

Questionnaire
to assess the practical difficulties in accessing the content of foreign law
and the need for the development of a global instrument in this area

Introduction

In April 2006, the then Special Commission (now called Council) on General Affairs and Policy of the Hague Conference on Private International Law (the "Hague Conference") invited the Permanent Bureau to prepare a feasibility study on the development of a new instrument for cross-border co-operation concerning the treatment of foreign law¹.

With a view to beginning the assessment of the need for such an instrument, the Permanent Bureau organized a meeting of experts in this area with either a commercial law or family law perspective. This meeting took place on 23-24 February 2007. In preparation for the meeting, the experts were provided with a succinct analysis document drawn up by the Permanent Bureau. At the meeting, the experts were also provided with summary tables on the status of and access to foreign law in a sample of jurisdictions and a sample of legal norms in relation to the treatment of foreign law. A Report on the meeting was prepared for the attention of the Council of April 2007². The experts emphasized "that there should be no attempt to comprehensively harmonize the different approaches to the treatment of foreign law, as there is no need or likelihood of success for harmonization."³ The experts acknowledged, however, "that there is clearly a need to facilitate access to foreign law" and "supported the Permanent Bureau's continued work in the area."⁴ The meeting concluded that further work was required in order to reach an affirmative or negative answer regarding the feasibility of establishing an efficient and effective instrument under the auspices of the Hague Conference. In particular, the experts suggested that a Questionnaire be prepared as part of a more elaborate scientific study.⁵

At its April 2007 meeting, the Council invited the Permanent Bureau to develop a Questionnaire, as suggested by the meeting of experts, with a view to identifying practical difficulties in accessing the content of foreign law and determining the areas of foreign law for which information is required.⁶ This questionnaire would also invite Members to comment on the models suggested in the Report on the meeting of experts and their possible implementation⁷. Finally, the questionnaire should seek to identify in particular whether there is a practical need for the development of such an instrument.

The following Questionnaire addressed to the Members of the Organization has been prepared for that purpose. Conscious of the short delay to respond to this Questionnaire, the Permanent Bureau invites Members of the Organization to bring to the attention of their judicial authorities Questions No 15 to 28.

¹ See Prel. Doc. No 11 of June 2006, "Conclusions of the Special Commission of 3-5 April 2006 on General Affairs and Policy of the Conference", for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, para. 4. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs".

² See Prel. Doc. No 21 A of March 2007, "Feasibility Study on the Treatment of Foreign Law - Report on the meeting of 23-24 February 2007", prepared by the Permanent Bureau, for the attention of the Council of April 2007 on General Affairs and Policy of the Conference. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs". Annex 1 of this document contains a list of the experts who attended the meeting. Annex 2 contains the succinct analysis document drawn up by the Permanent Bureau and which formed the basis for the discussions at the experts meeting. The summary tables and sample of legal norms prepared for the experts meeting are reproduced in Prel. Doc. Nos 21 B and 21 C respectively; both documents are of March 2007 and are also available at < www.hcch.net >, under "Work in Progress" then "General Affairs".

³ See *ibid.*, Prel. Doc. No 21 A, 3rd para. of the introduction.

⁴ *Ibid.*, 1st para. of the conclusion.

⁵ *Ibid.*

⁶ See Prel. Doc. No 24 of July 2007, "Report of the Council on General Affairs and Policy of the Conference of 2-4 April 2007", para. 5. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs".

⁷ See Prel. Doc. No 21 A of March 2007, *supra*, note 2, for a description of the models: "Information Sheets and Country Profile Model"; "Network of Experts and Specialised Institutes Model"; "Direct Judicial Communications Model"; and "Revision of the Co-operative Mechanisms of the London and Montevideo Conventions". See also *ibid.*, Ann. 2, paras 54-65.

The Permanent Bureau would very much appreciate receiving your answers (in either English or French) **before 11 January 2008** in order to have sufficient time to prepare, before the end of February 2008, a Report summarizing the results of this consultation for the attention of the Council of early April 2008. Answers should be sent by e-mail to < secretariat@hcch.net > with the following heading and indication in the subject field:

"Questionnaire concerning the Treatment of Foreign Law - [name of the Member of the Organization]". Your cooperation in responding to this Questionnaire is very much appreciated.

Identification

Name of the Member State: The Russian Federation

For follow-up purposes

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Part I – General Questions

Please answer the following general questions with regard to the *European Convention of 7 June 1968 on Information on Foreign Law* (the "London Convention"), the *Inter-American Convention of 8 May 1979 on Proof of and Information on Foreign Law* (the "Montevideo Convention"), the *Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters* (the "Minsk Convention") and any bilateral treaty on proof of and / or information on foreign law ("bilateral treaty").

In this Questionnaire, the term "foreign law" encompasses both foreign internal (substantive) law and foreign private international law.

1) Is your State Party to:

- a) The London Convention⁸ YES
 - b) The Montevideo Convention⁹ NO
 - c) The Minsk Convention^{10,10} YES
 - d) Any bilateral treaty YES
- (Please indicate the number of bilateral treaties concluded: more than forty)

2) If not, does your State intend to become in the near future a Party to:

- a) The London Convention -----
- b) The Montevideo Convention NO
- c) The Minsk Convention -----
- d) or conclude any bilateral treaty YES

3) Please indicate (if applicable) the number of requests received in 2006 and the average number of weeks taken to respond to the requests under:

There is no statistical data on this matter. However according to the content, a response to two requests takes the arbitration court¹¹ about 4 weeks.

4) Please indicate (if applicable) the number of requests that emanated from the judicial authorities in your State in 2006 and the average number of weeks taken to respond to these requests under:

There is no statistical data on this matter.

5) Do you foresee an increase in the number of requests referred to in:

⁸ This Convention is not restricted to Member States of the Council of Europe (Art. 18). See Prel. Doc. No 21 C, *supra*, note 2, for the text of that Convention.

⁹ This Convention is not restricted to Member States of the Organisation of American States (Art. 13). See Prel. Doc. No 21 C, *supra*, note 2, for the text of that Convention.

¹⁰ The Minsk Convention states in Art. 15 that "[t]he central judicial authorities of the Contracting States shall provide one another upon request with information about the internal legislation in effect or which was in effect on their territories and about the practices of its application by the judicial authorities". This Convention is not restricted to Member States of the Commonwealth of Independent States (Art. 86). The text of the Minsk Convention can be found in Prel. Doc. No 27 of April 2005, "The Relationship between the Judgments Project and certain Regional Instruments in the arena of the Commonwealth of Independent States", prepared by E. Gerasimchuk for the Permanent Bureau, for the attention of the Twentieth Session of June 2005 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Ann. II. This document is available at: < www.hcch.net >, under "Conventions", then "Convention No 37", and "Preliminary Documents".

¹¹ The arbitration courts of the Russian Federation serve as federal courts and are part of the judicial system of the Russian Federation. Under the jurisdiction of the arbitration courts are the violations of rights of enterprises, institutions, organizations, state structures and citizens, concerning business, commercial and other economic activity.

According to Central Authority's opinion an increase in the number of incoming or outgoing requests is not foreseen. In the opinion of the other competent authorities (the arbitration courts as an example) an increase in the number of requests is virtual.

- 6) If so, in which areas of the law? Please specify for each of the sub-questions:
- a) Contract law (rent contracts, sale of goods contracts, lease contracts, building contracts)
Bankruptcy law
Corporate law
 - b) Contract law (rent contracts, sale of goods contracts, lease contracts, building contracts)
Bankruptcy law
Corporate law
Intellectual property law
Organization of the courts
Procedure law, concerning executive procedure.

7) Please indicate, if applicable, in bullet form to what extent you are satisfied with the instruments referred to in Question No 1:

Satisfied in general.

8) Please indicate, if applicable, in bullet form any shortcomings of these instruments:¹²

As a shortcoming of these instruments the arbitration courts reveal the problem, that the conventions in force permit the designation of only one Central Authority whereas the request concerning foreign law application should be responded by the supreme Courts.

Part II – Free public access to information on the content of the law

9) Does your State and / or Regional Economic Integration Organization ("REIO") provide online access to its legislation¹³ through an official (governmental) website?

YES

10) Does your State and / or REIO respond to written or oral requests for information on the content and / or application of its law?¹⁴¹⁵

YES.

Please specify for which areas of the law: civil, criminal & family law.

11) Are the services in Question No 10 available to people in other States?

¹² A list of Recommendations regarding day-to-day operations of the London Convention can be found in Prel. Doc. No 21 A, *supra*, note 2, Ann. 2, paras 62-63.

¹³ In force or which was in force.

¹⁴ In this Part, and questions related thereafter in Part IV, the term "law" encompasses both internal (substantive) law and private international law, including relevant provisions in treaties and Conventions.

¹⁵ The areas could include the following subjects: the legal order in general; organisation of the courts of justice system; organisation of the administrative tribunals system; legal professions; access to justice including legal aid; jurisdiction of the courts / administrative tribunals; bringing a case to a court / an administrative tribunal; alternative dispute resolutions; procedural time limits; applicable law; service of documents; taking of evidence and modes of proof; interim measures and precautionary measures; enforcement of judgments; simplified and accelerated procedures; marriage and nullity of marriage; divorce and legal separations; parental responsibility; parent-child relationship; international child protection including child abduction and child adoption; protection of adults; maintenance (child support and other forms of family support); traffic accidents; products liability; other types of torts; consumer protection; commercial contracts; sale of goods; securities transactions; property; secured interests; inheritance; bankruptcy; choice of court agreements; or legalisation and / or certification of documents.

YES. The requests concerning the Russian legislation should be formed in consistence with the provisions of the relevant multilateral convention or bilateral treaties. For example, in the case of the London Convention the request for information should be in the language of the requested State or may be accompanied by a translation into that language.

12) If yes, do people in other States have access to this service at the same costs as residents?

YES. For free.

13) Do you foresee the proportion of people in other States using these services increase in the future?

YES.

Please specify: It has been caused by the expansion of the economic operations with foreign entities, as a result of the trade turnover growth with the other states for the last ten years & also by an increasing degree of foreign entities activities in the Russian economy through foreign investments, which number has been growing recently.

Part III – Access to information on the content of foreign law at the litigation stage

14) Please indicate, where possible, a rough estimate of the percentage of civil and commercial law cases heard by the judicial authorities of your State in 2006 which required the application of foreign law and whether this percentage is likely to increase.

If no estimate can be obtained for 2006, please refer to another year. Percentage: 0,02 % (2003-2006). Likely to increase: YES

The dynamics of the quantity of cases for this period shows the number of such kind of actions does not increase. At the same time it is not excluded, that in the near-term period the number of the cases with the application of foreign & international legislation is going to increase gradually for the reasons, indicated in question № 13.

15) Please Indicate, if possible, the most common areas of foreign law applied by or invoked before the judicial authorities of your State.

Marriage and nullity of marriage
Divorce and legal separations
Commercial contracts (rent, lease, building contracts & etc.)
Sale of goods
Securities transactions
Corporate law
Property
Bankruptcy
Traffic accidents
Choice of court agreements
Intellectual property
Procedural time limits

16) Please identify, if possible, the States whose laws are most frequently applied by or invoked before judicial authorities in your State:

Great Britain, Ukraine, Germany, the Netherlands, France, the USA.

17) In your State, a judicial authority ascertains foreign law (check more than one box if applicable):¹⁶

- a) *ex officio* without the assistance of an expert¹⁷ (e.g. law firm, specialized institute,¹⁸ university, government (i.e. specialized department or embassy), etc.)
- b) *ex officio* with the assistance of an expert
- c) by submitting, *ex officio*, a request for information under a bilateral or multilateral treaty (where applicable)
- k) by submitting, at the request of a party (without the objection of the other or another party) or all parties, a request for information under a bilateral or multilateral treaty (where applicable)

18) Please rank in order of priority (1 being the highest) the sources consulted by judicial authorities in your State to ascertain the content of foreign law under any of the methods described in a), d) and h) of Question No 17:

Internet (official legislation, case-law and legal publications websites)

Internet (legislation, case-law and legal publications from private databases (as opposed to official databases))

Local or personal library (local electronic databases)

Local or personal library (printed legislation, case-law and legal publications)

Other: databases & libraries of research-and-development centers & universities; databases & libraries of embassies & consulates & other agencies of the Russian Federation abroad.

19) Please explain whether and, if so, how the judicial authorities in your State verify the reliability and / or authenticity of these sources and the information provided therein:

The information from the official sources (an official website, publications & etc.) doesn't need to be examined, because the reliability of this information is very high. The information from the unofficial sources has to be checked with the help of supplementary information, data received from the expert's report, as an example, or other sources of information, which are determined by the court in case there are reasons to doubt the received information on foreign legislation (an application of the litigant, fact's inconsistency & other reasonable causes to doubt). In any case the court estimates on its own the reliability and/or authenticity of the received information on foreign law.

20) Where these sources and the information provided therein are not available in a language understood by the judicial authority, please describe the mechanisms used to address this difficulty. Description:

An expert translator can be engaged in the process. The arbitration court has the right to appoint the examination of the translation on the grounds of litigant's application or on its own initiative. The person, who was entrusted with the examination of the translation, is obliged to appear before the arbitration court. The legislation provides for opportunity to ask the translator the questions concerning his translation. The translation (or expert report) as a result of the translator work becomes a proof in the case.

¹⁶ See Prel. Doc. No 21 A, *supra*, note 2, Ann. 2, paras 4-15, and Prel. Doc. No 21 B, *supra*, note 2, for a description of the status of and mechanisms to access foreign law in a sample of jurisdictions.

¹⁷ In this Questionnaire the term expert is used in its broadest sense; see also Questions Nos 21 to 23 for possible qualifications that may apply.

¹⁸ For example, the Swiss Institute of Comparative Law in Lausanne, the Max Planck Institute in Hamburg, the *Deutsches Notarinstitut* in Germany, the *Internationaal Juridisch Instituut* in The Hague, the CRIDON in France, or any relevant institute / office attached to a University.

At the same time the court examines on its own the translation and applies the correspondent rule of foreign law. That allows the court to choose the most appropriate interpretation of the law taking into account all facts of the case.

21) Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question No 17), does this expert need to be a qualified lawyer or jurist in accordance with the law of your State? In the case of a specialized institute, does it need to meet certain requirements?

YES

22) Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question No 17), does this expert need to be a qualified lawyer or jurist in accordance with the law of the State whose laws are being ascertained? In the case of a specialized institute, does it need to meet certain requirements?

YES, with the assistance of a qualified lawyer, but not a jurist in accordance with the law of the State whose laws are being ascertained.

23) Please specify which individuals and / or Institutions may provide expertise under any of the methods described in b), e) and i) of Question No 17:

a) Local private expert (e.g. law professor, lawyer and / or jurist in private practice)

YES

b) Foreign private expert (e.g. law professor, lawyer and / or jurist in private practice)

YES

c) Local specialised Institute

YES

d) Foreign specialised Institute

YES

e) Local government (including embassies abroad)

YES

f) Foreign government (including embassy in your State)

YES

g) Member of the local judicial authority

YES

h) Member of a foreign judicial authority

YES

i) Other(s):-----

j) Which of the above is most often used?

Local specialised institute
Local private expert
Local government (including embassies abroad)
Foreign private expert
Foreign specialised institute

24) Please indicate who bears the costs of the expertise provided under any of the methods described in b), e) and i) of Question No 17:

Other: The costs of the expertise are included in general costs.

25) Would your answers to Questions Nos 21-24 be the same for the expert referred to under f) and j) of Question No 17?

YES. As long as an expert is not a litigant, but only the person, assisting the justice, he doesn't have any litigant procedural rights. The expert is allowed to participate in the hearings only to the extent necessary to provide an expert report. The expert has no right to influence the process in general.

26) Please describe, if possible, the common characteristics of requests for information on foreign law submitted under any of the methods described in c), g) and k) of Question No 17: The type of question asked; who most frequently asks questions (*e.g.*, parties with too little or no resources to afford an expert); the reasons why questions are asked (*e.g.*, no material available in a language understood by the judicial authority seized of the matter); etc.

Description:

Usually the requested questions are indicated in a general and specified forms. Mostly the questions are formulated by the Court. However the litigants have the right to apply to the Court for some questions to be included in the request. If the Court considers these questions appropriate for the dispute settlement they are included in the request. Usually, the Court is interested in particular provisions of foreign law, regulating specific relations. The foreign law practice or requests for the legislation and doctrine is extremely rare.

Usually the Court enables the mechanism of the request at the very last turn, namely when the litigants failed to present the proofs of the existence of appropriate foreign rule and its application practice and when the Court failed to find out independently the correspondent rule or its translation.

27) Please indicate whether judicial authorities in your State can transmit the request for information directly to a receiving agency in the State addressed under any of the methods described in c), g) and k) of Question No 17?

Only if such a mechanism is provided by the international treaty, which the Russian Federation is a party. As an example, such a mechanism is provided by the Agreement on the commercial disputes settlement procedure, Kiev 1992 (The Kiev Agreement).

28) If so, can the request be transmitted by regular non-secured e-mail?

NO, the request for information is regarded as official correspondence.

Part IV – Future development of an instrument and / or mechanisms to access information on the content of foreign law

29) In the light of your answers to this Questionnaire, are you of the view that the Hague Conference should develop a global instrument and / or mechanisms to access information on the content of foreign law?

The mechanisms, provided by the effective international treaties, are in general satisfactory. At the same time if the new developed mechanisms do not duplicated the present one, but make the legal assistance cooperation between state authorities as quickly and qualitative as possible, such a work could contribute significantly to that cooperation.

30) If the Hague Conference were to develop a global instrument to access information on the content of foreign law:

a) Would you be in favour of a flexible instrument in particular with respect to:

i) the availability of several channels through which information on foreign law can be sought and in relation to experts from whom information can be obtained?

YES. Several information channels could increase the reliability of this information and could provide its search in an appropriate and the most convenient way for a particular question. For example, a request concerning procedural terms for a particular application can be responded with the help of a foreign legislation without any experts involving. For such kind of requests simplified information retractor would be the most effective. Besides, the wide range of information channels allows getting more precise information if one of the channels provides incorrect information and a mistake is discovered before the Court takes a decision.

ii) the use that may be made of each such channel and expert?

NO. The Court is expected to determine independently which channel or expert should be requested, taking into account the facts of the case and litigants' arguments.

iii) the availability of information technologies to ensure a speedy process of the requests and to alleviate language barriers?

YES. The implementation of the information technologies would make a positive impact on request effectiveness. A speed of a process of the outgoing and incoming requests would rise severely. But it's rather early to talk about the alleviation language barriers, because the translation of juridical texts requires special language knowledge and skills. Modern automatic translators can't provide a qualitative translation level, required for taking the decision.

b) Should the information received provide an objective and general description of the law in the foreign State, including references to relevant case-law (as opposed to a specific answer as to how the foreign law should be applied to the issue(s) at stake)?

YES. The Russian legislation, namely the Code of administrative procedure, adopted in 2002, provides that the content of the foreign rule is determined in accordance with its official reading, application practice and doctrine in a particular foreign state. It is presumed that the objective and general information on foreign legislation should be submitted in scopes and cases, necessary for the fair dispute settlement. This question should be determined by the Court on the bases of difficulty of the question.

c) Should the information received be non-binding (as opposed to binding)?

YES, otherwise the principal of judge independence would be violated.

d) Should this instrument and / or these mechanisms be general in order to permit access to different areas of foreign law (as opposed to being limited to certain area(s) of the law)?

YES. The general mechanism would permit making information exchange system more simple, convenient and effective. Besides, other options could also be considered. With the help of this options the mentioned above mechanism would allow the information exchange not only for the disputes settlements before the Court, but for the exchange of experience on legislation improvement and other issues.

e) Should this instrument and / or these mechanisms contain provisions on legal assistance to accommodate individuals with little or no resources?

YES. It is possible to include the provisions on this matter in the text of the future convention. It could be an additional guarantee of the access to the impartial justice for the individuals with little or no resources.

f) Should this instrument and / or these mechanisms be extended to notaries and other professionals who need to have access to the content of foreign law in contexts other than litigation (e.g. in relation to successions)?

YES. Wide access to the legal information would increase the legal culture of the individuals and organizations, promote the expansion of economic links between states, because the knowledge of foreign legislation helps to determine more precisely the status of the international trade participants and to foresee the consequences of the external contracts.

31) If this is not yet the case for your State / REIO, are you of the opinion that it would be useful to make information on the content of the law of your State / REIO available online in a central database?

The mechanism, providing the online access to the information on the content of the foreign law would facilitate quick access to that information, avoiding rather prolonged request procedures. Besides the information on these websites could be revived easily, that could ensure the access to the relevant legislation, its application practice and latest law doctrine.

32) Are you of the opinion that it would be useful to have information on the content of the law of your State / REIO available online in a standard electronic format (e.g. in the form of country profiles that are based on a pre-established, harmonised structure) available in English and French (or other language(s)) in addition to its language of origin?

Certain uniformity in this sphere could assist the convenient use of the correspondent website by all interested visitors.

33) If information on the content of the law of your State were to be made available worldwide in either of the forms mentioned in Questions Nos 31 and 32, please identify for which of the following subjects it would be most valuable?

Legal order in general

Organisation of the courts of justice system

Organisation of the arbitrary courts

Organisation of the administrative tribunals system

Access to justice including legal aid

Jurisdiction of the courts / administrative tribunals

Bringing a case to a court / an administrative tribunal

Alternative dispute resolutions

Procedural time limits

Applicable law

Service of documents

Taking of evidence and modes of proof

Interim measures and precautionary measures
Enforcement of judgments
Simplified and accelerated procedures
Commercial contracts
Sale of goods
Securities transactions
Property
Inheritance
Bankruptcy
Legalisation and / or certification of documents
Notarial acts or certificates

Other, please specify:

Corporate law, because it touches questions concerning discretions, vested by a legal person on contracts making, creates the conditions for business activities abroad, determines the issues of establishment & abatement of legal person, rights of the participants & founders of the legal person;

Tax law, because it determines practical particularities of business activity abroad;

Intellectual property, because it allows to determine the guarantees of right holder abroad & etc.

34) Are you of the opinion that the instrument identified under Question No 29 should be developed in combination with either of the instruments described under Questions Nos 31 and 32?

YES. It could correspond to the latest tendencies of free access to the legislation & justice. The consideration of these tendencies could help to work out the document, corresponding to all latest requirements.

35) Other comments on the models proposed in Preliminary Document No 21 A, any other model, or on a possible future instrument in this field:¹⁹

No comments.

¹⁹ See Prel. Doc. No 21 A, *supra*, note 2, for a description of the models: "Information Sheets and Country Profile Model"; "Network of Experts and Specialised Institutes Model"; "Direct Judicial Communications Model"; and, "Revision of the Co-operative Mechanisms of the London and Montevideo Conventions". See also *ibid.* Ann. 2, paras 54-65.