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DEUXIÈME MISE A JOUR DE LA NOTE SUR LA COMPETENCE JUDICIAIRE ET LA RECONNAISSANCE ET L'EXECUTION DES DECISIONS EN MATIERE DE SUCCESSIONS

établie par le Bureau Permanent

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SECOND UPDATE ON JUDICIAL JURISDICTION AND RECOGNITION AND ENFORCEMENT OF DECISIONS IN MATTERS OF SUCCESSION UPON DEATH

drawn up by the Permanent Bureau

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à l'intention de la Commission spéciale de mai 2000
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INTRODUCTION

1 The Eighteenth Session of the Hague Conference on Private International Law, after a short discussion, included in the Agenda of the Conference, but without priority:

> "a *jurisdiction, and recognition and enforcement of decisions in matters of succession upon death*".[1]

2 This topic had already been on the Agenda adopted by the Sixteenth and Seventeenth Sessions, and was the subject of a "Note on judicial jurisdiction and recognition and enforcement of decisions in matters of succession upon death", drawn up by the Permanent Bureau (Prel. Doc. No 14 of May 1992 for the attention of the Special Commission of June 1992 on general affairs and policy of the Conference, *Proceedings of the Seventeenth Session*, Tome I, *Miscellaneous matters*, pp. 221-227 [attached hereto as Annex I]) and of an "Update on judicial jurisdiction and recognition and enforcement of decisions in matters of succession upon death" also drawn up by the Permanent Bureau (Prel. Doc. No 8 of June 1995 for the attention of the Special Commission of June 1995 on general affairs and policy of the Conference, *Proceedings of the Eighteenth Session*, Tome I, *Miscellaneous matters*, pp. 99-101 [attached hereto as Annex II]).

3 The past few years have not seen any major new developments which would affect the Permanent Bureau's conclusions:

- that there is a need for a Convention on jurisdiction and recognition and enforcement of decisions in matters of succession upon death, and that such a Convention would be feasible, if States were willing to apply a limitation to the huge variety of existing grounds of jurisdiction and accept the forum where the deceased had his or her habitual residence at the time of death as the cornerstone of the treaty framework, but
- that this would seem difficult to accomplish as long as no unification of conflict rules has been achieved and, more particularly, as long as the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* has not entered into force or at least its main principles have not been generally accepted.[2]

4 With regard to the 1989 Hague Succession Convention, it should be noted that the Netherlands ratified the Convention on 27 September 1996, and, in order to give immediate effect to its provisions in its internal law, have incorporated the rules of the Convention by an Act of 4 September 1996 on the conflict of laws in matters of succession upon death which entered into force on 1 October 1996. The Convention's rules have therefore been tested in the Netherlands for more than three years, with satisfactory results. Yet, no further ratification has followed,[3] even though major principles of the Convention, such as the *professio juris*, have found their way in domestic legislation on private international law.[4]

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[1] See Final Act of the Eighteenth Session, Part B, 4*a.*

[2] For a detailed explanation of these conclusions the reader is referred to Preliminary Document No 14 of May 1992 (Annex I).

[3] The Convention has been signed by Argentina, Luxembourg and Switzerland.

[4] See, for example, Article 46(2) of the Italian Statute on Private International Law of 31 May 1995, entered into force 1 September 1995.

5 Paradoxically, one notices in legal literature, and also judging from the contacts which the Permanent Bureau has with governments and individuals, a growing recognition of the inherent qualities of the Convention, its carefully balanced nature and the soundness of its principles.[5] There seems to be an emerging consensus that the Convention, in its Article 3, strikes the right balance between nationality and habitual residence as a connecting factor.[6] There is no doubt that the choice of the applicable law (within certain limits, so as to protect the interests of spouses and children), as provided for in Articles 5 and 6 of the Convention, is the key to international estate planning. And unity of the succession, as foreseen in Article 7 of the Convention, is likewise indispensable for a rational system both of applicable law and of jurisdiction in matters of succession. Finally, given the age old restrictions on agreements as to succession still prevailing in many systems even after recent reforms, uniformity of conflict rules concerning such agreements, as provided in Chapter III of the Convention, remains indispensable.

6 It seems, therefore, that the reason why the Convention of 1989 has not been more widely ratified has not to do with any inherent defects, but rather with the enormous diversity that continues to exist, even as between neighbouring countries, with regard both to the substantive rules on succession and to choice of law rules. It will require vision, concerted action and political will to overcome this huge diversity in order to put the available solution – as provided by the rules of the 1989 Convention – in place. And this, in turn, would then facilitate the unification of grounds of jurisdiction.

7 In determining the relative priority of the need for unification of conflict rules, as compared to the need for unification of jurisdiction rules and of provisions on recognition and enforcement, there is another factor which should not be overlooked. The overwhelming majority of successions are being handled without court intervention (except for administrative matters such as the issuing of documents or the appointment of personal representatives of the deceased to administer the estate. In respect of the latter, the *Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons* remains still relevant).

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[5] See, for example,

BORRÁS, A. – La Convention de La Haye de 1989 sur la loi applicable aux successions à cause de mort et l'Espagne, *E Pluribus Unum. Liber Amicorum Georges A.L. Droz*, Martinus Nijhoff Publishers, The Hague/Boston/London 1996, p. 7;

BRANDI, T., *Das Haager Abkommen von 1989 über das auf die Erbfolge anzuwendende Recht*, Duncker & Humblot, Berlin 1996;

HAYTON, D., The Significance of the Hague Conventions on Trusts and on Succession: A Common Law Perspective, *E Pluribus Unum. Liber Amicorum Georges A.L. Droz*, Martinus Nijhoff Publishers, The Hague/Boston/London 1996, p. 121 (spec. pp. 128 ff.);

PIRRUNG, J., Die Haager Konferenz für IPR und ihr Übereinkommen vom 1. August 1989 über das auf die Rechtsnachfolge von Todes wegen anzuwendende Recht, *Mélanges Fritz Sturm*, Editions Juridiques de l'Université de Liège 1999, p. 1607.

In Japan, the Explanatory Report drawn up by Professor Waters is presently under translation.

[6] It is significant that Professor Dieter Henrich, referring to developments within the European Union, notes that in light of the principle of free settlement and immigration policy, "the original nationality loses weight. This has repercussions for Private International Law. We notice that international Conventions use, to an increasing degree, habitual residence as a connecting factor instead of nationality. This trend will continue. *The next Hague Convention which will assert itself internationally will be the Convention on the Law Applicable to Succession to the Estates of Deceased Persons*, …" (emphasis added by the Permanent Bureau). See HENRICH D., Family law across frontiers: facts, conflicts, trends, in *Families Across Frontiers* (eds. Nigel Lowe and Gillian Douglas), The Hague/Boston/London, 1996, pp. 41-51.

8 In many countries, professionals such as civil notaries, solicitors, lawyers and others assist heirs and others interested in the succession in a satisfactory manner, in paying the debts, determining shares of heirs, devisees and legatees, dealing with any obligations to restore or account for gifts, advancements or legacies, etc. It is in the common interest that this practice, which tends to reduce or eliminate litigation, be reinforced by the uniform application, regionwide and worldwide, of clear balanced rules such as those provided by the 1989 Successions Convention. The example of the widely ratified *Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions* comes to mind here: this Convention has helped to reduce considerably litigation over the formal validity of wills.

9 The conclusion remains, therefore, that while the drawing up of the Convention on jurisdiction and recognition and enforcement of decisions in matters of succession would be useful, especially in combination with other areas of family property law, such an effort is unlikely to yield satisfactory results considering the great variety of existing grounds of jurisdiction which reflect the equally great variety of conflict rules. In order to be really useful, it should be combined with a common sustained effort to embrace the rules and principles of the 1989 *Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons*.

ANNEXES

ANNEXE I Note sur la compétence judiciaire et la reconnaissance et l'exécution des décisions en matière de successions (Doc. prél. No 14 de mai 1992)

ANNEXE II Mise à jour de la Note sur la compétence judiciaire et la reconnaissance et l'exécution des décisions en matière de successions (Doc. prél. No 8 de juin 1995)

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ANNEX I Note on judicial jurisdiction and recognition and enforcement of decisions in matters of succession upon death (Prel. Doc. No 14 of May 1992)

ANNEX II Update on judicial jurisdiction and recognition and enforcement of decisions in matters of succession upon death (Prel. Doc. No 8 of June 1995)