversary, the Netherlands Society of International Law initiated the publication of Dutch case law on private international law as from 1900.[28]

During the first years of its existence the Netherlands Society of International Law, as is shown by its records, took an interest in legal matters concerning bills of exchange and in the accession of certain states (e.g., the British Empire) to the Hague Convention on Private International Law.[29] The Board of the Netherlands Society invited (and still invites) scholars and practitioners to write a preliminary report (in Dutch: *preadvies*) on a certain matter of public or private international law. The main objective of such a preliminary report is to inform the members of the Society (and the public) about developments in this particular field of law. The reports are discussed at the annual meetings of the Society. Whether the reports play any role in the development of public and private international law is difficult to say. In my view, the information given by the reports is certainly of great importance but whether the reports have influenced legal developments

25. This convention has already been signed by the USA (on 23 November 2007) and Burkina Faso (on 7 January 2009).

26. See also C.W. Dubbink, 'De Nederlandse rechter en het internationale recht' ('Dutch Courts and International Law'), in *Zin en tegenzin in internationaal recht*, *supra* n. 1, p. 21.

27. See, e.g., District Court of Amsterdam, 22 April 1910, *Weekblad van het Recht* 9195 (a company law matter); see further the cases mentioned in: L. van Praag, *Léon's Rechtspraak*, II(2)(1e) (The Hague, Belinfante 1928).

28. N. van Hasselt, *De Nederlandsche Rechtspraak betreffende Internationaal Privaatrecht* (Dutch Judicial Decisions on Private International Law) (The Hague, Belinfante 1936). The first Supplement encompassing 1937 and 1938 was published in 1938, the second Supplement (1938-1951) in 1952, both on the authority of the Netherlands Society.

29. The first preliminary report ('*preadvies*') on this matter of accession was written by Daniël Josephus Jitta in 1912.

defies measurement. In inviting authors to write a preliminary report, the Board of the Society tries to find a balance between public and private international law. Many preliminary reports dealt with subjects on the edge of both areas of law, such as the legal effects of nationalization (preliminary reports by L. Erades and K. Jansma, 1952), the act of state doctrine and private international law (by C.C.A. Voskuil in 1968), state immunity according to the European Convention on State Immunity (by W.G. Belinfante, 1973) and extra-territorial legislation in public and private international law (by P. Peters and R. Kotting, 1984). 'Hard core' private international law subjects were chosen in 1961, when J.C. Schultsz and H.J. Goudsmit wrote preliminary reports on the subject of adoption in private international law. In 1963 Schultsz became a member of the Dutch Standing Government Committee. In 1972, he succeeded the late L.I. de Winter as president of the Committee, a post which he retained until his death in 1994. Another connection with the Standing Committee could be seen in the preliminary reports of 1971, when seven members of the Committee wrote separate memoranda about the *Benelux* Draft Convention on the Uniform Law on Private International Law of 3 July 1969.[30] This codification within the framework of the *Benelux*, initiated by the Dutch professor of law E.M. Meijers (1880-1954), became stranded in 1976.[31] This was due to further developments within the (then) European Economic Community, where private international law was discovered as a possible subject for treaty-making activities (especially in the field of contractual and non-contractual matters). Therefore it was not surprising that in 1975 preliminary reports (by W.E. Haak and H.U. Jessurun d'Oliveira) were published on the private international law aspects of contracts, in which attention was paid to the draft EEC convention on contractual and non-contractual obligations. The Brussels Convention on Jurisdiction and Enforcement of Judgments of 27 September 1968 was the subject of preliminary reports in 1978 (by A.V.M. Struycken and J.E. Krings). Struycken had become a member of the Standing Government Committee in 1975 and would succeed Schultsz in 1994 as the Committee's president. Two members of the Permanent Bureau of the Hague Conference, J.H.A. van Loon and A. Dyer, wrote preliminary reports in 1983 on the Anglo-American Trust, when the negotiations on the Hague Trust Convention were underway. Van Loon was, at that time, also the secretary of the board of the Society, and of the Dutch Standing Committee. He is now Secretary

30. C.D. van Boeschoten, L.I. de Winter, H.U. Jessurun d'Oliveira, J.K. Franx, J.C. Schultsz, J.E.J.Th. Deelen and B. Sluyters. This (final) version of the Draft Convention is published in *Tractatenblad* (1969) no. 167.

31. See 'Benelux Uniform Law on Private International Law Abandoned', 23 *NILR* (1976) pp. 248-255; H.U. Jessurun d'Oliveira, 'Die Freiheit des niederländischen Richters bei der Entwicklung des internationalen Privatrechts: zur antizipierenden Anwendung des Benelux-Einheitsgesetz über das Internationale Privatrecht – ein Requiem' ('The freedom of the Dutch courts in the development of private international law: on the anticipatory application of the Benelux Uniform Law on Private International Law'), 39 *RabelsZ* (1975) pp. 224-252.

General of the Hague Conference, in which position he succeeded the famous Georges A.L. Droz (1931-2004) in 1996.[32]

In 1992 the subject of international jurisdiction would once again be discussed on the occasion of the conclusion of the Lugano Convention[33] and the possible revision of the 1968 Brussels Convention (by P.A.M. Meijknecht and H. Duintjer Tebbens, both at that time also members of the Dutch Standing Government Committee). Apart from the jurisdiction conventions, attention was paid to the changes in Dutch private international law due to the developments within the European Community, now the European Union. On 1 May 1999 the EC Amsterdam Treaty came into force, providing for the possibility of regulations on private international law (then Art. 65 EC, now Art. 81 of the Treaty on the Functioning of the European Union, which came into force on 1 December 2009).[34] The Netherlands Society certainly took an interest in this European dimension: in 2002 with preliminary reports on the reception of European private international law into the national legal order (by M.V. Polak and C.A. Joustra), in 2006 on the subject of European international family law (by J. Meeusen and G.E. Schmidt) and in 2008 on the Rome I and II Regulations (by T.H.M. van Wechem and J.A. Pontier).

The codification of private international law was the subject of the annual meeting of the Society in 1990, where preliminary reports by Th.M. de Boer (against codification) and M.V. Polak (in favour of codification) were discussed. At the annual meeting Jaap van Rijn van Alkemade, counsellor at the Justice Department and one of the initiators of the codification of Dutch private international law, delivered a passionate speech in which he emphasized the importance of a national step-by-step codification.[35] This step-by-step codification had already started in 1981 and would come to an end in 2009 with the introduction of the bill on Book 10 of the Dutch Civil Code.

4. CODIFICATION OF DUTCH PRIVATE INTERNATIONAL LAW: THE LONG ROAD TO BOOK 10 CIVIL CODE

In 1897 the Dutch Standing Government Committee had as its first and foremost task to advise on matters concerning the international codification of private international law by means of conventions to be concluded at the Hague Conference. National codification was, as we have seen, not a matter of high priority. For a long time it was thought that the unification of private international law would take place within the *Benelux* and that the 1969 Convention on the Uniform Law

32. From 1978 to 1996, Georges Droz was Secretary General of the Hague Conference. He succeeded the first Secretary General Matthijs van Hoogstraten.

33. The EC/EFTA Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, Lugano, 16 September 1988.

34. *Official Journal EU* (2008) C 115/47.

35. See *Mededelingen NVIR* (Announcements of the NVIR) No. 102 (April 1992), pp. 18-22.

on Private International Law would enter into force. When – as we have seen in the previous section – the Convention's ratification process was halted in 1976, it became clear that there were no longer any obstacles to working on national codification. In 1980, the Standing Committee was involved in this national codification process. At the Dutch Ministry of Justice the initiative was taken to draft a bill on private international law. In 1982 a preliminary draft (the so-called 'blue book') was published in inner circles, followed in 1992 by the publication of the Sketch for a general law on private international law (the so-called 'red book'). Both drafts have served as a starting point for further work on the codification. It was decided not to codify all matters of private international law at one time, but gradually, from one subject to another. In the last three decades the Committee has advised over more than 15 bills on private international law and international procedural law. The first Act of 25 March 1981 on private international law aspects of separation and divorce came into force on 10 April 1981. The 1981 Act provides conflicts rules for divorce and for the recognition of foreign divorces and repudiations.[36] Finally, on 25 February 2008, the Act on the law applicable to matters of property law was enacted, which came into force on 1 May 2008. Consolidation could now take place: on 18 September 2009 a bill was proposed for Book 10 (Private International Law) of the Dutch Civil Code.[37] This bill introduces the further codification and consolidation of the existing statutes and re-combines them into Book 10 Civil Code.[38] It may be expected that the bill will be adopted by Parliament in 2011.

Book 10 Civil Code does not provide rules for all questions of private international law. It does not contain matters which are dealt with in EU regulations and international conventions which are binding for the Netherlands. Article 1 of Book 10 Civil Code reminds us of the precedence which these international sources take over their national counterparts. In some provisions, Book 10 explicitly refers to certain conventions of the Hague Conference, for instance in Article 116:

> 'The applicable law to maintenance obligations is decided by:
> a. the Convention on the Law Applicable to Maintenance Obligations, concluded at The Hague on 2 October 1973 (Trb. 1974, 86), or
> b. the Convention on the Law Applicable to Maintenance Obligations for Children, concluded at The Hague on 24 October 1956 (Trb. 1956, 144).'[39]

For each matter of private international law the Minister of Justice mentions in the Explanatory Memorandum to the bill the existing international instruments,

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36. See for an English translation of this Act: 28 *NILR* (1981) pp. 390-396.
37. Bill no. 32 137 (2009-2010).
38. P. Vlas, 'Lang verwacht, toch gekomen: wetsvoorstel Boek 10 BW (IPR)' ('Expected for a long time and finally it came: Bill Book 10 Civil Code (PIL)'), *Weekblad voor Privaatrecht, Notariaat en Registratie* (2009) 6819 pp. 893-898.
39. Reference is made to the Dutch Official Treaty Series, *Tractatenblad* (*Trb.*).

which are binding for the Netherlands. However, if an international instrument is not mentioned, one may not deduce from this silence that this particular instrument is not applicable. It is simply impossible to give an up-to-date overview of all international instruments which are binding for the Netherlands.[40]

Book 10 Civil Code does not contain any national rules on jurisdiction and the recognition and enforcement of foreign judgments. These rules are to be found in the Dutch Code of Civil Procedure, as far as the matter is not dealt with in EU regulations or in conventions. On 1 January 2002 an important amendment to the Dutch Code of Civil Procedure (CCP) came into force.[41] Articles 1 to 14 CCP were introduced, which provide for the jurisdiction of the Dutch courts in civil and commercial matters (including matters of succession, family law and insolvency) if no international instruments (EU regulations or conventions) apply. The jurisdiction rules of the Brussels Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (as amended), succeeded by the Brussels I Regulation (in force as from 1 March 2002), stood as a model for the national rules of jurisdiction. Consideration was also given to the jurisdiction rules of the Lugano Convention of 16 September 1988, which are in many respects identical to the rules of the Brussels Convention.[42] Before the 2002 reform Act, the Dutch rules of jurisdiction were to be found in case law and the rules of internal territorial jurisdiction. If the court had jurisdiction according to these territorial rules, it also had jurisdiction for international purposes.[43] The national rules on the recognition and enforcement of foreign judgments (outside the scope of EU regulations and other international instruments) are still to a large extent based on case law and on Article 431 CCP. Reform is urgently needed, but is not yet underway.

Book 10 Civil Code is divided into fifteen Chapters, ranging from Chapter 1 on General Provisions (Arts. 1-17) to Chapter 15 on Some Provisions regarding the Law of the Sea, Inland Shipping and Air Law (Arts. 160-165). Most of the Chapters are derived from one of the separate acts dealing with a particular aspect of private international law.

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40. Explanatory Memorandum, 32 137, no. 3, p. 7-8.

41. Act of 6 December 2001, *Staatsblad* (2001) no. 580.

42. The 1988 Lugano Convention will be succeeded by the Lugano Convention of 30 October 2007, which came into force on 1 January 2010 in the relationship between the EU Member States and Norway. The 2007 Convention is modelled on the Brussels I Regulation. The Explanatory Report by Professor Fausto Pocar is published in *Official Journal EU* (2009) C 319/1.

43. Known as the 'distribution is attribution' rule and was standing case law since the judgment of the Dutch Supreme Court (*Hoge Raad*) 24 December 1915, *NJ* 1917, 417. See further on this subject: H. van Lith, *International Jurisdiction and Commercial Litigation*, *Uniform Rules for Contract Disputes* (PhD thesis EUR) (The Hague, T.M.C. Asser Press 2009) pp. 122-138; A.V.M. Struycken, 'Bruxelles I et le monde extérieur' ('Brussels I and the Outer World'), in G. Venturini & S. Bariatti, eds., *New Instruments of Private International Law, Liber Fausto Pocar* (Milan, Giuffrè 2009) pp. 893-908 at p. 898.

(a) Chapter 2 on Names (Arts. 18-26) is taken from the Act of 3 July 1989.
(b) Chapter 3 on Marriage (Arts. 27-59) deals with the validity of marriages (Arts. 27-34, taken from the Act of 7 September 1989), the relationship between spouses (Arts. 35-41, taken from the Act of 16 September 1993), the matrimonial property regime (Arts. 42-53, taken from the Act of 20 November 1991) and with separation and divorce (Arts. 54-59, taken from the Act of 25 March 1981). Sometimes changes have been made. The conflicts rule on separation and divorce laid down in Article 56 has been modernized compared to the provision of the 1981 Act. Now, Article 56 applies Dutch law as the main rule, where the law of the common foreign nationality of the spouses can only be applied if, in legal proceedings, certain conditions are met.
(c) Chapter 4 (Arts. 60-91) deals with official cohabitation in the form of registered partnerships (in Dutch: *geregistreerd partnerschap*) and repeats, for a great part, the provisions of the Act of 6 July 2004.
(d) The matter of legitimacy is provided for in Chapter 5 (Arts. 92-102) and is taken from the Act of 14 March 2002.
(e) Chapter 6 on Adoption (Arts. 103-112) is a repetition of the provisions of the Act of 3 July 2003.
(f) Chapter 7 (Arts. 113-116) deals with other matters of family law: parental responsibility and child protection (Art. 113), international child abduction (Art. 114) and maintenance obligations (Art. 116). These articles refer to the international instruments which are applicable to the Netherlands. Article 115 does not yet exist and is reserved for a provision referring to the Hague Convention of 13 January 2000 on the International Protection of Adults.
(g) The conflict rules dealing with corporations are laid down in Chapter 8 (Arts. 117-124) and are taken literally from the Act of 17 December 1997.
(h) In Chapter 9 on Agency (Art. 125) reference is only made to the Hague Convention of 14 March 1978 on the Law Applicable to Agency, which has been in force for the Netherlands as from 1 October 1992.
(i) Chapter 10 (Arts. 126-141) on the Law of Property is taken from the most recent Act of 25 February 2008.
(j) Chapter 11 on Trusts refers to the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, which came into force for the Netherlands on 1 February 1996. The ratification of the Hague Trust Convention was accompanied by the Act of 4 October 1995, now reiterated in Articles 143 and 144 of Book 10 CC.
(k) The law of succession is dealt with in Chapter 12 (Arts. 145-152) and these articles are taken from the Act of 4 September 1996. Although the Hague Succession Convention of 1 August 1989 is not yet in force due to the lack of the required number of (three) ratifications, the convention is already applicable in the Netherlands.[44]

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44. The Netherlands ratified the Succession Convention on 27 September 1996 and has been applying the convention as from 1 October 1996 according to Art. 1 of the Act of 4 September 1996 (Act on the conflict of laws regarding succession). Art. 1 states: 'The law applicable to succession is designated by the provisions of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, done at The Hague on 1 August 1989 …' This provision is repeated in Art. 145 of Book 10 CC.

(l) Chapter 13 (Arts. 153-156) deals with matters of contractual obligations and Chapter 14 (Arts. 157-159) with matters of non-contractual obligations. In both matters recent EU regulations are applicable: the Rome I and Rome II Regulations.[45] It is interesting that Articles 154 and 159 Book 10 CC provide for an extension of the scope of both regulations. According to Article 154, the Rome I Regulation is also applicable to obligations falling outside the scope of Rome I, if these obligations can be qualified as contractual. The same is provided for in Article 159: Rome II is applicable to non-contractual obligations falling outside the scope of Rome II, if these obligations can be qualified as non-contractual. This means, for instance, that the law applicable to matters of libel, which are excluded from the material scope of Rome II (Art. 1(2)(g)), is to be designated by the conflict rules of Rome II and not by national Dutch conflict rules. The Dutch Act of 11 April 2001 regarding conflict of laws on matters of tort will be repealed if the bill on Book 10 CC is accepted by Parliament.[46] The Minister of Justice proposed an amendment to Article 159 preventing this provision leading to the application of Rome II on the liability of the state for acts or omissions in the exercise of state authority (*acta iure imperii*). Now it is proposed that in such cases the liability of the Dutch state will be governed by Dutch law.[47] The question of state liability is important in view of possible actions against (financial) supervisors, such as the *Nederlandsche Bank*.[48]

(m) Finally, Chapter 15 gives provisions on matters of the Law of the Sea, Inland Shipping and Air Law (Arts. 160-165) and is taken from the Act of 18 March 1993.

As we have seen, Book 10 Civil Code is a consolidation of the existing Dutch statutes on private international law with some renovating changes. International legislation, such as new EU regulations, will lead to further renovations and amendments. In Brussels negotiations have already started on a Regulation for jurisdiction, applicable law, recognition and enforcement of decisions in matters of succession and the creation of a European Certificate of Succession.[49] If this regulation is accepted, the law which is applicable to succession will no longer be governed by the Hague Succession Convention, since, according to Article 25 of the proposed regulation, its conflict rules will have a universal nature.

In drafting Book 10 CC the Dutch legislator was certainly inspired by the codifications of other countries.[50] Of course, the Swiss Act on Private Interna-

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45. As from 17 December 2009 Regulation no. 593/2008 regarding the law applicable to contractual obligations (Rome I), *Official Journal EU* (2008) L 177/6 and as from 11 January 2009 Regulation no. 864/2007 regarding the law applicable to non-contractual obligations (Rome II), *Official Journal EU* (2007) L 199/40.

46. An English translation of this Act, as well as of the Opinion of the Standing Government Committee on this subject, is published in 50 *NILR* (2003) pp. 221-237.

47. See Bill no. 32 137, no. 7 (17 March 2010).

48. On 2 March 2010 the Standing Government Committee on Private International Law advised in favour of the government's proposal to apply Dutch law on the liability of the Dutch state and its official bodies.

49. See for the Commission's proposal of 14 October 2009: COM (2009) 154 final.

50. Comparative legal research has been carried out concerning each of the separate statutes on conflict of laws. The Explanatory Memorandum of Bill no. 32 137 does not give any views on comparative legal aspects, because the Bill's first objective is consolidation.

tional Law of 18 December 1987 is the most famous example of this codification trend. Notably, however, the Netherlands made other choices than Switzerland. Unlike the Swiss, no general statute covering all matters of private international law was drafted (jurisdiction, applicable law and the recognition and enforcement of judgments); rather, the Dutch opted for codifying the rules of applicable law. No separate statute was produced, as the Swiss did, but was simply part of the Dutch Civil Code. It is also important to note that the Netherlands is party to many international conventions in the field of private international law, especially the Hague conventions.[51] From this perspective national codification is of less importance than international codification by means of conventions. In this respect the spirit of Tobias Asser is still alive and kicking!

5. 2010: HOPE AND IDEALISM

Since 1910 the World has changed and international law has changed with it. New problems require new solutions and challenges for new legislation. In private international law questions raised in 1910 are no longer interesting. The law regarding bills of exchange and cheques, with which the Netherlands Society was occupied in 1910, is nowadays more or less obsolete. The character of the Hague Conference changed from a regional organisation into a global one, aiming at legal cooperation in various areas of private international law. European countries are working together within the EU, establishing regulations on matters of private international law. If a matter is governed by an EU regulation, the Hague conventions in this regard are put to one side in the relationship between the EU Member States. Within the EU, a uniform private international law is emerging. If new EU regulations have a universal character, i.e., are applicable irrespective of the question whether the law designated is the law of a Member State, the Hague conventions are no longer needed. The EU has its own rules of private international law and is thinking regionally rather than globally. The interest in and the need for the ratification of the Hague conventions would diminish accordingly. This trend would be destructive for international global cooperation and, of course, contrary to the spirit of Tobias Asser. However, there are rays of hope. The relations between the Hague Conference and the EU are fine, especially since the EU officially joined the Conference as a Member.

On the national level, the codification of Dutch private international law in Book 10 CC is a landmark event which will lead to further interest in this important area of law. Certainly the Netherlands Society of International Law will pay attention to this important event, just as it paid attention to the discussion between the advocates and opponents of national codification. In this discussion,

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51. Cf. Th.M. de Boer, 'The Hague Conference and Dutch Choice of Law: Some Criticism and a Suggestion', 40 *NILR* (1993) pp. 1-13. In 1993 De Boer counted 20 Hague conventions in force in the Netherlands; in 2010 this number amounted to 22 Hague conventions.

Asser and his contemporaries would have taken a firm stand. Whatever they had in mind, their thoughts and ideas were based on hope and idealism, just as nowadays international law – public *and* private – can only prosper by hope and idealism. May the Netherlands Society contribute in the years to come to the prosperity of international law!