Belgian Court Recognizes US Opt-Out Class Action Settlement

By Stefaan Voet, Leuven University

The Belgian Lernout & Hauspie (L&H) case was one of the largest corporate scandals in European history (for an empirical case study analysis see S. Voet, 'The L&H Case: Belgium's Internet Bubble Story' in D. Hensler, C. Hodges & I. Tzankova (eds.), *Class Actions in Context: How Economics, Politics and Culture Shape Collective Litigation*, Edward Elgar (2016)).

It was a criminal case that was brought before the Criminal Court of Appeal in Ghent. Contrary to common law jurisdictions, the victim of a Belgian criminal case is not absent from the criminal trial. He or she is a formal party to the proceedings and has standing to plead. Regarding his or her civil claim, the victim can piggyback on the evidence brought forward by the Public Prosecutor in order to prove a civil fault. The victim only has to prove causation and his or her damages. Based on this technique, more than 15,000 duped shareholders filed their civil claim during the L&H criminal trial.

On 20 September 2010, the Court ruled on the criminal aspect of the case. L&H's founding fathers and most previous directors were convicted. The deep-pocket defendants Dexia Bank and KPMG, respectively L&H's bank and statutory auditor, were acquitted.

On 23 March 2017, seven years after its criminal decision, the Court ruled its first decision on the civil claims. The decision is available in Dutch at https://www.rechtbanken-tribunaux.be/sites/default/files/public/content/lh_-_geanonimiseerd.pdf.

Because L&H also had a second headquarters in the US, some (opt-out) class action procedures, on behalf of all persons and entities who had bought L&H shares on Nasdaq, were brought there against Dexia and KPMG (*In re* Lernout & Hauspie Sec. Litig., 138 F. Supp. 2d 39 (D. Mass. 2001); *In re* Lernout & Hauspie Sec. Litig., 208 F. Supp. 2d 74 (D. Mass. 2002) and Warlop v. Lernout, 473 F. Supp. 2d 260 (D. Mass. 2007)). Ultimately, these cases were settled. In the KPMG settlement 115 million dollars were paid, while in the Dexia settlement the

shareholders received 60 million dollars.

One of the issues the Belgian Court had to deal with was the impact of these US class action settlements in the Belgian procedure. More particularly, the question arose if the civil claimants in the Belgian procedure who were part of the US class action settlements and who had not opted out, still can claim damages in the Belgian procedure. In other words, does the Belgian Court has to recognize the US class action settlements?

Because the court decisions approving the class action settlements are rendered by a US court, the European rules (i.e. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) do not apply. Belgian international private law is applicable, and more particularly the Belgian Code of Private International Law (CPIL) (an English translation is available at http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf).

The Court first decides that the US decisions approving the class action settlements are foreign judgements that can be recognized and enforced in Belgium (Art 22, §1 CPIL). The Court rebuts the argument of one of the parties that the class actions settlements are nothing more than contractual agreements to which he is not a party (§ 66).

The central issue before the Court is whether the US court decision approving the class action settlements can be recognized in Belgium and whether the class members who did not opt out are bound by these settlements in the Belgian procedure (§ 67). If not, they can bring their civil claim. If so, they cannot bring their civil claim (at least to the amount they received in the US class action settlements).

The Court cannot assess the question whether the US District Court (approving the class action settlements) correctly applied Rule 23(a) and Rule 23(b)(3) FRCP (Federal Rules of Civil Procedure). Art 25, §2 CPIL clearly states that under no circumstances the foreign judgment will be reviewed on the merits (§§ 68-69).

Art 22, §1, 4th para CPIL states that the foreign judgment may only be recognized or declared enforceable if it does not violate the conditions of Art 25 CPIL. The latter states (in §1, 1° and 2°): “A foreign judgment shall not be recognized or

declared enforceable if 1° the result of the recognition or enforceability would be manifestly incompatible with public policy; upon determining the incompatibility with the public policy special consideration is given to the extent in which the situation is connected to the Belgian legal order and the seriousness of the consequences, which will be caused thereby and 2° the rights of the defense were violated." These are the two basic questions before the Court (§ 72).

The main criterion is the international public order. According to Belgium's Supreme Court (i.e. Court of Cassation) a law is of international public order if the legislator wanted to lay down a principle that is vital for Belgium's established moral, public or economic order. Any foreign rule or decision violating this international public order should be set aside (Court of Cassation 18 June 2007, C.04.030.F, www.cass.be). The criterion is subject to a marginal appreciation by the court (§§ 74-75).

The Court concludes that the US decision approving the class actions settlement does *not* violate Belgium's international public order. Consequently, the Court has to recognize the US decision. The Court invokes multiple reasons.

First of all, reference is made to the existence in Belgium, since September 2014, of an opt-out class action procedure (as laid down in Title II of Book XVII of the Code of Economic Law (CEL)) (see about this Belgian class action procedure S. Voet, 'Consumer Collective Redress in Belgium: Class Actions to the Rescue?', European Business Organization Law Review 2015, 121-143). Moreover, the legislature emphasized that the opt-out system is compatible with Art 6 ECHM (§§ 79-80).

Secondly, the Court compares the procedural rights of class members according to US federal class action law and to Belgian class action law. The US class action settlements were subject to a fairness hearing (see Rule 23(e)(2) FRCP). A similar provision exists in Belgium (Art XVII.38 CEL). The class action settlements were notified to US and foreign L&H shareholders (see Rule 23(e)(1) FRCP). A special website was also created. Similar provisions exist in Belgium (Art XVII.43, §3 CEL). In the US, the Court assessed whether the class actions settlements were fair, reasonable, and adequate (see Rule 23(e)(2) FRCP). Similar provisions exist in Belgium (Art XVII.49, §2 FRCP). Based on this analysis, the Court concludes that the procedural rights of the class members in the US class actions settlements were protected in a similar way as they would have been protected

under Belgian law. The Court adds that the procedural protection under Rule 23 FRCP is even stronger than under Belgian law (§§ 82-83).

Next, the Court examines whether the fact that non-US class members are bound by the US opt-out class action settlements violates Belgium's international public order. Although there are arguments to be made that only under an opt-in regime foreign class members can be bound by a class action decision or settlement, the Court reiterates that nevertheless opt-out class actions are possible in Europe (see Art 21 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms and the existing opt-out regimes in Portugal, Bulgaria, Denmark and the Netherlands (under the Dutch Collective Settlements Act)). It concludes that the desirability of an opt-in system for foreign class members does not automatically leads to the conclusion that an opt-out regime contradicts Belgium's international public order (§§ 84-88).

Finally, the Court notes that an opt-out class action, leading to a settlement that could be binding for foreign class members, could entail a violation of the rights of defense if not everything was done to guarantee that the foreign class members were notified of the class action procedure and the opt-out possibility. The Court concludes that this was the case. It for example refers to the following facts: 82.8169 individual notice packages were sent; notification was provided in the Wall Street Journal, the Wall Street Journal Europe and a Belgian journal; a specific website (www.lernouthauspiesettlement.com) was launched; the Belgian press reported about the US class action settlements; one of the Belgian associations representing L&H shareholders informed its clients about the US class action settlements and instructed them what to do if they wanted to opt out or receive money; the US District Court decided that Rule 23(e)(1) FRCP was met and that 288 mainly Belgian shareholders had opted out correctly while 325 other opt-out requests were dismissed; etc. KPMG, one of the parties to the class action settlements, submitted an expert report to the Belgian Court stating that everything possible was done to notify all class members. In conclusion, the Court finds that there was sufficient notice and that the rights of defense of the non-US class members were not violated (§§ 89-93).

The general conclusion of the Court is that all claims brought by the civil parties who were part of the US class action settlements and who did not opt out are only admissible insofar as they claim damages above the amount they received from the US class action settlements.

The Impact of Brexit on the European Aviation Industry – Düsseldorf, Wednesday, 31 May 2017, 3.30 PM

The Düsseldorf Airport and Professor *Stephan Hobe* from the Institute of Air and Space Law at the University of Cologne, in cooperation with the international law firm Herbert Smith Freehills, have established a new series of events, which will deal with current topics of the aviation industry, involving internationally renowned experts before a selected audience.

The theme of the kick-off event could not be more up-to-date. Less than a week ago, British Ambassador Tim Barrow handed over to EU Council President Donald Tusk the first petition to trigger the application of Art. 50 TEU in the history of the European Union. The next two years will involve an unprecedented negotiating marathon in which the departure of Great Britain from the EU will be shaped.

Few areas are now as Europeanized as air transport. Air transport agreements need to be re-negotiated, the Single European Sky has to be restructured, airline ownership has to be checked – the impact of the Brexit on the aviation sector is unpredictable. The conference's aim is to start with a first inventory. To this end, the organizers have invited distinguished experts from politics, academia, aviation associations, lawyers and international airports.

For further details and registration, please click here.

PhD Scholarships at the MPI for International, European and Regulatory Procedural Law

The Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law offers a limited number of PhD scholarships for foreign scholars to support their research stay at the Institute for up to twelve months.

Eligibility
Scholarships are offered to PhD students who plan to undertake research at the Institute within the Institute's areas of research, i.e. international dispute resolution and comparative procedural law.

Application
A complete application file must include the following documents (in English):
.- cover letter (max. 1 page), indicating the motivation and also the link of your research with the research of the Institute;
.- curriculum vitae (indicating grades of the university degrees);
.- summary of the PhD project (max. 2 pages), including subject, description and working plan;
.- two (2) letters of recommendation (including one from the PhD supervisor, with his/her contact details).

Grant and benefits
The scholarship is paid in monthly installments of 1500 €.
Selected scholars will be offered a working place in the library reading room of the Institute and will have the opportunity to participate in the regular scientific events and other activities of the Institute.

Deadline for applications
30 April 2017

Application details
Please follow this link and apply online.

Contact

Viktoria Drumm: scholarship@mpi.lu

EJTN Webinar on Brussels IIbis

The European Judicial Training Network (EJTN) launches its pilot webinar programme with two events in April 2017 which are now open for Registration. One of the webinars has special appeal for those working within the field of private international law. The webinar on the **Wrongful removal or retention of the child – the Brussels II*bis* Regulation will take place on Thursday, 20 April 2017 from 11:00 to 12:30 CET**. It will provide participants a better understanding of the current legal landscape of cross-border child abduction in the EU and will also look at other key issues and aspects of the topic.

• **Presenter**: *Carlos M. G. de Melo Marinho*, Court of Appeal Judge, Co-Founder and Former National Contact Point of the European Judicial Network in Civil and Commercial Matters, Senior Expert on European and International Judicial Cooperation and E-justice, Portugal.
• **Objectives**: To provide a better understanding of the current legal landscape of the cross-border child abduction in the EU; to analyse the Council Regulation (EC) No 2201/2003 of 27 November 2003 (Brussels II*bis*) as a true icon of the achievements of the European Judicial Cooperation in Civil and Commercial Matters generated by the approval of the Amsterdam Treaty; to underline the role of this Regulation as a precursor EU law text in a fruitful and unfinished process of suppression of the *exequatur* in the proceedings with a cross-border connection developed with a view to create a Common Space of Justice marked by the existence of mutual trust and direct contacts between courts and by the free circulation of decisions; to reveal the swift new ways that envisage to grant the return of a child wrongfully removed or retained, entailed by an enforceable judgment given in a Member State, in cases connected with two or more countries.
• **Target audience**: Judges and prosecutors, preferably those involved in judicial

cooperation in civil matters. Other legal professionals having professional contact with these questions are also welcome to join.
• **Registration** is open from March 31, 2017, until the end of the webinar. Register online here.

Hague Securities Convention in force

This is no April fool's prank: The Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary will enter into force today. It will apply in the United States, Mauritius and Switzerland. More states will hopefully soon follow.

The Justice Initiative Frankfurt am Main 2017

Written by Prof. Dr. Dres. h.c. Burkhard Hess, Executive Director Max Planck Institute Luxembourg for Procedural Law

Against the backdrop of Brexit, an initiative has been launched to strengthen Frankfurt as a hot spot for commercial litigation in the European Judicial Area. On March 30, 2017, the Minister of Justice of the Federal State Hessen, Ms Kühne-Hörmann, organized a conference at which the Justice Initiative was presented. More than 120 stakeholders (lawyers, judges, businesses) attended the conference. The original paper was elaborated by Professors Burkhard Hess (Luxembourg), Thomas Pfeiffer (Heidelberg), Christian Duve (Heidelberg) and Roman Poseck (President of the Frankfurt Court of Appeal). Here, we are pleased

to provide an English translation of the position paper with some additional information on German procedural law for an international audience. The proposal has, as a matter of principle, been endorsed by the Minister of Justice. Its proposals are now being discussed and shall be implemented in the next months to come. The paper reads as follows:

1. Background Information

In the European Judicial Area, London has positioned itself as the most important hub for cross-border disputes arising from the European internal market. According to statistics, in around 80% of all commercial cases at least one party is foreign, while almost 50% of all claims issued in the London court concern only foreigners. The value of disputes before the London Commercial Court is regularly in the 6 – 7-digit range. The court hears approximately 1,000 procedures per year, of which almost 200 concern parties from the continent (see here). A key focus is on financial disputes. Often, the jurisdiction of the High Court of London is based on jurisdiction agreements (Article 25 Brussels I^{bis} Regulation).

The upcoming Brexit will change this situation in relation to parties from the continent. In the future, the United Kingdom as a state will no longer benefit from the benefits of the European Judicial Area; the UK will rather be a third country. Parties to civil disputes must already consider whether they prefer to choose other courts within the European Judicial Area. The liberal rules of jurisdiction laid down in Article 25 of the Brussels I^{bis} Regulation and the special jurisdiction rules established in Articles 7 and 8 of the Brussels I^{bis} Regulation promote appropriate strategies. In financial contracts, jurisdiction clauses do not only provide for London, but also for other courts in the European Judicial Area, such as Frankfurt. Therefore, Germany can become a competing judicial hub. With the expected relocation of the financial center from London to Frankfurt (and indeed, likely to other European locations) a relocation of the judicial hub is also to be expected. It is submitted that one should strive for a shift of financial disputes to Frankfurt; even today, the Frankfurt judiciary is characterized by the existence of its special expertise in commercial areas. Indeed, the Frankfurt civil courts already have a high degree of specialization to hear financial and banking disputes.

Attracting high-profile, commercial disputes entails positive effects with regard to the legal services sector, in particular the legal profession, but also the courts of ordinary jurisdiction. Corresponding developments can be observed with regard to patent litigation. In this highly-specialized area of law, the courts of Düsseldorf, Mannheim and Munich have already established themselves as sought-after throughout Europe.

For these reasons, the Justice Initiative proposes that the attractiveness of the civil and commercial courts of Frankfurt should be strengthened through some targeted (mainly organizational) measures. A simultaneous information campaign would also increase Frankfurt's visibility as an attractive place for the solution of international commercial disputes. Our considerations are linked to and continue to advance earlier initiatives ("Law Made in Germany") that aim to strengthen Germany as a compelling place for dispute resolution.

In particular, the authors propose the following measures:

A. A comprehensive strategy to strengthen Frankfurt as a hub for international dispute settlement

I. The core concern relates to the further specialization of the dispute resolution bodies within the state courts in order to promote the efficient resolution of cross-border commercial disputes. A combination of targeted measures, including the provision of a well-equipped court and experienced judges with good language skills as well as a modern process design shall enable a practical, user-friendly framework for the settlement of international commercial disputes

II. The initiative shall be accompanied by the comprehensive involvement of the judiciary, of the business sector (the Chamber of Industry and Commerce) as well as of the legal profession (including lawyers' associations and lawyers' chambers).

III. Simultaneous strengthening of arbitration in Frankfurt (via the creation of a Center for International Dispute Resolution).

B. Establishment of Chambers for International Commercial Matters at LG Frankfurt as well as of appropriately specialized senates at OLG Frankfurt

I. Composition of the Chamber for International Commercial Disputes with judges

who have:

1. In-depth experience of business law (and, if possible also experience as lawyers) as well as;
2. Good English language skills.

II. Occupation of the commercial lay judges in consultation with the Chamber for Commerce with experts from the fields:

1. Finance and banking;
2. International commercial matters;
3. Auditing.

Here again, adequate language skills must be ensured.

III. Sufficient equipment of the Chamber for International Commercial Disputes:

1. Comprehensive use of the electronic support system, for example by providing an IT tool in order to enable an "electronic process and case file management";
2. Adequate equipment of the registrar of the Chamber / Senate with a staff, which also disposes of a sufficient knowledge of foreign languages and is able to manage (partially or partly) foreign-language files;
3. Borrowing best practices from arbitration with regard to the secretary/registry who adopts active support functions (as a case manager).

C. Process design

I. In respect of its own procedural practice, the Kammer für international Handelssachen should borrow "best practices" from patent litigation and international commercial arbitration:

1. The court should establish a "road map" with the parties at the start of the process; this would structure the course of the procedure. In this respect, it would seem to be a good idea to use the first hearing as a "Case Management Conference" with the parties:
2. Intensive use of the obligation of the court to provide information on open legal and factual issues under section 139 ZPO (German Code of Civil Procedure – the text is reproduced at the end of the document), in order

to facilitate a speedy and transparent procedure;
3. Written preparation statements of witnesses shall generally be permitted (see § 377 (3) ZPO);
4. Increased use of sections 142 to 144 ZPO to enable a (structured) exchange of evidence between the parties under the control of the court ("German disclosure");
5. Recording of the hearing and preparation of a textual record (sections 160 to 164 ZPO) – as an electronic document.

II. Extensive use of the English language within the existing framework of sections 184 and 185 (2) of the Court Organisation Act (but no English-speaking hearings per se). The court should decide at its own discretion whether and to what extent the hearing is held in English. The proposals of the parties must be respected as far as possible.

1. No translation of documents which are drafted in the English language (as already foreseen by section 142 (3) ZPO):
2. Witness will be heard in their original tongue or in English;
3. Extensive use of video conferencing:
4. Elaboration of judgments in a way which allows for their speedy translation into foreign languages.

D. The implementation of the initiative

I. Obtaining the support of lawyers, the judiciary and politicians in Hesse (Fall 2016)

II. Opening symposium on the 30th of March 2017;

III. Establishment of a working group with the aim of defining the necessary measures to be taken;

IV. Development and implementation of an accompanying communication strategy;

V. Establishment of a chamber for international trading at Regional Court of Frankfurt and a parallel specialization at the the Heigher Regional Court preferably on January 1, 2018 (within the business distribution plan of 2018).

All in all, the undertaking of the necessary organizational endeavor as well as the timetable for the implementation of the initiative both appears to be feasible. The implementation requires, in particular, the establishment of the Chamber for International Commercial Disputes (Kammer für international Handelssachen) within the District Court of Frankfurt. The following disputes could be assigned to the Chamber from the date of its establishment: international disputes, where the jurisdiction of the Landgericht Frankfurt (District Court of Frankfurt) is based on the Brussels I^{bis} Regulation or the Lugano Convention. Within the District Court, the respective disputes would be allocated to the specialized chamber via the business distribution plan of the court.

Annex: The pertinent provisions of the German Code of Civil Procedure and the Court Organisation Act

Code of Civil Procedure (Zivilprozessordnung – ZPO)

Section 139 Direction in substance of the course of proceedings

(1) To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.

(2) The court may base its decision on an aspect that a party has recognisably overlooked or has deemed to be insignificant, provided that this does not merely concern an ancillary claim, only if it has given corresponding notice of this fact and has allowed the opportunity to address the matter. The same shall apply for any aspect that the court assesses differently than both parties do.

(3) The court is to draw the parties' attention to its concerns regarding any items it is to take into account ex officio.

(4) Notice by the court as provided for by this rule is to be given at the earliest

possible time, and a written record is to be prepared. The fact of such notice having been given may be proven only by the content of the files. The content of the files may be challenged exclusively by submitting proof that they have been forged.

(5) If it is not possible for a party to immediately make a declaration regarding a notice from the court, then the court is to determine a period, upon the party having filed a corresponding application, within which this party may supplement its declaration in a written pleading.

Section 142 Order to produce records or documents

(1) The court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference. The court may set a deadline in this regard and may direct that the material so produced remain with the court registry for a period to be determined by the court.

(2) Third parties shall not be under obligation to produce such material unless this can be reasonably expected of them, or to the extent they are entitled to refuse to testify (…).

(3) The court may direct that records or documents prepared in a foreign language be translated by a translator who has been authorised or publicly appointed by the authorities of a Land, under the stipulations of Land law, for the preparation of translations of the nature required, or who is deemed to have equivalent qualifications. The translation shall be deemed to be true and complete where this is confirmed by the translator. The confirmation is to be set out on the translation, as are the place and date of the translation and the translator's authorisation/appointment/equivalency, and the translated document is to be signed by the translator. It is admissible to prove that the translation is incorrect or incomplete. The order provided for in the first sentence hereof may not be issued to the third party.

Section 143 Order to transmit files

The court may direct the parties to the dispute to produce the files in their possession to the extent they consist of documents concerning the hearing on the matter and the decision by the court.

Section 144 Visual evidence taken on site; experts

(1) The court may direct that visual evidence is to be taken on site, and may also direct that experts are to prepare a report. For this purpose, it may direct that a party to the proceedings or a third party produce an object in its possession, and may set a corresponding deadline therefor. The court may also direct that a party is to tolerate a measure taken under the first sentence hereof, unless this measure concerns a residence.

(2) Third parties are not under obligation to so produce objects or to tolerate a measure unless this can be reasonably expected of them, or to the extent they are entitled to refuse to testify pursuant to sections 383 to 385. Sections 386 to 390 shall apply mutatis mutandis.

(3) The proceedings shall be governed by the rules applying to visual evidence taken on site as ordered upon corresponding application having been made, or by those applying to the preparation of reports by experts as ordered by the court upon corresponding application having been made.

Section 377 Summons of a witness

(3) The court may instruct that the question regarding which evidence is to be taken may be answered in writing should it believe that, in light of the content of the question regarding which evidence is to be taken and taking into consideration the person of the witness, it suffices to proceed in this manner. The attention of the witness is to be drawn to the fact that he may be summoned to be examined as a witness. The court shall direct the witness to be summoned if it believes that this is necessary in order to further clear up the question regarding which evidence is to be taken.

Court Organisation Act

Section 184

The language of the court shall be German. The right of the Sorbs to speak Sorbian before the courts in the home districts of the Sorbian population shall be guaranteed.

Section 185

(1) If persons are participating in the hearing who do not have a command of the German language, an interpreter shall be called in. No additional record shall be made in the foreign language; however, testimony and declarations given in the foreign language should also be included in the record or appended thereto in the foreign language if and to the extent that the judge deems this necessary in view of the importance of the case.(…)

(2) An interpreter may be dispensed with if all the persons involved have a command of the foreign language.

Brexit, again: White Paper on the Great Repeal Bill

Since Wednesday it is official: The UK will leave the EU. What this means for judicial cooperation in cross-border matters has been the subject of an intense debate over the last months. The UK government, however, has thus far not indicated how it plans to proceed. A White Paper that was released yesterday now gives some basis for speculation:

- The UK will adopt a Great Repeal Bill that will convert the current body of EU law, notably directly applicable EU Regulations, into UK domestic law (para. 2.4).
- When applying the EU-derived body of law UK courts will be required to give "historic" CJEU decisions, i.e. decisions that the CJEU will render up until the day of Brexit, the same binding, or precendent status as decisions of the UK Supreme Court (para. 2.14).
- To the extent that EU law cannot simply be converted into domestic law, because it is based on reciprocity, the UK will seek to secure reciprocal arrangements as a part of the new relationship with the EU (para. 3.3).

Applied to conflict of laws this suggests that the UK will most likely convert the non-reciprocal regulations, notably the Rome I and the Rome II Regulations, into

domestic law and apply them unilaterally. UK courts will then be required to follow and apply relevant CJEU decisions that have been and will be rendered up to the date of Brexit. As regards regulations that rest on the principle of reciprocity, notably the Brussels Ia Regulation but also the Service and Evidence Regulation, the UK will most likely seek to secure their continued reciprocal application.

Of course, this leaves a lot of questions open. What will, for example, happen to post-Brexit CJEU decisions relating to the Rome I and the Rome II Regulation? Will they have any meaning for UK courts? And what happens to the Brussels Ia Regulation if the UK and the EU do manage to reach agreement on its continued reciprocal application?

So, stay tuned.

Paris, 12 May 2017: Symposium on the Recast of the Brussels IIbis Regulation

On Friday, 12 May 2017, Professor *Sabine Corneloup* and *Alexandre Boiché* will organize a symposium on the recast of the Brussels II*bis* Regulation in Paris. The following announcement has been kindly provided by Professor *Corneloup*:

"On June 30th 2016, the European Commission submitted a proposal for the revision of Regulation n° 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. While the overall operation of the Regulation is considered to be satisfactory, the Regulation has shortcomings and lacks clarity on some points, in particular with regard to questions of parental responsibility. Problems encountered include excessive delays, caused by imprecisions in the Regulation on the length of proceedings, or by the necessity to obtain the exequatur. Cross-border recognition and enforcement of decisions are

still too often hampered by divergent national practices, may it be the hearing of the child or the enforcement measures that may be taken. Furthermore, the role of the central authorities has not been defined with sufficient precision, possibly leading to dysfunctional cross-border cooperation, thus jeopardizing mutual trust between Member States and the protection of the fundamental rights of children. Regarding matrimonial matters, on the other hand, the Commission proposes the status quo: choice of court agreements are not among the innovations selected.
The symposium brings together experts from the academic and institutional worlds as well as from the bar, who share their experience in order to work together to reach solutions to the problems and shortcomings observed."

The full programme is available here.

The event will take place at:

University Paris II, Panthéon-Assas
Centre Vaugirard 1
391 rue de Vaugirard
75015 Paris
France

The conference will be held in French.

For further information and registration, please contact Ms *Laurence Tacquard*:
+ 33 1 44 41 56 01
laurence.tacquard@u-paris2.fr

Conference on the "Codification of Private International Law" – Cologne, 23-24 September 2016:

Proceedings now published in IPRax 2/2017

The year 2016 did not only mark 30 years since the great reform of German private international law in 1986, but it was also the 35th anniversary of the foundation of the *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*. Therefore, Professor *Heinz-Peter Mansel*, President of the German Council for Private International Law and editor-in-chief of IPRax, and Professor *Jan von Hein*, chairman of the Council's 2nd Commission, organized a celebratory conference on **23-24 September 2016** at the University of Cologne (Germany) under the title: **"Codification of Private International Law: German Experience and European Perspectives Thirty Years After the PIL-Reform of 1986"** (see our previous post here). The conference was (mostly) held in German and generously supported by Gieseking, the publisher of IPRax. After being welcomed by Dr. Johannes C. Wichard (Federal Ministry of Justice and for Consumer Protection), the speakers – members of the German Council and a guest from Switzerland – both analyzed how private international law has evolved in the past and provided an outlook on current and future challenges of the field, particularly in the European context. The conference proceedings have now been published in IPRax 2/2017. The abstracts (kindly provided by the publisher) read as follows:

D. Henrich: **The Deutsche Rat für Internationales Privatrecht and the genesis of the Rearrangement Act of International Private Law**

The article shows the different stages on the way to the so-called IPR-Neuregelungsgesetz (Rearrangement Act of International Private Law) 1986. Starting point was Art. 3(2) of the German Grundgesetz: Men and women having equal rights. Consequently, the rules of applicable law could no longer prefer husband or father over wife or mother. Above all, the article describes the role of the Deutscher Rat für Internationales Privatrecht constituted in 1953 in developing proposals not only to fill the gaps opened by Art. 3(2) GG but also for the formulation of a modern Act of Private International Law.

J. Pirrung: **International and European Influence on the 1986 Reform of Private International Law**

The 1986 reform of German Private International Law did not neglect international solutions, essentially such as proposed by the Hague Conference on PIL. But, in the main issues, determination of the law to be applied concerning the person, family relationships and succession, as well as in international procedural questions with regard to these matters, the reform largely followed the proposals of the German Council on PIL, namely application of the law of the nationality of the persons concerned, with some attenuations by applying the law of the State of habitual residence and admitting, to a certain extent, party autonomy. The relatively short provisions on these matters are in contrast to the rather detailed Articles of the 1980 Rome Convention on contractual obligations. Nevertheless, the incorporation of the rules of the Convention into the Introductory Provisions to the Civil Code (EGBGB) followed strong practical interests. This solution, though criticized by the EEC Commission and the Max-Planck-Institute on PIL, convinced the Law Committee of the Parliament. After 30 years, some important parts of the reform have, up to now, survived – Art. 4–7, 9, 11–16 EGBGB; but PIL on divorce, childhood, succession and obligations has undergone many changes, mainly because of the influence of the EU.

P. Mankowski: **The principle of nationality – in the past and today**

Since 1986, when the EGBGB was promulgated, the principle of nationality has lost ground in PIL. European PIL has switched over to the principle of habitual residence. The most recent examples are the PIL of successions and the PIL of matrimonial property. The principle of nationality can be based on the links between a State and its citizens, in particular the right to vote. Furthermore, nationality appears to be a pragmatic and practical connecting factor for nationality can be evidenced by ID documents like passports or ID cards. Yet, factual developments challenge this assumption: allegedly lost or burnt ID documents, forgery, States not issuing ID documents. All these challenges demand subsidiary answers or solutions.

A. Dutta: **Habitual residence – Success and future of a connecting factor**

The battle over the appropriate personal connecting factor in private international law appears to be over, at least on the continent where nationality has been increasingly ousted by habitual residence. The paper shows that, from a German perspective, this development did not start with the activities of the European legislature in the area of private international law. Rather, the Hague

Conventions and also national law had already laid the basis for a shift from a purely legal to a more factually oriented connecting factor in order to identify the law which is most closely connected to a natural person. The article sketches the advantages of habitual residence from the perspective of the European Union before addressing some future challenges, in particular the danger of a domicilisation of habitual residence and the limits of personal connecting factors in general, especially as to "new" family status relations.

S. Corneloup: **On the loss of significance of renvoi**

The moderately "renvoi-friendly" attitude of the German legislator of 1986 contrasts with the evolutions having taken place on the European level, where principle and exception are clearly reversed. Today the question whether renvoi is to be observed has become rather negligible. Several reasons may explain this reality. Significant changes in PIL over the last decades have rarefied the practical need for renvoi, as the latter presupposes a specific constellation of the case, which has become less frequent in today's practice. Moreover, the objectives of renvoi are increasingly implemented through functional equivalents, which stem mainly from the field of international and European civil procedure, resulting in a further loss of significance of renvoi. In addition, the aim of international uniformity of decision, which is the main rationale behind renvoi, no longer expresses the overall priority of legislators and courts, as considerations based on substantive law increasingly take precedence over the uniformity of decision. This frequently results in an exclusion of renvoi.

T. Helms: **Public policy – The influence of basic and human rights on private international law**

On the occasion of the 30th anniversary of the extensive German private international law reform of 1986, this article seeks to determine the influence of basic and human rights on public policy. It demonstrates how the national public policy exception in Art. 6 of the Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch/EGBGB) is, by and large, substantially identical to the specific public policy exceptions that are enshrined in the European regulations on private international law. Impetus in favor of a European public policy has been provided by the jurisprudence of the European Court of Human Rights in particular. Recent decisions of the ECtHR which have had especially wide-ranging consequences for German law include the Mennesson

and Labassee cases, which determined to whom a child born to a surrogate abroad is related under parentage law.

B. Heiderhoff: **The autonomous German Private International Law in family matters**

Following the order of provisions contained in the EGBGB, from Art. 13 to Art. 24, the essay gives an overview over the most important changes of German international family law since 1986. Some topical issues, such as the validity of marriages with minor refugees and the application of the Rome III-Regulation to the recognition of private divorces are discussed. It is demonstrated that the existing legal framework does not solve all issues in a satisfactory, contemporary manner. Some newer subjects, such as the treatment of same-sex marriages or of children born by surrogate mothers, require further reforms of international family law. In summary, it can be observed that the importance of the nationality of the parties for the determination of the applicable law is diminishing, while the habitual residence has gained substantially in importance. At the same time, party autonomy has been strengthened. While this may partly raise concerns about the protection of the weaker party, it is clearly a necessary complement to the habitual residence as connecting factor. It is the only way to reach stability for legal relationships. These changes have been caused mainly by EU-law and the principle of free movement of persons. However, the reforms, both those already implemented and those yet to come, are not simply triggered by Europeanisation, but have been and will be reactions to modifications in the material family law and to changes in human behavior in familial contexts.

M.-P. Weller: **The German autonomous International Company Law**

The following article presents the state of the art of German autonomous International Company Law. It discusses the real seat theory, which is applied in cases concerning third state companies. In consequence of this approach, companies from third states (e.g. from Switzerland) are converted into domestic partnerships. In addition, the article shows that the applicable company law is superposed by international mandatory rules. Furthermore, it has to be delimited from company insolvency law by the method of classification. Finally, the article highlights mechanisms to impose creditor protection and domestic public interests vis-à-vis foreign companies.

E. Jayme: **The future relevance of national codifications of private international law**

The European Union has enacted many regulations concerning conflict of laws and international civil procedure. In addition, there are many international conventions which contain conflicts rules. National codifications of private international law, however, retain their relevance for many questions which have not been regulated by European Acts and international conventions. We may mention the whole area of property, the law concerning the conclusion of marriage as well as some parts of the law of parents and children such as the establishment of paternity. The European conflicts rules, sometimes, state expressly not being applicable to certain questions such as invasion of privacy or agency. Here, national codifications remain in force. In addition, also methods and instruments of national conflicts law such as "characterization" will still be of some relevance, particularly with regard to the borderline between private international law and international civil procedure.

A. Bonomi: **European Private International Law and Third States**

Articulated in a number of sectorial regulations, the European private international law system has not always grown in a very systematic way. After years of swift development towards a more extensive coverage of different civil law areas and an increased integration of the national systems, the time has probably come to improve the coordination among the single instruments. The regulation of third-country relationships is undoubtedly one of those issues that call for a more consistent approach. While the universal application of choice-of-law rules is a constant feature of all adopted regulations, unjustified disparities persist with respect to jurisdiction and lis pendens. The national rules of the Member States have been entirely replaced by uniform European rules in certain areas, whereas they are still very relevant in others. Parallel proceedings pending in a third country are dealt with under one regulation, but ignored by the others. And while the recognition and enforcement of third-country judgments is consistently left to national law, this might seem at odds with the far-reaching European coverage of jurisdiction and choice-of-law issues. Hopefully, the Hague Judgments Project will result in a successful convention in the near future. But the external relations of the EU in the area of private international law should not depend entirely on the prospects for a Hague instrument. Whether this prospect materializes or not, the EU institutions should take advantage of the negotiation

process in order to elaborate on a coherent set of unilateral European law rules for disputes involving parties of third countries

(This contribution is published in English.)

J. Basedow: **EU Conflicts Legislation and the Hague Conference – A Difficult Relationship**

The transfer of legislative competence for the conflict of laws to the EU by the Treaty of Amsterdam has compelled the Hague Conference to aim at new goals. It was necessary to strengthen the universal character of this organization. As shown by the institutional development of EU and Hague Conference this goal has come closer. However, the legislative activities throughout the last 15 years indicate that the Europeans still exercise a controlling influence on the projects of the Hague Conference; this emerges from the judgements project, the maintenance project and the Principles on Choice of Law. For the future, the author advocates the adoption of more non-binding texts such as principles or model laws, that it cares more for the functioning of existing conventions and that it commits itself more to the dissemination of knowledge on the conflict of laws.

E.-M. Kieninger: **Towards a Codification of European Private International Law?**

In the first part, the article focuses on those areas of commercially relevant private international law which so far have not been touched by the European legislator, i.e. the law applicable to companies and to property law issues. In the second part, the author argues that an overall codification of European Private International Law, although perhaps desirable, might not be feasible and suggests a more moderate approach

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Germany: Legal Consequences of

the Draft Legislation on Child Marriage

On 17 February 2017, the German government presented a legislative draft on child marriage that represents a significant departure from current court practice (the text of the draft is available here). The legal status quo envisages a case-by-case examination whether a marriage was lawfully concluded outside of Germany. Such a determination considers both whether the marriage was consistent with German public policy and whether the surrounding circumstances of the individual situation of the minor spouse were taken into account. Particularly in cases where the marriage was concluded already some time ago and the spouses have since then voluntarily stayed together and established a family life, German courts have in the past upheld foreign marriages that would have been regarded as offensive at the time of their conclusion. Contrary to this case-by-case approach, the centerpiece of the recent draft is the automatic and strict non-recognition of marriages concluded outside of Germany by persons under the age of sixteen. Furthermore, marriages concluded by persons between the ages of sixteen and eighteen shall only be recognized if severe negative consequences were to occur otherwise.

In a recently published interview, Professor Jürgen Basedow, Director of the Max-Planck-Institute for Comparative and Private International Law in Hamburg, criticizes the rigid setting of a minimum age and the underlying assumption of the draft that a strict non-recognition of an under-age marriage would always be beneficial to the person concerned: “This overlooks many realities: In many instances the under-aged wife does not desire such assistance; for many young women marriage represents a recognition of their adulthood within their particular social setting.“ Basedow states further that there is no sensible way to avoid a meticulous case-by-case analysis of the particular circumstances of the individual case. The proposed draft, however, would lead to inflexibility and offer only little leeway to take the cultural identity of the spouses and their personal decisions into account.

The full interview with Jürgen Basedow is accessible here.