

**ÉTUDE DE FAISABILITÉ SUR L'ADMINISTRATION DU DROIT ÉTRANGER
QUESTIONNAIRE**

préparé par le Bureau Permanent

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**FEASIBILITY STUDY ON THE TREATMENT OF FOREIGN LAW
QUESTIONNAIRE**

drawn up by the Permanent Bureau

*Document préliminaire No 25 d'octobre 2007
à l'intention du Conseil d'avril 2008
sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 25 of October 2007
for the attention of the Council of April 2008
on General Affairs and Policy of the Conference*

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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 law.¹

With a view to beginning the assessment of the need for such an instrument, the Permanent Bureau organised 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 2007.² The experts emphasised "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."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 implementation.⁷ Finally, the questionnaire should seek to identify in particular whether there is a practical need for the development of such an instrument.

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 following Questionnaire addressed to the Members of the Organisation has been prepared for that purpose. Conscious of the short delay to respond to this Questionnaire, the Permanent Bureau invites Members of the Organisation to bring to the attention of their judicial authorities Questions Nos 15 to 28.

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 summarising 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 Organisation]". Your cooperation in responding to this Questionnaire is very much appreciated.

Identification

Name of the Member State: _____

For follow-up purposes

Name of contact person: _____

Telephone number: _____

E-mail address: _____

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 Convention ⁸ | <input type="checkbox"/> YES | <input type="checkbox"/> NO |
| b) The Montevideo Convention ⁹ | <input type="checkbox"/> YES | <input type="checkbox"/> NO |
| c) The Minsk Convention ¹⁰ | <input type="checkbox"/> YES | <input type="checkbox"/> NO |
| d) Any bilateral treaty | <input type="checkbox"/> YES | <input type="checkbox"/> NO |
- (Please indicate the number of bilateral treaties concluded: ____)
- 2) If not, does your State intend to become in the near future a Party to:
- | | | |
|-------------------------------------|------------------------------|-----------------------------|
| a) The London Convention | <input type="checkbox"/> YES | <input type="checkbox"/> NO |
| b) The Montevideo Convention | <input type="checkbox"/> YES | <input type="checkbox"/> NO |
| c) The Minsk Convention | <input type="checkbox"/> YES | <input type="checkbox"/> NO |
| d) or conclude any bilateral treaty | <input type="checkbox"/> YES | <input type="checkbox"/> NO |
- 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:
- | | | |
|------------------------------|----------------------|-------------------|
| a) The London Convention | No of requests: ____ | No of weeks: ____ |
| b) The Montevideo Convention | No of requests: ____ | No of weeks: ____ |
| c) The Minsk Convention | No of requests: ____ | No of weeks: ____ |
| d) Any bilateral treaty | No of requests: ____ | No of 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:
- | | | |
|------------------------------|----------------------|-------------------|
| a) The London Convention | No of requests: ____ | No of weeks: ____ |
| b) The Montevideo Convention | No of requests: ____ | No of weeks: ____ |
| c) The Minsk Convention | No of requests: ____ | No of weeks: ____ |
| d) Any bilateral treaty | No of requests: ____ | No of weeks: ____ |

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”.

- 5) Do you foresee an increase in the number of requests referred to in:
- a) Question No 3 (incoming requests)
 - YES
 - NO
 - b) Question No 4 (outgoing requests)?
 - YES
 - NO
- 6) If so, in which areas of the law? Please specify for each of the sub-questions:
- a)
 - b)
- 7) Please indicate, if applicable, in bullet form to what extent you are satisfied with the instruments referred to in Question No 1:
- 8) Please indicate, if applicable, in bullet form any shortcomings of these instruments:¹¹

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

- 9) Does your State and / or Regional Economic Integration Organisation (“REIO”) provide online access to its legislation¹² through an official (governmental) website?
- YES. Please specify whether this information is also provided in a non-official language and, if so, in which language(s):
- NO. Does another, non-governmental body or organisation provide this information online (please specify which organisation or body)?
- 10) Does your State and / or REIO respond to written or oral requests for information on the content and / or application of its law?^{13 14}

¹¹ 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.

¹² In force or which was in force.

¹³ 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.

¹⁴ 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. Please specify for which areas of the law:

NO. Does another, non-governmental body or organisation provide this service (please specify which organisation or body)?

11) Are the services in Question No 10 available to people in other States?
 YES. Is this service offered in any non-official language and, if so, in which?

NO

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

YES

NO

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

YES

NO

Please specify:

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: ____% (year: ____). Likely to increase: YES NO

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

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 tort

Consumer protection

Commercial contracts

Sale of goods

Securities transactions

Property

Inheritance

Bankruptcy

Choice of court agreements

Other, please specify:

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

17) In your State, a judicial authority ascertains foreign law (check more than one box if applicable):¹⁵

- a) *ex officio* without the assistance of an expert¹⁶ (e.g. law firm, specialised institute,¹⁷ university, government (i.e. specialised 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)
- d) as the result of an (express) agreement of all parties, without the assistance of an expert
- e) as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by the judicial authority
- f) as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by all parties
- g) by submitting, as the result of an (express) agreement of all parties, a request for information under a bilateral or multilateral treaty (where applicable)
- h) at the request of a party (without the objection of the other or another party) or all parties, without the assistance of an expert
- i) at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by the judicial authority
- j) at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by one or all parties
- 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)
- l) by any other method (please specify):

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:

¹⁵ 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.

¹⁶ 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.

¹⁷ 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.

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:

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:

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 specialised institute, does it need to meet certain requirements?

YES

NO

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 specialised institute, does it need to meet certain requirements?

YES

NO

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

NO

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

YES

NO

c) Local specialised institute

YES

NO

d) Foreign specialised institute

YES

NO

e) Local government (including embassies abroad)

YES

NO

f) Foreign government (including embassy in your State)

YES

NO

g) Member of the local judicial authority

YES

NO

h) Member of a foreign judicial authority

YES

NO

i) Other(s):

j) Which of the above is most often used?

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:

- The requesting judicial authority
- The party that raised the application of foreign law
- The party(ies) against whom costs will be awarded
- All parties
- Other:

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
- NO, please explain:

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:

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?

- YES
- NO, please explain:

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

- YES
- NO, please explain:

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?

YES

NO

Please explain:

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

NO

Please explain:

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

YES

NO

Please explain:

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

YES

NO

Please explain:

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

NO, please explain:

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

YES

NO, please explain:

- 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
 NO, please explain:
- e) Should this instrument and / or these mechanisms contain provisions on legal assistance to accommodate individuals with little or no resources?
 YES
 NO, please explain:
- 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
 NO, please explain:

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?

YES

NO

Please explain.

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?

YES

NO

Please explain.

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 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 tort
- Consumer protection
- Commercial contracts
- Sale of goods
- Securities transactions
- Property
- Secured interests
- Inheritance
- Bankruptcy
- Legalisation and / or certification of documents
- Notarial acts or certificates
- Other, please specify:

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

NO

Please explain.

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:¹⁸

¹⁸ 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.