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RAPPORT SUR LA RÉUNION DU 23-24 FÉVRIER 2007

préparé par le Bureau Permanent

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FEASIBILITY STUDY ON THE TREATMENT OF FOREIGN LAW
REPORT ON THE MEETING OF 23-24 FEBRUARY 2007

prepared by the Permanent Bureau

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INTRODUCTION

In April 2006, the Special Commission 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 law. The Permanent Bureau determined that the most useful manner in which to begin the assessment of the need for such an instrument was to organise a meeting of experts, who know about the area and have either a commercial law or family law perspective. Attached is a list of experts, consisting of judges, practitioners and academics, who attended the meeting, which took place at the Permanent Bureau from 23 February to 24 February 2007.[1]

In preparation for the meeting of experts, the Permanent Bureau drew up a succinct analysis document, which is also attached.[2] The document provided experts with a very brief comparative law synopsis of national law and existing international multilateral mechanisms[3] dealing with the treatment of foreign law, as well as suggested avenues for discussion in relation to possible future work in this area. The purpose of the present report is to summarise the main conclusions of the meeting and to suggest a way forward. Although, as an overall conclusion from the meeting of experts, it may be concluded that there is clearly a need to facilitate access to foreign law, it also appeared that further work is 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. This report should, thus, not be regarded as a final feasibility study on the subject matter, but rather as an intermediate description of the current status of discussions and possible ways forward.

DISCUSSIONS AT THE MEETING

At the meeting, experts were provided with summary tables on the status of and access to foreign law in a sample of jurisdictions. These summary tables, which accompanied the succinct analysis document,[4] revealed a surprisingly disparate and changing picture of the treatment of foreign law, marked by subtle nuances from one jurisdiction to another. From an analysis of these tables, and as a result of discussions throughout the meeting, experts concluded that there should be no attempt to comprehensively harmonise the different approaches to the treatment of foreign law, as there is no need or likelihood of success for harmonisation. Several experts, nevertheless, recognised the need to develop an instrument, which effectively improves access to foreign law, accommodates the different approaches taken by legal systems in this subject matter and at the same time fits into their procedural framework. The experts indicated that according to their practice, there is a need to obtain information on foreign law mostly in the areas of family law, the law of successions and commercial law. They were of the view that there were no compelling reasons to exclude, at this point, any areas of civil, commercial and procedural law.

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[1] See Appendix 1.

[2] See Appendix 2.

[3] *Inter alia* 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 *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Art. 1); the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Art. 14); the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children* (Art. 35); and, the *Hague Convention of 13 January 2000 on the* International Protection of Adults (Art. 29).

[4] See Preliminary Document No 21 B of March 2007, "Summary Tables on the Status of and Access to Foreign Law in a Sample of Jurisdictions", prepared by the Permanent Bureau with the assistance of experts, some of which attended the 23-24 February meeting of experts, 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".

During the meeting, consideration was given to four different models, detailed in the succinct analysis document.[5] Each of the four models was elaborated to respond to specific scenarios and needs. Nevertheless, each could be combined with other models, as the models were by no means mutually exclusive. The first model – the most informal – proposed the creation of information sheets and country profiles. Less informal was the second model, which contemplated the creation of a network of experts and specialised institutes. The third model proposed the establishment of direct judicial communications in a judicial network. Finally, the last model suggested a revision of the co-operative mechanisms of the London and Montevideo Conventions.

THE INFORMATION SHEETS AND COUNTRY PROFILES MODEL

Under the information sheets and country profiles model, non-binding information on foreign law could be made accessible to the public at no cost. The model would offer individuals with little or no resources an economical source of information on foreign law. However, as a result of access to foreign law differing from State to State, the model's disadvantages may include variations in the quality of information available. Maintaining and updating information sheets and country profiles requires an ongoing commitment of resources from the States. While some experts pointed to the potential weaknesses of this model, as well as the challenges involved in its implementation, other experts endorsed the model for purposes of providing basic information about the content of foreign law. During the discussion, some experts indicated that several States already provide information on their law to immigrants and other individuals moving within their States or regions. It is recognised that Member States attending the Council on General Affairs and Policy of the Conference are probably best placed, as regular recipients of requests for information on the law of their State, to give consideration whether some areas of the law could be addressed in the future by information sheets or other country profiles.[6]

THE NETWORK OF EXPERTS AND SPECIALISED INSTITUTES MODEL

A vast majority of experts indicated support for the network of experts and specialised institutes model. Under this model, standard forms could be used to appropriately tailor requests to experts and specialised institutes, either listed at a website for direct consultation at the user's expense, or set up under an administrative structure – perhaps supported by a system of cross-border transmission via government authorities similar to that of the London Convention – and financed by the Contracting States. Most experts acknowledged advantages to this model, particularly because of the potential reliability of information emanating from specialised institutes. Consideration would need to be given to the costs of this model where financed by States.

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[5] See, Appendix 2, Succint Analysis Document, paragraphs 54-65.

[6] This could include the law of successions or cross-border family mediation. See on this latter point, Preliminary Document No 20 of March 2007, "Feasibility Study on Cross-Border Mediation in Family Matters" drawn up by the Permanent Bureau, available at < www.hcch.net >, *supra*, note 4. Country profiles are currently under development within the Hague Conference for the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption* and the future Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

THE DIRECT JUDICIAL COMMUNICATIONS MODEL

The direct judicial communications model found comparatively fewer supporters among the experts at the meeting. Direct judicial communications have been used in the context of cross-border insolvency issues and also under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. Issues arise as to whether judges can provide information on matters other than logistical and case management issues and whether or not views provided by judges are binding. The majority of experts were reluctant to advocate the direct judicial communications model in the treatment of foreign law context. A few experts expressed concern that the model might touch upon domestic procedural law and create liability for judges. Other experts highlighted the fact that judges might be reluctant to offer other judges information, including an opinion – even on their own law.

REVISION OF THE CO-OPERATIVE MECHANISMS OF THE LONDON AND MONTEVIDEO CONVENTIONS

The final model, suggesting a revision of the co-operative mechanisms of the London and Montevideo Conventions, was met with mixed reviews. Experts were made aware that any formal revision of the London Convention would be limited to Member States of the Council of Europe and other States Parties to the Convention. Experts also pointed to the futility of rewriting, expanding upon or adding to the London Convention, which most considered to be of limited use due to a lack of publicity and effective monitoring to improve its overall operation. The model proposed instead a new instrument, established within a global framework, taking into account the deficiencies and drawing upon the strengths of other co-operative mechanisms. The prevailing view among the experts was that a completely new mechanism, facilitating access to foreign law and established under the auspices of the Hague Conference would be preferable to any revision of the London and Montevideo Conventions.

Some experts, however, failed to see the added value of such an instrument, especially if a new instrument were to give the same evidentiary weight as the London Convention gives to information on foreign law (*i.e.* an account of foreign law) provided by an expert. A reply to a request, made under the London Convention, provides, to the requesting judicial authority, authoritative, objective, impartial and non-binding information on the law of the requested State. Some experts, however, advocated that added weight be given to the information provided by the requested State, and proposed the possibility of such information having either greater probative value or *prima facie* validity in the requesting State. A majority of experts, however, were concerned that this might have the effect, in certain situations, of compelling judges to accept such information for the truth of its content, thereby potentially interfering with judicial discretion.

POST-DISCUSSION PROPOSED MODEL

From the discussion, experts concluded that each of the proposed models, particularly the first and second model, standing alone, did not appear to offer sufficient added value to the current system for ascertaining foreign law. It was, however, possible to enumerate a number of important cornerstones, essential to a new model or instrument in the treatment of foreign law context:

(1) Speed, particularly in replying to requests for information on foreign law;

(2) Flexibility, particularly with respect to channels through which information on foreign law can be sought and with respect to circumstances where the need to make follow-up requests arises;

(3) Reliability of the information on foreign law, which should be non-binding, and non-partisan and should provide an objective (and general) description of the state of the law in the foreign State in order to avoid interference with judicial discretion;

(4) Generality, permitting access to different areas of foreign law;

(5) Cost-effectiveness and accessibility to individuals with little or no resources; and,

(6) Consideration of opportunities provided by advances in information technology.

In light of these cornerstones, the Permanent Bureau presented a mixed model, which combined the network of experts and specialised institutes model and the model suggesting a revision of the co-operative mechanisms of the London and Montevideo Conventions. This mixed model provided alternatives: either a request for information about a foreign law could be addressed directly or indirectly, via an authority in the requesting State, to a specialised institute, private expert, law firm or Central Authority in the requested State. This Central Authority could then either answer the request for information itself or delegate the answering function to another expert (body), specialised institute, private expert, or law firm. The proposed model envisaged an increase of specialised institutes, which could arise with or without a new instrument for cross-border co-operation in place.

Experts were invited to discuss the proposed mixed model. Consideration was also given to the question of whether or not there is a need to limit the requesting authority therein to judges. Special attention was drawn to the potential for conflicting replies arising from situations where requests emanated from litigants rather than from a judicial authority. It was also mentioned that notaries, as known in States with a civil law tradition, in their quasi-judicial capacity, could also be considered requesting authorities.

Experts also discussed the idea of creating a network of certified bodies authorised to answer requests. A few experts remarked that since few States have institutes specialising in providing information on foreign law, the creation of other such institutes might follow. Essentially, certification of these specialised institutes, private experts and law firms would provide a mechanism whereby quality assurance could be assessed and even advertised in a competitive environment between certified institutes. The certifying body could also provide information to users regarding the services, available resources, as well as the number of cases and States dealt with by each of the certified bodies.

Several experts questioned how the certification of specialised institutes, private experts and law firms could be managed, as well as the criteria for certification. No conclusion was reached as to whether a national authority or, perhaps, an international authority could provide certification and whether the latter would be competent to certify all specialised institutes, private experts and law firms. A few experts expressed the view that accreditation by an international authority may not be as credible as national certification. Others, on the other hand, noted the possibility that national authorities

might be reluctant to withhold certification, thereby compromising the standards for certification and consequently, casting doubt on the reliability of the information on foreign law.

CONCLUSION

Experts concluded that there is clearly a need to facilitate access to foreign law. As a result of the meeting, experts supported the Permanent Bureau's continued work in this area. Most experts, in fact, remarked that the mixed model proposed by the Permanent Bureau constituted a starting point for further work. It was suggested that a more elaborate scientific study be conducted in order to ascertain whether or not a new instrument for cross-border co-operation in this area is achievable. In the course of this scientific study, a questionnaire might be sent to Member States of the Hague Conference and might include, for example, the following questions:

(1) Please indicate, where possible, a rough estimate of the percentage of civil and commercial law cases heard by the courts of your State in the past year which involved the application of foreign law.

(2) Describe the mechanisms available to judges in your State for the ascertainment of foreign law.

(3) Is your State party to any bilateral or multilateral treaties facilitating access to foreign law? If so, please describe the frequency with which sitting judges in your State use these bilateral and multilateral treaties to ascertain the content of foreign law and state reasons for your response.

(4) Are there any procedural rules in your State that would prohibit the use by a sitting judge of a non-partisan expert to ascertain relevant foreign law where it is applicable or invoked in proceedings before that judge?

(5) Given the current state of the law in your State, can a sitting judge directly seek information on foreign law from a specialised institute, private expert, university or law firm – in your State, or also abroad? - in order to ascertain the content of a foreign law, applicable or invoked in proceedings before that judge?

(6) If so, please provide an explanation as to how the sitting judge might come to know of the existence of the services of these specialised institutes, private experts, universities or law firms.

(7) If so, please indicate how the cost issues are addressed and covered in relation to these services.

(8) If not, is there a government body in your State through which a sitting judge could make a request for information regarding foreign law?

(9) If so, is that government body qualified and competent enough to reply to requests for information regarding basic legal questions under a foreign law?

(10) Is that government body qualified and competent enough to reply to requests for information regarding complex legal questions under a foreign law?

(11) Are there particular States whose laws are frequently applied or invoked in your State?

(12) If so, is there, in your State, an official translation body in place that can provide official translations of foreign legal texts from such particular States into the official language of your State?

(13) For which areas of the law, in cross-border situations, is the public most frequently seeking information?

(14) If information sheets or country profiles were to be developed, please identify areas of civil, commercial and/ or procedural law for which these should be made available.

The Permanent Bureau of the Hague Conference recommends that the Council on General Affairs and Policy of the Hague Conference extend the feasibility study on the development of a new instrument for cross-border co-operation concerning the treatment of foreign law. The Permanent Bureau suggests that, subject to available resources, the feasibility study be extended to November 2007 or until the meeting of the Council on General Affairs and Policy of the Hague Conference in 2008.

A N N E X E S

Foreign Law Experts Meeting
(23-24 February 2007)

Final list of participants

Mr Paul R. Beaumont, Professor – University of Aberdeen, School of Law, United Kingdom

Mr Gilberto Boutin I., Practising Attorney; Professor – Universidad de Panama, Panama

M. Domenico Damascelli, Notaire – UINL, Bari, Italie

Mr Eberhard Desch, Ministry of Justice, Berlin; Curator – Advisory Board, Max Planck Institute for European Legal History, Frankfurt am Main, Germany

Ms Talia Einhorn, Senior Research Fellow – T.M.C. Asser Institute (The Hague) and Professor – Tel Aviv University, Israel

M. Benoît Emery, Juge – Cour supérieure du Québec, Montréal, Québec, Canada

Mr Richard G. Fentiman, Professor – University of Cambridge, Queen's College, Cambridge, United Kingdom

Mr Francisco J. Garcimartin Alférez, Professor – Universidad Rey Juan Carlos, Madrid, Spain

Mrs Yujun Guo, Professor of Law – Wuhan University, Hubei, China

Mr Miloš Hatapka, Directorate-General – Justice, Freedom and Security, European Commission, Brussels, Belgium

Mr Geoffrey C. Hazard, Professor – University of California, Hastings College of the Law, United States of America

Mr John G. Koeltl, Judge – US District Court of New York, United States of America

Mr Herbert Kronke, Secretary General – UNIDROIT; Professor – Ruprecht-Karls-Universität Heidelberg, Germany

M. Pierre Mayer, Professeur – Université de Paris I Panthéon-Sorbonne, Paris, France

Mr J. David McClean, Emeritus Professor – University of Sheffield, School of Law, Sheffield, United Kingdom

Mr Gustaf Möller, Judge – Supreme Court of Finland, Helsinki, Finland

Mme Françoise Monéger, Conseiller à la première chambre civile de la Cour de Cassation, Paris, France

Mr Ved P. Nanda, Professor – College of Law, University of Denver, United States of America

Ms Yuko Nishitani, Associate Professor – Tohoku University, Sendai, Japan

Mme Jocelyne Palenne, Rédactrice au Bureau de l'entraide civile et commerciale internationale, à la direction des affaires civiles et du sceau, Ministère de la Justice, Paris, France

Mme Eleanor Ritaine, Directeur – Institut Suisse de droit comparé, Lausanne, Suisse

Mr David Steel, Judge – Admiralty and Commercial Court, Royal Courts of Justice, London, United Kingdom

Mr A.L.G.A. Stille, Professor – University of Amsterdam; Vice-President, Court of Appeals of The Hague; Director – International Juridical Institute, The Hague, Netherlands

Mr A.V.M. Struycken, Professor Emeritus – University of Nijmegen; President of the Netherlands Standing Government Committee on Private International Law, Heilig Landstichting, Netherlands

Mr Koji Takahashi, Associate Professor – Doshisha University, Kyoto, Japan

Mr Clemens Trautmann, Scientific Collaborator – Max Planck Institute for Comparative and International Private Law, Hamburg, Germany

Mr Peter D. Trooboff, Partner – Covington & Burling LLP, Washington, DC, United States of America

Ms María Elsa Uzal, Professor – University of Buenos Aires; Magistrate – Buenos Aires Commercial Court of Appeals, Argentina

M. Jean-Luc Vallens, Magistrat, Professeur – Université Robert Schuman, Colmar, France

M. George Yates, Partenaire – Orrick, Paris, France

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L'ADMINISTRATION DU DROIT ÉTRANGER
DOCUMENT D'ANALYSE SUCCINCT

préparé par le Bureau Permanent

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THE TREATMENT OF FOREIGN LAW
SUCCINT ANALYSIS DOCUMENT

prepared by the Permanent Bureau

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INTRODUCTION[1]

1. In April 2006, the then Special Commission (now called the Council) on General Affairs and Policy of the Hague Conference on Private International Law "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 law",[2] *i.e.* information relating to its content as well as its status.

2. In its preparation for this feasibility study, the Permanent Bureau is organising a meeting of experts to be held on 23 and 24 February 2007 at the Permanent Bureau in The Hague. This meeting will bring together judges, practitioners and academics, who have a particular expertise in the relevant field from either a commercial law (*e.g.*, international commercial transactions or cross-border insolvency) or family law perspective.

3. The purpose of this document is to assist the experts meeting by providing (I.) a very brief comparative law synopsis of the treatment of foreign law, and (II.) some avenues for discussion in relation to possible future work in this area. At its meeting of 2 to 4 April 2007, the Council on General Affairs and Policy of the Organisation may (the decision may also be taken by the XXIth Session) decide what, if any, future work the Permanent Bureau will undertake in this field. It is the intention of the Permanent Bureau to present this document to the Council, accompanied by a brief report on the meeting of experts.

I. *DE LEGE LATA* – THE CURRENT SITUATION

4. With an increasing number of cases involving foreign elements and with greater ease of cross-border movement and global communication, there is an ever-growing need for instruments providing effective international legal and judicial co-operation. An effective management of cross-border cases presupposes that there are reliable means in place to seek information about the content of foreign law in pre-litigation phases (*e.g.*, to choose the applicable law to a contract or to assess the legality of an envisaged transaction), as well as in court proceedings.

5. Particularly in a litigation context, the "treatment" of foreign law raises a series of delicate questions: Are the conflict of laws rules of the forum mandatory or not? How can the content of foreign law, where applicable, best be established, by whom (judge or parties) and at what costs? At the appellate level, can the application of foreign law be reviewed, and if so, under what circumstances?

6. The summary tables provide succinct answers to these questions for a sample of jurisdictions from both civil and common law traditions. They reflect a surprisingly disparate – and changing – picture with numerous subtle nuances.

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[1] The Permanent Bureau would like to thank Shaheeza Lalani (Canada), Assistant Legal Officer, Intern at the Permanent Bureau from October 2006 until April 2007, and Carole Chan (Canada), former Legal Assistant and Intern at the Permanent Bureau from September 2005 until June 2006, for their research assistance in relation to this project.

[2] See "Conclusions of the Special Commission held from 3-5 April 2006 on General Affairs and Policy of the Conference" drawn up by the Permanent Bureau, June 2006, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs".

A. Description of the status of and access to foreign law in a sample of jurisdictions[3]

7. In his 1978 paper, entitled "Foreign Law Before Domestic Tribunals", George T. Yates distinguished between three approaches to the problem of establishing foreign law in national courts: the passive, or "fact approach"; the active, or "law approach"; and, the intermediary, or "discretionary approach".[4] In States taking the latter approach courts have the discretion, but not the obligation, to invoke foreign law issues and ascertain the relevant content of the applicable foreign law *ex officio*.[5]

8. The passive approach refers to the passivity of the judge where foreign law is invoked by a litigant to a dispute. States taking the passive approach often treat foreign law as a matter of fact, rather than as a matter of law and require the litigant invoking the foreign law to also prove the relevant content of the foreign law – often a burdensome and costly task.[6] That foreign law is treated as a matter of fact rather than as a matter of law, theoretically means that foreign law is beyond the scope of judicial notice,[7] and findings at trial are only reversible on appeal if insufficiently proved or clearly erroneous.[8]

9. In stark contrast to the passive approach, the active approach refers to the active role of the judge in the treatment of foreign law. In States taking this approach, foreign law is treated as a matter of law, often resulting in fewer technicalities and exclusionary rules of evidence hindering the admissibility of foreign law. States taking this approach often compel courts to invoke foreign law *ex officio* and require courts to ascertain the relevant foreign law to the extent possible.[9] In this regard, courts may rely on a multitude of resources, such as independent foreign law experts. Additionally, there are, at least in theory, fewer restrictions preventing review of the application of foreign law in States taking the active approach.[10]

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[3] This section is limited to a study of the treatment of foreign law in the following countries: Argentina, Canada, China, Egypt, Finland, France, Germany, India, Israel, Japan, Mexico, the Netherlands, Panama, Spain, Sweden, Switzerland, the United Kingdom and the United States.

[4] G.T. Yates, "Foreign Law Before Domestic Tribunals" (1978) 18 *Va. J. Int'l L.* 725.

[5] *Ibid.*, at 729.

[6] According to Yates's 1978 study, among the States examined, Argentina, China, India, Mexico, Spain, and the United Kingdom were found to take the passive approach. Since Yates's study, however, the situation has changed for some States. For example, Argentina and Mexico seem to be moving toward a more active approach. According to J.-G. Castel, *Canadian Conflict of Laws*, 3rd ed. (Toronto and Vancouver: Butterworths, 1994) at 147, Canada generally takes the "fact approach" and since the reform of the Civil Code of Québec came into effect in 1994, that jurisdiction operates a mixed system composed both of a passive and somewhat active approach. Finally, according to. T. Einhorn, "Proof of Foreign Law in Israeli Courts – Getting the facts and fallacies straight" in T Einhorn & K. Siehr, eds., *Intercontinental Cooperation Through Private International Law – Essays in Memory of Peter E. Nygh* (The Hague: T.M.C. Asser Press, 2004) at 109, Israel also takes the "fact approach".

[7] Exceptionally, courts in these States may take judicial notice of the foreign law where it is notorious, previous findings regarding the relevant foreign law are presumed binding, a statute confers judicial notice of particular foreign laws, or it is possible to establish the foreign law merely from reading foreign legal materials. States where judicial notice of foreign law may be taken include Argentina, India, and the United Kingdom.

[8] In practice, review of the application of foreign law is permissible despite foreign law's factual status in Argentina, Canada, China, India, Spain, the United Kingdom, and the United States. In Israel, the application of foreign law is not reviewed by the appellate court. If the appellate court has not been satisfied with the ascertainment of the foreign law, it may remand the case to the court of first instance instructing the latter to reconsider this matter on the basis of additional evidence.

[9] According to Yates's 1978 study, among the States examined, Egypt, Finland, Germany, Japan, the Netherlands, Sweden and Switzerland were found to take the active approach. According to G. Boutin I., *Derecho Internacional Privado Segunda Edición* (Panamá: Edition Maître Boutin, 2006) at 403-406, 906-911, Panama also takes the "law approach".

[10] However, legislation in these States often prevents direct review of the application of foreign law. States where direct review of the application of foreign law is prohibited by clear legislation include Germany (see Paragraph 545 ZPO; see also BGH 29.06.1987, II ZR 6/87, *IPRax* 1988, 228-229; G. Kegel, & K. Schurig, *Internationales Privatrecht* 9th ed. (München: Beck, 2004) at § 15 IV, p. 509-510), and the Netherlands (see Article 79 Code on Judicial Organisation ("*Wet op de Rechterlijke Organisatie*"); HR 31 May 1985 NJ 1985, 717, HR 3 March 1989 NJ 1990, 688 and HR 13 July 2001 NJ 2002, 215).

10. Through the use of a chart setting forth procedures for the treatment of foreign law in over 50 different States, Yates's 1978 study painted a picture of what holds true even today: in many jurisdictions, which theoretically take a passive approach to the treatment of foreign law, courts play a significant role in establishing foreign law, and there is "wider acceptance of various means of establishing foreign law than would be permissible under strict application of the fact doctrine."[11] For example, since the time of Yates's study in 1978, courts in Argentina, a State characterised by Yates as taking the passive approach, court have imposed no limitations on the means through which foreign law can be ascertained.[12] Similarly, in China, characterised by Yates as taking a passive approach to the treatment of foreign law,[13] yet belonging to the group of countries of the "so-called 'civil law' system",[14] foreign law is ascertainable through evidence procured by the "Central Authority" (or a central authority) of a foreign State, the mission of a foreign State in China or the Chinese mission in a foreign State.[15]

11. It is noteworthy that certain States, which Yates described in his 1978 study as theoretically taking either a passive or active approach to the treatment of foreign law, have increasingly combined both approaches. For instance, Yates characterised Mexico as taking a passive approach to the treatment of foreign law. However, in Mexico a distinction is currently being made between foreign law in civil matters and foreign law in commercial matters, the former being treated as a matter of law, which courts must raise and ascertain *ex officio*.[16] Similarly, Yates characterised the Argentinean approach to the treatment of foreign law as passive. However, in Argentina, there is a trend in modern jurisprudence toward an *ex officio* application of foreign law.[17] In fact, the approach taken by courts in Argentina is very similar to the approach taken in Sweden, characterised by Yates as taking an active approach to the establishment of foreign law.[18]

12. It is noteworthy that both in Spain,[19] described in Yates's study as taking a passive approach to the treatment of foreign law, and in the United States, with its common law

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[11] G.T. Yates, *supra,* note 4 at 727.

[12] *Ibid,* at 733; R.R. Balestra, *Manual de Derecho Internacional Privado: Parte General* (Buenos Aires: Abeledo-Perrot, 1988) at 123-124.

[13] *Ibid.,* at note 18.

[14] M. Jänterä-Jareborg, "Foreign Law in National Courts" (2003) 304 *Recueil des cours* 181 at 265.

[15] R. Süβ, *Grundzüge? des chinesischen Internationalen Privatrechts* (Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG, 1991) at 86.

[16] L.P. Castro & J.A. Silva Silva, *Derecho internacional privado: Parte especial* (Oxford University Press: México, 2006) at 553. See also L.P. Castro, *Derecho Internacional Privado,* cuarta edición (Harla: México, 1980) at 290.

[17] See *Estudios Espindola* c. *Bollati*, (E.D., 33-26), *Ocerin* c. *TAIM,* (Non published – April 13, 1976, Juzgado Nacional de Primera Instancia en lo Comercial Nº13, presided by Judge A. Boggiano) and *Deutsches Reisebüro* v. *Speter,* (L.L. 1984-D-563). This is true except where the content of the applicable foreign law cannot reasonably be established and in the case of disposable rules of choice of law enabling parties to subject their dispute to the *lex fori.* See also R. R. Balestra, *supra,* note 12 at 124-125. See also relevant legislation; particularly, Article 377 of the *Código Procesal Civil y Comercial,* which allows judicial discretion in deciding when to ascertain the relevant foreign law based on relative costs and delays. See also Civil Code of Argentina, Articles 1205-1214, which provide for choice of law in contracts. See also M. Jänterä-Jareborg, *supra,* note 14, citing A. Boggiano, *Curso de derecho international privado* 4ª ed. (Buenos-Aires: Abeledo-Perrot, 2000) at 346-354. See also A. Boggiano, *Derecho Internacional Privado* 3rd ed. (Buenos-Aires: Abeledo-Perrot, 1991) at 446: Whether parties can override the conflict of laws rules is a question to be decided on a case by case basis.

[18] G.T. Yates, *supra,* note 4 at note 19. Swedish courts must apply foreign law *ex officio* when adjudicating indispositive disputes (disputes that cannot be settled by agreement between the parties). As regards dispositive disputes (disputes that are within the control of the parties, who are allowed to settle them out of court), parties must plead foreign law in order for foreign law to be applied. In this regard, see M. Jänterä-Jareborg, *supra,* note 14 at 278-279.

[19] A.-L. Calvo Caravaca & J. Carrascosa González, "Proof of Law in the new Spanish Civil Procedure Code 1/2000" (2005) 2 *IPRax* 170 at 173.

system derived from English law,[20] courts may ascertain the relevant content of the foreign law. In the United States, where foreign law is treated as a matter of law rather than as a matter of fact,[21] it has even been argued that courts may reach decisions on the basis of independent examination of foreign legal authority.[22]

13. On the other end of the spectrum, in Switzerland, characterised by Yates as taking an active approach to the treatment of foreign law, courts not only have to apply the conflict of laws rules *ex officio*, they also have to establish the content of the foreign law *ex officio*. However, in matters involving an "economic interest" (in German: *vermögensrechtliche Ansprüche*; in French: *matière patrimoniale*)[23] a judge may request the co-operation of the parties. Similarly, in both, Japan and the Netherlands, each characterised by Yates as taking an active approach, courts, though expected to ascertain the content of the foreign law *ex officio*, may request assistance from the parties.[24] In a few Japanese cases, courts have dismissed a claim on the ground that the claimants failed to prove the applicable foreign law.[25]

14. The attached summary tables tend to demonstrate that no jurisdiction consistently follows either the "fact approach" or the "law approach". As Maarit Jänterä-Jareborg aptly remarks in her 2003 study on "Foreign Law in National Courts", it is often impossible to place a given jurisdiction in one of the two "camps".[26] Practical concerns, in particular the needs of the procedure,[27] rather than legal traditions, are decisive in determining the approach taken in a given country to the treatment of foreign law.

15. The diversity of the national approaches makes it difficult – likely impossible - to harmonise them in substance. Therefore, the need for effective international (or regional) co-operation becomes all the more apparent. The following is a commentary on some of the most important existing international and regional instruments, applicable in this field (or currently under preparation).

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[20] J.R. Brown, "44.1 Ways to Prove Foreign Law" (1984) 9 *Mar. Law.* 179 at 183.

[21] *Ibid.*, at 195.

[22] P.D. Trooboff, "Proving Foreign Law" (9/18/2006) 29 *N.L.J.* 13, citing *Curtis* v. *Beatrice Foods Co*., 481 F. Supp. 1275 (S.D.N.Y. 1980), aff'd, 633 F. 2d 203 (2d Cir. 1980): According to P.D. Trooboff, citing *Universe Sales Co. Ltd.* v. *Silver Castle Ltd.*, 182 F. 3d 1036 (9th Cir. 1999), if a trial court fails to do its homework, the likelihood of reversal increases greatly.

[23] Essentially, the claim has to be measurable in money and the subject matter not precluded from the parties choice of law (because of considerations relating to a party's protection); See D. Girsberger, "IPRG Kommentar" in *Zürcher Kommentar zum IPRG : Kommentar zum Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987* (Zürich: Schulthess, 2004) - at notes 15-46. Examples: Corporate and contractual claims. The task [in German: *Nachweis*, not *Beweis*, in other words, it is not proof in the technical, procedural sense and thus the consequences of failing to "prove" foreign law are not to be determined under the ordinary, technical rules of evidence] [in French: preuve] of establishing the content of the foreign law *may* be assigned to the parties: see *Private International Law Act*, Article 16(1). See also B. Dutoit, *Droit international privé suisse : Commentaire de la loi fédérale du 18 décembre 1987* (Basel: Helbing & Lichtenhahn, 2005), Article 16 at notes 4-10.

[24] For the Netherlands, See L. Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht* 8th ed. (Deventer: Kluwer, 2005) at 35-38, citing RB Rotterdam 10 October 1996, NIPR 1997, nr 108; Rb Rotterdam 13 February 1997 NIPR 1997, nr 227 and RB Den Haag 7 April 2000 NIPR 2000, 182.

[25] K. Takahashi, "Foreign Law in Japanese Courts – A Comparison with the English Approach: Idealism Versus Pragmatism" 2002 *Sing. J. Legal Stud.* 489 at 491.

[26] M. Jänterä-Jareborg, *supra*, note 14 at 265.

[27] *Ibid.*, at 265.

B. Description of existing instruments at the international or regional levels

1. European Convention of 7 June 1968 on Information on Foreign Law (the "London Convention")[28]

16. Under the London Convention, a request for information on foreign law shall always emanate from a judicial authority and the request may be made only where proceedings have actually been instituted.[29] The transmitting agency is a body set up or appointed by a Contracting Party of the London Convention to receive requests for information from its judicial authorities and transmit them to the competent foreign receiving agency. In the absence of a transmitting agency, a request for information shall be transmitted directly to the receiving agency of the requested State by the judicial authority from which it emanates.[30] The use of a transmitting agency is optional.[31]

17. The receiving agency is a body set up or appointed by a Contracting Party to receive requests for information on the Contracting Party's law and to reply to these requests. The receiving agency may either draw up the reply itself or transmit the request to another State body or official body to draw up the reply. The receiving agency may in appropriate cases or for reasons of administrative organisation, transmit the request to a private body or to a qualified lawyer to draw up the reply.

18. The judicial authority sending a request must specify as exactly as possible the questions on which information concerning the law of the requested State is desired. It must also, where appropriate, specify the system of law on which information is desired. The request must state the facts necessary for its proper understanding, and copies of relevant documents may be attached.[32]

19. The object of a reply is to give information to the judicial authority in an objective and impartial manner on the law of the requested State. As such, a reply must contain, as appropriate, relevant legal texts, relevant judicial decisions, additional documents such as extracts from doctrinal works and *travaux préparatoires*, and / or explanatory commentaries.[33] The information given in the reply shall not bind the judicial authority from which the request emanated.[34]

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[28] The London Convention is currently in force in 43 States, including Albania, Austria, Azerbaijan, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. Non-member States of the Council of Europe where the London Convention is in force include Belarus, Mexico, Montenegro and Costa Rica. An Additional Protocol to the London Convention, dated 31 August 1979, which extends the scope of the London Convention to cover the exchange of information relating to criminal matters and procedural law, is currently in force in 39 States: Albania, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Spain, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom, Belarus, Mexico and Montenegro. Additional information on the London Convention is available at: < http://conventions.coe.int/Treaty/en/Treaties/Html/062.htm > (as per 20 February 2007).

[29] Article 3.

[30] Article 5.

[31] Article 2.

[32] Article 4.

[33] Article 7.

[34] Article 8.

20. For a commentary regarding the effectiveness of the London Convention, see the comments below (under II.B.4).

2. Inter-American Convention of 8 May 1979 on Proof of and Information on Foreign Law (the "Montevideo Convention")[35]

21. Under the Montevideo Convention, the authorities of each of the States Parties shall provide the authorities of the other States Parties that so request, with elements of proof of and reports on the text, validity, meaning, and legal scope of their law. International co-operation in this regard must be provided through any of the suitable means of proof contemplated in both the law of the State of origin and the law of the State of destination, including: (i) documentary proof; (ii) expert testimony; and, (iii) reports of the State of destination on the text, validity, meaning and scope of its law on specific points.[36]

22. A request for information may emanate from judges, courts or other authorities.[37] Each State Party must reply to requests through its Central Authority,[38] which may transmit such requests to other authorities of the same State. Information given in the reply shall not bind the authority from which the request emanated and the authority addressed shall not be held responsible for opinions expressed in the reply.[39]

3. Council Decision of 28 May 2001 establishing a European Judicial Network in Civil and Commercial matters (2001/470/EC)[40] (the "European Judicial Network")

a. Members of the European Judicial Network

23. The objective of the European Judicial Network in civil and commercial matters, as in criminal matters, is to improve, simplify and expedite effective judicial co-operation between the Member States of the European Community. The members of the Network are: (a) contact points designated by the Member States; (b) central bodies and Central Authorities provided for in Community instruments, in instruments of international law, such as the Hague Conventions, to which the Member States are parties or in rules of domestic law in the area of judicial co-operation in civil and commercial matters; (c) the liaison magistrates to whom the Joint Action concerning a framework for the exchange of liaison magistrates applies;[41] and, (d) any other appropriate judicial or administrative authority with responsibilities for judicial co-operation in civil and commercial matters whose membership of the Network is considered to be useful by the Member State to which it belongs.[42] The Network is supported in each State by a point of contact whose responsibility is to supply to the network, and update information in relation to their national legal system.

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[35] See < http://www.oas.org/juridico/english/treaties/b-43.htm > (as per 20 February 2007). To date, the Inter-American Convention has been ratified by 11 States: Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, Paraguay, Peru, Uruguay and Venezuela. In addition, Spain acceded to the Convention on 11 December 1987.

[36] Article 3.

[37] Article 4.

[38] The Central Authority is designated under the authority of Article 9.

[39] Article 6.

[40] Additional information on the European Judicial Network is available at the following website: < http://ec.europa.eu/civiljustice/index.htm > (as per 20 february 2007).

[41] Joint Action 96/277/JAI of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial co-operation between the Member States of the European Union (OJ L 105, 27.4.1996, p. 1).

[42] Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters (OJ L 174, 27.6.2001, p. 25).

b. Information sharing between the Members of the Network

24. A first set of information[43] concerning the members of the Network such as their names, full addresses of the authorities, specifying their communication facilities and knowledge of other languages is made available only to the members of the Network.[44] This information is used in order to ensure, without prejudice to other Community or international instruments, the effective operation of procedures having a cross-border impact and the facilitation of requests for judicial co-operation.[45]

c. Public Information - Information Sheets

25. A second set of information gathered by the Network is made available to the public. The public information system includes elements of Community case-law[46] and information on subjects such as: (a) principles of the legal system and judicial organisation of the Member States; (b) procedures for bringing cases to court […]; (c) conditions and procedures for obtaining legal aid […]; (d) national rules governing the service of documents; (e) rules and procedures for the enforcement of judgments given in other Member States; (f) possibilities and procedures for obtaining interim relief measures […]; etc.[47] The information available to the public is available at no cost.

4. Minsk Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family, and Criminal matters (the "Minsk Convention")

26. Under the Minsk Convention, central judicial authorities must provide one another, upon request, information about the internal legislation in effect or previously in effect on their territories and about the practices of its application by the judicial authorities.

27. The rules governing such requests, which are tantamount to direct judicial communications, are set out under Part II of the Minsk Convention, which deals with legal assistance (Art. 4 - 15). The rules set out *inter alia* the requirements of the content, language and cost of the request. In this regard, Article 18 of the Minsk Convention provides that the Contracting States shall themselves bear any and all of the expenses for the extension of legal assistance on their territories.[48]

5. Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "1970 Hague Evidence Convention")

28. The 1970 Hague Evidence Convention replaces the cumbersome diplomatic channels with a system of direct communication between requesting courts and a receiving Central Authority. The 1970 Hague Evidence Convention allows a judicial authority in a Contracting State, in accordance with the provision of the law of that State, to request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform

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[43] *Ibid*., Article 2(5).

[44] *Ibid*., Article 13(1) *a)*.

[45] *Ibid*., Article 3(2) *a)*.

[46] *Ibid.,* Article 14.

[47] *Ibid*., Article 15.

[48] The French and English text of the Minsk Convention can be found in Annex II of E. Gerasimchuk, "The Relationship between the Judgments Project and certain Regional Instruments in the arena of the Commonwealth of Independent States", Preliminary Document No 27 of April 2005, prepared, for the Permanent Bureau, for the attention of the attention of the Twentieth Session of June 2005 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. This document is available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention No 37", and "Preliminary Documents".

some other judicial act.[49] It is therefore a perfect example of direct international communication in writing between a judge and another authority. Furthermore, as nothing in the Convention forbids States to designate a court as a Central Authority, the direct international communication could be one between judges.[50] Finally, a Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request.[51] In this respect, prior authorisation by the competent authority designated by the declaring State may be required.[52] Practice varies as to the role that the judicial personnel of the requesting authority may have during the execution of a Letter of Request. It is not reported if the 1970 Hague Evidence Convention is also being used to obtain evidence on the content of foreign law. The scope of the Convention does not seem to exclude such requests.

6. Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the "1980 Hague Child Abduction Convention")

a. Article 14

29. Under the 1980 Hague Child Abduction Convention, the removal or the retention of a child is to be considered wrongful where it is in breach of rights of custody under the law (including the rules of private international law) of the State in which the child was habitually resident immediately before the removal or retention. Therefore, it is clear that the authorities of the requested State will have to take this law and judicial or administrative decisions into consideration when deciding whether the child should be returned.

30. Pursuant to Article 14, the authority concerned "may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable".[53] This rule is particularly important in order to ensure speedy decisions in the best interest of the child.

b. Direct Judicial Communications

31. During the past ten years, direct judicial communications have developed under the 1980 Hague Child Abduction Convention. Additionally, an International Network of Hague Judges comprised of 21 judges from 19 jurisdictions has been established under the Convention.[54]

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[49] Article 1.

[50] In this respect, it is interesting to note that Belarus has designated both the Supreme Court and the Supreme Economic Court of the Republic of Belarus; Israel has designated the Director of the Courts; Switzerland has designated the tribunals in the Cantons of Fribourg, Lausanne and Sion; and, Barbados has designated the Registrar of the Supreme Court of Barbados.

[51] The following States have made such a declaration: Australia, Belarus, Bulgaria, Denmark, Estonia, Finland, Israel, Italy, Lithuania, Netherlands, South Africa, Spain, Sri Lanka, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America and Ukraine.

[52] Prior authorisation is not necessary for all the States listed in the previous footnote except Israel, Sweden and United Kingdom of Great Britain and Northern Ireland.

[53] It is interesting to note that some States have adopted similar rules with regard to the approval of adoption decision in the context of Article 17 *b)* of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, see, for example, Article 574 and 3092 of the *Code civil du Québec*.

[54] P. Lortie "Report on Judicial Communications in relation to International Child Protection", Preliminary Document No 8, for the attention of the Fifth meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at paragraph no 2. This document is available on the Hague Conference website at: < www.hcch.net >, under "Conventions", "Convention No 28", and "Practical Operation Documents".

Practice indicates that these communications are used sparingly and in a limited number of instances. For example:

(1) to ascertain reassurances concerning potential or outstanding criminal charges, which may pose obstacles in the negotiations between parties;

(2) to clarify the nature of any undertakings which may have been given in the past or which are now being given and, if necessary, to establish the effect of such undertakings;

(3) to ensure that jurisdictional conflict is, if possible, removed or at least that risks are minimised;

(4) to reassure, in some cases, the abducting parent that, upon return of the child to the country from which the child was abducted, there will promptly be an opportunity for a hearing on the matters of concern, such as protection for him / herself or the abducted child, provision of legal representation, contact, custody and, perhaps, the involvement of social services etc.; and,

(5) to encourage mediation, or other similar mechanisms, and swift proceedings.

32. In Contracting States in which direct judicial communications are practised, the following are commonly accepted safeguards:

"- communications to be limited to logistical issues and the exchange of information;

- parties to be notified in advance of the nature of proposed communication;

- record to be kept of communications;

- confirmation of any agreement reached in writing;

- parties or their representatives to be present in certain cases, for example via conference call facilities."[55]

33. It is noteworthy that the most challenging element of this network has been the appointment of its member judges. The procedures for the appointments differ from one country to another but all appointments involved the judiciary either in a consultative or in an appointing capacity. It appears that in most cases, appointments concern the administration of the justice system or the management of the courts. Therefore, the judicial council, the national association of judges, the chief judge of the jurisdiction or the supreme courts are always involved.[56] The executive branch of the governments concerned were in most cases not involved in making the designations.

c. Country profile

34. The Country profile is a tool used to provide information on a per country basis concerning the relevant national laws and procedures in relation to the operation and implementation of a specific Convention. As for the information sheets of the European Judicial Network, the information is presented to the public on the web in the form of a template for ease of reference. Contracting States are exclusively responsible for updating the information

[55] See, Conclusions and Recommendations No 5.6 of 2001 Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and Conclusions and Recommendations No 1.6.3 of the 2006 Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. Both documents are available on the Hague Conference website, *ibid*.

[56] P. Lortie, *supra*, note 54, at paragraphs no 19-22.

contained in the country profiles. A country profile will be developed in the near future for the purpose of the 1980 Hague Child Abduction Convention.[57]

7. Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the "1996 Hague Child Protection Convention")

a. Article 35

35. It would appear that under Article 35(2) of the 1996 Hague Child Protection Convention an authority having jurisdiction under Articles 5 to 10 could admit and consider *ex officio* information, including laws, and administrative or judicial decisions, gathered and transmitted to it by the authorities of a Contracting State in which the child does not habitually reside.

b. Judicial Co-operation – Articles 8-9

36. The 1996 Hague Child Protection Convention marks a new phase in the development of co-operation mechanisms within Hague Conventions. "What is new in the Convention, in juridical terms, is the way in which the private international law rules themselves, particularly those dealing with jurisdiction, have begun to embody co-operation mechanisms. In particular Articles 8 and 9 contain procedures whereby jurisdiction may be transferred from one Contracting State to another in circumstances where the judge normally exercises jurisdiction (*i.e.* in the country of the child's habitual residence) […]".[58]

37. For example, under Article 8 of the 1996 Hague Child Protection Convention, by way of exception, an authority having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in a particular case to assess the best interests of the child, may either: (i) request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or (ii) suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State. Article 9 of the 1996 Hague Child Protection Convention sets a mirror scheme for the counterpart authorities identified in Article 8(2). The judicial co-operation system necessary to support these communications is laid out in Articles 30 and following of the Convention.[59]

8. Hague Convention of 13 January 2000 on the International Protection of Adults (the "2000 Hague Adults Convention")

38. Article 8 of the 2000 Hague Adults Convention establishes a system of transfer of jurisdiction parallel to Articles 8 and 9 of the 1996 Hague Child Protection Convention. Like Article 30(2) of the 1996 Hague Child Protection Convention, the objective of Article 29 of the 2000 Hague Adults Convention is to facilitate the dissemination, between competent authorities under the Convention, of information as to the laws of their States relating to the

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[57] See, Conclusions and Recommendations no 1.1.11 of the 2006 Special Commission, *supra*, note 55. Note that a similar profile is being developed under the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* and in the context of the future Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

[58] W. Duncan, "Administrative and judicial Co-operation with regard to the International Protection of Children", in *International Law and The Hague's 750th Anniversary*, edited by W.P. Here, T.M.C. Asser Press, The Hague, 1999, pp. 199-208, at p. 206.

[59] As the operation of the 1996 Hague Convention is still very young there is not yet any known case law on this matter under the Convention.

protection of adults. Making these laws readily accessible certainly assists competent authorities that can take direct judicial notice of foreign laws.

9. UNCITRAL Model Law of 30 May 1997 on Cross-Border Insolvency

39. The concept of direct cross-border communications has been developed in cross-border insolvency matters. The first example of cross-border arrangements in insolvency matters between courts of different States involved proceedings between the United Kingdom and United States, known as the "*Maxwell Communication*" case. In 1994, shortly after the *Maxwell* case, the United Nations Commission on International Trade Law (UNCITRAL), in co-operation with the International Association of Insolvency Practitioners (INSOL), initiated a project on Cross-Border Insolvency. The project took the form of a model law, *i.e.* a legislative text that is recommended to States for incorporation into their national law. The model law was adopted on 30 May 1997.[60]

40. According to its preamble, the model law is to provide an effective mechanism for dealing with cases of cross-border insolvency and, to achieve this goal, one of the issues regulated is the co-operation between the courts and other competent authorities of the States involved in cross-border cases. Chapter IV, entitled "Cooperation with foreign courts and foreign representatives", incorporates these rules in Articles 25-27.

41. According to the article-by-article remarks of UNCITRAL, the model law not only authorises cross-border co-operation, but also mandates it by using "shall" instead of "may".[61] Co-operation and direct communication are in fact the only means by which traditional and time-consuming procedures, such as letters of request, are avoided. Since civil law judges cannot appeal to their "general equitable or inherent powers", an express statutory basis must be found to allow courts to contact and deal with foreign courts. The forms of co-operation listed in Article 27 are provided as suggestions for countries which have little experience in cross-border co-operation and direct communications.

42. It is noteworthy that the model law does not include safeguarding measures that might be taken to protect the parties' rights and the fairness of the process when direct judicial communications take place. Instead, the article-by-article remarks explain that, "the implementation of co-operation would be subject to any mandatory rules applicable in the enacting States".[62] Included are the procedural rules of the forum preserving a proper and transparent process.

10. European Parliament legislative resolution of 18 January 2007 on the Council common position with a view to the adoption of a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (9751/7/2006 – C6-0317/2006 – 2003/0168(COD))

43. On 21 February 2006, the European Commission adopted a modified Proposal for the *Regulation on the law applicable to non-contractual obligations* ("Rome II"). The modified proposal was adopted in light of amendments proposed by the European Parliament as a result of its first reading of the original proposal presented by the Commission in 2003. Discussions on Rome II are ongoing – making it difficult to comment on the draft. It is interesting to note,

[60] See UNCITRAL Model Law on Cross-Border Insolvency, 30 May 1997, 36 I.L.M. 1386 (1997). See also Guide to enactment of the UNCITRAL Model Law on Cross-Border Insolvency, 1997 XXVIII UNCITRAL Y.B. pt. 3, par. 2, U.N. Doc. A/CN. 9/422.

[61] See Article 25 and 26 of the Model Law.

[62] See the "Article-by-article remarks" published in the Guide to enactment of the UNCITRAL Model Law on Cross-Border Insolvency, 1997 XXVIII UNCITRAL Y.B. pt. 3, par. 2, UN Doc. A/CN. 9/422.

however, that in her Recommendation for Second Reading,[63] the Rapporteur for the European Parliament suggests inserting, into the *Draft European Parliament Legislative Resolution on Rome II*, a new Recital (30a), which would read as follows: "As in the Rome Convention [Convention of Rome 1980 on the law applicable to contractual obligations], the principle of '*iura novit curia*' applies. The court itself should of its own motion establish the foreign law. In establishing the foreign law the parties are permitted to assist the court and the court should also be able to ask the parties to provide assistance."

II. *DE LEGE FERENDA* – WHAT COULD BE DONE UNDER THE AUSPICES OF THE HAGUE CONFERENCE?

A. Distinguishing pre-litigation and litigation scenarios?

44. The brief analysis offered in the first part of this Note is deliberately broad and general in nature; it is essentially meant to assist the experts in their discussion of the subject and does not purport to be complete.[64] However, some preliminary conclusions can be drawn from the analysis. At the outset, it is important to recall that there is no truly *global instrument*, either in force or currently being developed, on the basis of which an interested party or a court seized could get reliable information on the content of foreign law. At the same time, there is an ever-increasing volume of cross-border activity – be it in the commercial, banking or family law fields. As a result, parties and courts are increasingly being exposed to foreign law, which may become relevant at different moments during the same case.

45. Issues requiring the application of foreign law not only come up in the context of litigation, *i.e.*, before a court or any other alternative dispute resolution body. For parties negotiating high stakes cross-border transactions, the choice of the law governing their contract is likely to be an important factor in the negotiations. Surely, for a significant number of these transactions, the parties will simply choose a well-known and well-established law, whether or not it is the law of one of the parties to the transaction. However, there may be reasons for which the parties might choose a "neutral" law, *i.e*. a law with which none of the parties is naturally very familiar with.

46. For sophisticated parties, the choice of a neutral law will not be an insurmountable obstacle. Sophisticated parties often have the option of instructing their lawyers to get a professional opinion regarding the legal implications of choosing a neutral law as governing the contract to a transaction. For less sophisticated parties (*e.g.*, two small or even mid-sized companies that engage in cross-border activity where neither party concedes to the other party having the advantage of "its" law governing the contractual relations), however, access to a third, "neutral" law through legal opinions may be difficult, or even impossible, given the expenses involved.

47. Similarly, for a couple – be it a married couple, a couple living in registered (or similar) partnership or simply a longstanding, unmarried couple – moving from one State to another may imply important changes in legal status. One form of cohabitation may be perfectly legal and recognised in one jurisdiction, but totally unknown or even illegal in another jurisdiction. A couple's matrimonial or succession law regime may be altered significantly because of a change in domicile or residence. If a couple wants to assess the legal implications of an envisaged move and plan ahead, access to reliable and inexpensive sources on the content of the new, foreign law is indispensable, in particular when under the applicable conflict of law

[63] Doc Ref 9751/7/2006 – C6 0317/2006 – 2003/0168(COD)

[64] For example, bilateral systems of co-operation and other similar systems found in domestic law are not covered.

rules the parties may designate the applicable law – as is clearly the modern trend under the influence of the Hague Conventions in the field.

48. Pre-litigation scenarios (for which multiple variations can easily be envisaged) beg a first series of questions: Is there a real need for a new mechanism, whereby parties to a planned cross-border transaction, relationship or other activity, can have prompt and reliable access to the content of foreign law? If the answer is yes, what role can and should governmental bodies (*e.g.*, Ministries, Consulates and Embassies) play in this context? What role can and should (semi-) private Institutes such as the Max Planck Institute in Hamburg or the Swiss Institute of Comparative Law in Lausanne play? More generally, should pre-litigation assessment of foreign law be part of a new instrument in this field, and, if so, to what extent? Or should parties in a pre-litigation context simply have to rely on professional legal advice?

49. There is little doubt that the most challenging part of developing a new instrument on the treatment of foreign law would relate to the litigation context: how can or should the content of foreign law be established before a court (or any other dispute resolution body), and by whom (judge, parties or a combination of both)? An increase in cross-border activity is necessarily going to lead to an increase in cross-border litigation, which, in turn, will most likely lead to an increase in the application of foreign law by courts.

50. The increase in applying foreign law is directly linked to the increasing number of conflict of laws rules, which – quite adequately – allow for party autonomy or otherwise favour a choice of court,[65] of the applicable law[66] or conflict of laws rules that otherwise refer to a foreign legal order.[67] It is true that some of the international instruments mentioned are either not yet in force or are signed by a few States only. Their potential, however, is enormous and some of these instruments have heavily influenced domestic conflict of laws rules.

51. The potential importance of a new instrument on the treatment of foreign law should not be measured against today's background and reality. Rather, it should be measured against needs envisaged fifteen to twenty years from now. The real challenge, in our view, lies in bridging the diversity of national approaches to the status of foreign law (see above under I.). In our view, there can only be one answer to this challenge: a new, global instrument in this field should *not be seeking to reform domestic rules on the nature of conflict of laws rules (i.e. not imposing a uniform regime as to whether these rules should be mandatory or not), nor should a new instrument be seeking to reform domestic rules on how courts determine the content of foreign law.*

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[65] *The Hague Choice of Court Convention of 30 June 2005* is of particular interest in this regard. The Convention contains three main rules addressed to three different courts: The chosen court must hear the case if the choice of court agreement is valid according to the Convention (Art. 5); any court seized that is located in a State other than that of the chosen court must dismiss the case unless the choice of court agreement is invalid according to the Convention (Art. 6); any judgment rendered by the court of a Contracting State which was designated in an exclusive choice of court agreement that is valid according to the Convention must be recognised and enforced in other Contracting States (Art. 8). Under Article 6 *a)*, the court before which proceedings are brought must apply the law of the State of the chosen court (including its rules of conflict of laws) to determine whether or not the choice of court agreement is null and void under the law of the chosen court. A similar rule applies when the judgment rendered by the chosen court is challenged at the stage of recognition and enforcement (Article 9 *a)*).

[66] The list of international or regional instruments taking such an approach is long, but one may mention in particular: the Rome Convention (Rome I), the *Inter-American Convention on the Law Applicable to International Contracts*, the envisaged Rome II Regulation, the Hague Securities, Trusts, Matrimonial Property Regimes and Succession Conventions.

[67] The 1980 Hague Child Abduction Convention, etc.

52. A State's answer to the question of the status of foreign law is part of the overall legal order of that State and intrinsically linked to procedural aspects. Imposing a change on the status of foreign law would likely disturb important procedural elements of that legal order. Such an approach would thus be unacceptable and contrary to the philosophy of the Hague Conference not to interfere unduly with the diversity of the legal traditions of its Member States. Against this background, the solution should instead be sought in *mechanisms that facilitate the establishment of the content of foreign law through international co-operation*.

53. For the design and operation of such an international co-operation regime to be effective – that is, to allow for an accurate, reliable, expeditious, yet reasonably priced establishment and assessment of the content of foreign law – a series of preliminary questions and fact-finding exercises should probably be examined and conducted. They should include, for example, questions such as: What are the most frequently asked questions with regard to foreign law under the existing instruments? Who most frequently asks questions with regard to foreign law? Is the need to have access to foreign law different depending on areas of the law (*e.g.*, family law, consumer law, labour law, insurance law, succession law, property law, commercial law, etc.)? Should the information provided with regard to foreign law be binding (with possible liability) or non-binding? Should the costs to provide information on foreign law be free of charge as much as possible? Can the use of information technologies improve the transmission of request and delays for answers? Can the use of information technologies alleviate the difficulties resulting from the operation of an instrument in a multilingual environment?

B. Possible Models

54. The following comments, mainly in the form of bullet points, try to brush – in very broad strokes – the distinctive features of possible models that could underlie an international co-operation regime. The models are categorised from the most informal, light and open structure to the most formal (and traditional) co-operation framework. These models do not exclude each other. In fact, it may well be that the most promising way forward consists of some sort of combination of these models, each of them responding to specific scenarios and needs.

1. <u>Creation of Information Sheets & Country Profiles</u>

- Non-binding information on foreign law
- Accessible to the public at no cost
- Mostly interesting for individuals with little or no resources
- Information from different States may vary in quality
- Maintenance and update of information under the responsibility of States

55. The European Judicial Network (see above under I.B.3) provides an interesting example of such information sheets and country profiles. Imagine one requires information on how service of process is effectuated in Portugal.[68] With the help of a few clicks on the Network's website, one has access to a comprehensive description of service of process in Portugal.[69] It is

[68] The need for information about foreign law on service of process is rapidly increasing, in particular in the context of service by e-mail. There is increasing case law (in particular in common law jurisdictions) that makes service by e-mail not only dependent on the law of the forum, but also on the law of the addressee. Again, this illustrates that the need for access to foreign law is not only increasing in volume, but also expanding in nature.

[69] < http://ec.europa.eu/civiljustice/serv_doc/serv_doc_por_en.htm > (as per 20 February 2007)

suggested that similar information access points would provide great assistance at the global level.

2. Creation of a Network of Experts & Specialised Institutes

- Could be listed under a website for direct consultations at the user's expense
- Could be set-up under an administrative structure (similar to the administrative structure of the London Convention) financed by the Contracting States
- Could use model forms
- Not all States have specialised institutes at their disposal (would need to identify equivalent institutions in such States)

56. It would be interesting to know if the existing specialised institutes are part of a global network already and if they cooperate in one way or another; if not, it would be interesting to know if there are plans in this respect.

3. Establishing Direct Judicial Communications (Judicial Network)

- Could judges provide information on matters other than logistical issues?
- Would information provided by the judges be binding or non-binding?

57. One of the biggest challenges in this respect is likely to be the change in legal culture that direct judicial communications necessarily entails. This being said, and as explained above, successful inroads have already been made and one may well want to expand on them. Maybe even more difficult is the question of how direct judicial communications would fit into an adversarial system.

4. Revision of the cooperative mechanisms of the London and the Montevideo Conventions – broadening their geographical scope

58. Although the London Convention is currently in force in 43 States after some 40 years of existence, the likelihood of its attaining global reach remains doubtful.[70] Any revision of the London Convention would be limited to Member States of the Council of Europe and other States Parties to the Convention. Under the auspices of the Hague Conference, a new instrument on the treatment of foreign law would be developed within a global framework.[71]

59. A new instrument on the treatment of foreign law could take into account and draw upon the strengths of other cooperative mechanisms, such as the Montevideo Convention. The Montevideo Convention differs from the London Convention in that (i) States Parties may extend its application to requests for information from authorities other than judicial authorities;[72] (ii) it does not contain a provision limiting requests to situations where

[70] Only four non-Member States of the Council of Europe are Parties to this Convention (Belarus, Costa Rica, Mexico and Montenegro).

[71] This work could be carried out in co-operation with other organisations, in particular the Council of Europe. It should be noted that in the context of maintenance obligations, the Hague Conference is developing a new instrument on the international recovery of child support and other forms of family maintenance with provisions relating to administrative co-operation as an essential element, thus modernising the 1956 New York Convention on the Recovery of Maintenance without amending that Convention *per se.* Moreover, within the Hague Conference framework, States Parties to a new convention would benefit from the post-Convention services of the Conference such as Special Commissions to review, at regular intervals, the practical operation of the Convention, the development of Guides to Good Practice under the Convention, networking opportunities for central authorities, electronic case-law and statistical databases, etc.

[72] Article 4.

proceedings have actually been instituted;[73] and (iii) it requires that international co-operation be provided through any of a number of enumerated suitable means, including documentary proof and expert testimony.

60. There have been studies conducted regarding the operation of the London Convention.[74] The most comprehensive independent study of the London Convention was published in 1997 with 21 States Parties to the London Convention offering responses to a questionnaire drawn up by Barry J. Rodger and Juliette van Doorn.[75] More recently, Eberhard Desch took a *Best Practices Survey*, based on data collected from Germany, Slovakia and the United Kingdom and the German government made *Proposals for Improvement of the Application of the London Convention.*[76]

61. Below is a summary of the recommendations and comments drawn from these surveys, which can be placed in three categories:

62. Recommendations regarding day-to-day operations

- A simplification of process is desired. First, local courts and transmitting agencies should be aware that requests must include sufficient detail of the facts of a case and a precise question, as well as all accompanying documents and translations as appropriate. While Rodger and van Doorn's study note the high cost of translation, Desch's study indicates that poor translation quality has made it more difficult to answer questions received.
- A clear and comprehensive directory of receiving agencies should be made available and States should verify and communicate information as it is updated.
- Requests should designate the applicable legal system where the receiving agency is in a State with multiple legal systems.
- Requests and responses should be limited to domestic law, despite increasing links to international and European law, covered in other instruments.
- Deadlines to respond should be strictly observed and transmitting agencies should indicate the level of urgency in the requests. In practice, the delay for replies ranges from three to eight weeks and waiting periods of over 12 months have been reported.
- Mechanisms to identify and prevent excessive delays should be introduced.
- Questions should be limited to those that require short information on specific points.

63. Recommendations regarding the systemic aspect of the *London Convention*

- The issue of costs needs clarification. Article 6(3) of the Convention, as well as Article 15(1) state that where the receiving agency transmits the request to a private body or qualified lawyer to draw up the reply and this is likely to involve costs, the receiving agency is obligated to inform the requesting authority as accurately as possible

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[73] Article 3(1) of the London Convention provides that "A request for information shall always emanate from a judicial authority, even when it has not been drawn up by that authority. The request may be made only where proceedings have actually been instituted." The Montevideo Convention may, therefore, have a broader application than the London Convention.

[74] There are no studies available to the Permanent Bureau on the operation of the Montevideo Convention.

[75] B. J. Rodger & J. van Doorn, "Proof of Foreign Law: The Impact of the London Convention" (1997) 46 *I.C.L.Q.* 151. States that offered responses include: Austria, Cyprus, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

[76] E. Desch, *Best Practices Survey of the European Convention on Information on Foreign Law* (Strasbourg: CDCJ, 2002), online: CDCJ, Documents 2003 < http://www.coe.int./T/E/Legal_Affairs/Legal_co-operation/Steering_Committees/CDCJ/Documents/ > (as per 20 February 2007).

of the probable cost and request consent. The recommendation is that clarification be provided as to whether charges from other government departments are permissible as costs.

- Legal staff, especially judges should be trained for drawing up and answering questions.
- Publicity regarding the benefits of the Convention should be increased.
- A contact person, whom transmitting agencies or receiving agencies may contact, should be designated.
- The possibility of transmitting requests by e-mail should be explored.
- Information should be compiled and links created to national and international websites that provide information sought after through Convention requests.
- The text of the Convention should be maintained, as it effectively balances the interests of transmitting and receiving States.

64. Comments and recommendations regarding the theoretical role of the London Convention in private international law

- The Convention is still very attractive as a mechanism for providing non-partisan information on foreign law, particularly in adversarial settings.
- The Convention may prove to be a cost advantage for litigants, who might otherwise have to pay for an expert to testify about the foreign law.
- Bilateral treaties are still used to define the channels of exchange over the Convention.
- A more international approach needs to be developed in jurisdictions where proof of foreign law and principles of private international law are generally applied with reticence.

65. The Permanent Bureau is looking forward to further exploration of this interesting and important field of law at the meeting of experts.