AFFAIRES GÉNÉRALES ET POLITIQUE
GENERAL AFFAIRS AND POLICY

Doc. prél. No 11 A
Prel. Doc. No 11 A

mars / March 2009

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

L'ACCÈS AU CONTENU DU DROIT ÉTRANGER ET LE BESOIN DE DÉVELOPPER UN INSTRUMENT MONDIAL DANS CE DOMAINE – ORIENTATIONS POSSIBLES

Note établie par le Bureau Permanent

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ACCESSING THE CONTENT OF FOREIGN LAW AND THE NEED FOR THE DEVELOPMENT OF A GLOBAL INSTRUMENT IN THIS AREA – A POSSIBLE WAY AHEAD

Note drawn up by the Permanent Bureau

Document préliminaire No 11 A de mars 2009 à l'intention
du Conseil de mars / avril 2009 sur les affaires générales et la politique de la Conférence

Preliminary Document No 11 A of March 2009 for the attention
of the Council of March / April 2009 on General Affairs and Policy of the Conference

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L'ACCÈS AU CONTENU DU DROIT ÉTRANGER ET LE BESOIN DE DÉVELOPPER UN INSTRUMENT MONDIAL DANS CE DOMAINE – ORIENTATIONS POSSIBLES

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ACCESSING THE CONTENT OF FOREIGN LAW AND THE NEED FOR THE DEVELOPMENT OF A GLOBAL INSTRUMENT IN THIS AREA – A POSSIBLE WAY AHEAD

Note drawn up by the Permanent Bureau

1. The feasibility study carried out by the Permanent Bureau since April 2006 has taken an interesting course. Initially, it concentrated on the feasibility of a new instrument concerning the cross-border *treatment* of foreign law. The Experts' Meeting held from 23-24 February 2007, however, concluded that it would be pointless to "attempt to comprehensively harmonise the different approaches to the treatment of foreign law, as there [was] no need or likelihood of any success for such harmonisation". Yet, the Experts agreed that there was "clearly a need to facilitate access to foreign law" and they "supported the Permanent Bureau's continued work in the area". These conclusions were shared by the Council on General Affairs and Policy in 2007. Consequently, the focus of the feasibility study shifted from the *legal status of foreign law*, in particular in civil and commercial proceedings, to the need for *cross-border administrative and legal co-operation* for the purpose of accessing the content of foreign law. Further work then revealed the increasing practical importance of *information on (foreign) law* available *online*.

2. As the "Report of the Meeting of Experts on Global Co-operation on the Provision of Online Legal Information on National Laws (19-21 October 2008)"[1] demonstrates, the recent development worldwide of computerisation of legal information – in particular of laws, legislative records (parliamentary debates and other explanatory materials), judicial decisions, and legal literature – and of rendering this material accessible, generally without costs to the public, has been truly astounding. The drive and energy of stakeholders behind, and the interest aroused by, the work of the organisations represented at the October 2008 meeting (and many others) is impressive. The Free Access to Law Movement and the activities of other legal information institutes promoting online accessibility of legal information clearly hold the promise for the future, where governments will discontinue to use printed texts and legal information will essentially be available in digital form – a "paperless world" which has already become visible in other activities of the Hague Conference (*e.g.*, the electronic Apostille Pilot Program (e-APP)).

3. On the one hand, the increasing accessibility online of legal materials enables the resolution of certain – although by no means all – questions on the content of foreign law, thus reducing to a certain extent the need for international legal co-operative machinery. On the other hand, this development poses in itself some challenges, in particular in cross-border situations, which would benefit from supportive forms of international co-operation. Indeed, the October 2008 Experts' Meeting already formulated some "Guiding principles to be considered in developing a future instrument" concerning free access to legal materials in e-form, facilitating re-publication / re-use, integrity, identification of the origin, preservation, citations, translations, knowledge-based systems, and support and co-operation.[2] Clearly, these principles constitute just a first attempt, but they are a telling result, agreed upon in only two days, and provide an indication for one possible direction of work by the Hague Conference.

4. The conclusions of the October Experts' Meeting suggest that the Hague Conference could become a most valuable platform for co-operation with legal information institutes and governments, to facilitate access to foreign law and play a co-ordinating role in the various ongoing efforts to establish standards for online legal resources. The platform would be supported by a set of "rules of the game", which would require certain

[1] Drawn up by the Permanent Bureau, Prel. Doc. No 11 B of March 2009 for the attention of the Council of March / April 2009 on General Affairs and Policy of the Conference (available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs).
[2] See Annex.

progressive efforts (rather than results)[3] from governments, and perhaps the establishment of a standing committee of experts to develop and monitor quality standards or best practices for free access to information and online publishing. The gatherings of such a committee could probably be largely auto-funded by the institutions themselves, since each of them has an interest in collaborating with each other and with governments, in developing realistic common global standards and in ensuring their observance. The work could lead to a "Hague portal on accessing foreign law" that would guide users to accredited (standards based) legal information providers. This would be of tremendous use to governments, courts, legal professionals and the public at large.

5. The need for information on foreign law is bound to expand in the years and decades ahead. Increasingly, legal fact patterns will be connected with more than one legal system, and parties and their advisers will need, either *ex ante* or *ex post*, to determine the law applicable to their relationships and transactions. International instruments at the regional level (recent examples: the EC Regulations Rome I and II on the law applicable to contractual obligations and to torts) and at the global level (recent example, the Hague Convention on Choice of Court Agreements) enhance the need for access to the content of foreign law.[4] Continuing regional integration and globalisation will further increase this need. While co-operation through the envisaged platform would focus on facilitating access to the content of *foreign* law, the benefits could go beyond this, since the work on standard-setting might extend to legal information for *domestic* purposes.[5] Obviously this spin-off effect would require further reflection and co-ordination.

6. The October 2008 Experts' Meeting was unanimous in its view that, no matter how perfected, the accessibility of online legal information could only provide a solution to certain needs for information. More particularly, there would always remain a need for "a photograph" of the law as applied at a certain time in a particular context. An effective mechanism allowing courts, in particular, to obtain such information from abroad would remain essential. This finding confirmed the conclusions of the February 2007 meeting of experts[6] but put it in a context of continuously increasing availability of online legal information.

7. The February 2007 Experts' Meeting had already given consideration to the need for the development of a new co-operative mechanism to provide authoritative statements on foreign law. It had recognised that the existing multilateral mechanisms, in particular the London and Montevideo Conventions, (1) were regional and not global in nature, (2) were not the subject of regular review, and (3) did not take into account modern

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[3] Such obligations to make best efforts are not unknown in Hague Conventions. For a recent example see Art. 35(1) of the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, according to which "Contracting States are encouraged to promote, including by means of international agreements, the use of the most cost-effective and efficient methods available to transfer funds payable as maintenance" or Art. 12(7) of that Convention which provides that "Central Authorities shall employ the most rapid and efficient means of communication at their disposal".

[4] Some international instruments have developed specific provisions for administrative and judicial co-operation regarding the determination of a legal issue according to foreign law or even regarding the legal status of foreign law in domestic proceedings, *cf.* Arts 15 and 14, respectively, of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. *Cf.* also Art. 35 of 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*.

[5] Such domestic undertakings could result in the implementation of the accountability, transparency and free access to public information, including law, principles found in international instruments such as the 12 December 2003 Geneva Declaration of Principles of the World Summit on the Information Society and the 26 October 2007 Montreal Declaration on "Free Access to Law".

[6] See "Feasibility Study on the Treatment of Foreign Law – Report on the meeting of 23-24 February 2007", prepared by the Permanent Bureau, Prel. Doc. No 21 A of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference (available at < www.hcch.net > under "Work in Progress" then "General Affairs"), pp. 5-6, "Post-discussion proposed model".

means of electronic communication. A case could therefore be put forward for a new global treaty system that, in addition to a chapter creating a platform for co-operation on standard-setting described above, would set up machinery to provide replies to requests for information on foreign law in the context of litigation in particular. This treaty system would essentially be:

- global in nature,
- subject to regular review to examine and improve its practical operation, and
- adapted to moderns means of communication.

8. The new machinery could build upon the best features of the existing multilateral systems, while taking into account the much larger availability of online legal information. This would mean, *e.g.*, that replies might be shorter than under the present treaty systems, and that they might refer for additional or supportive documents to open online sources. The new system should be flexible, enabling each requested State Party either to mandate one or more contact points to draw up the reply themselves or to transmit the request to an efficient and reliable body or individual to draw up the reply. Moreover, an optional possibility should be built in to enable courts, or indeed other authorities or legal professionals, in one State Party to address a request directly to a designated authority in another State Party. Whether the backbone of the system should be co-operation among administrative ("Central") authorities or a system of judicial co-operation / certification,[7] or a combination of both, remains to be seen. Special attention should be given both to the cost factor for situations that may arise where requests are transmitted to private bodies or qualified professionals,[8] and to cost burdens for administrative or other bodies of requested State Parties which may arise from drafting requests for information under such a mechanism.

9. Machinery as provided by the London and Montevideo Conventions is not suitable in complex cases, such as protracted insolvency or inheritance proceedings, with ramifications in perhaps a multitude of countries. For such cases, it would be helpful if a future Hague instrument would create a network of recognised specialist bodies and institutions and / or individual experts that would meet certain international criteria of professionalism and expertise.

10. It would therefore seem that useful work may be done through a new Hague Convention that would consist of three parts:

(a) Part I: Facilitating access to online legal information on foreign law. This part would focus on assuring the free accessibility of a country's or regional economic integration organisation's main legal materials, particularly legislation, case law and international agreements (and potentially doctrine that would be important in civil law jurisdictions) for online publication and re-publication / re-use; it could possibly provide some guidance on realistic quality standards or best practices for such free access and online publishing, and perhaps the provision of a permanent body of experts to monitor the development of practical standards and / or best practices in these areas, also with a view to the compatibility or "interoperability" of global online publishing standards.

[7] As practiced under the Uniform Certification of Questions of Law Act (1995) in the United States of America, in some states also in response to Canadian or Mexican Court enquiries, see "Feasibility Study on the Treatment of Foreign Law – Report on the meeting of 23-24 February 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, Prel. Doc. No 21 B of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference (available at < www.hcch.net > under "Work in Progress" then "General Affairs"), p. 39.

[8] *Cf.* Art. 6 of the London Convention.

(b) Part II: Cross-border administrative and / or judicial co-operation. This part would provide for the handling of requests for information in response to concrete questions on the application of foreign law in relation to a specific matter that arises in court proceedings (and possibly also in other contexts), and for which information available online is not sufficient.

(c) Part III: A global network of institutions and experts for more complex questions. This part would address situations where there may be a need for accessing more in-depth information on complex legal questions in specific areas (*e.g.*, insolvency or inheritance), or in the course of complex litigation that involves the interface of multiple areas of foreign and / or local law(s). Here, one might think of a series of networks of qualified organisations (bar associations, comparative law institutes, organisations of notaries and other specialists, whose services would not be free) facilitated via the Permanent Bureau.

ANNEXE / ANNEX

Guiding Principles to be Considered in Developing a Future Instrument[9]

Free access

1. State Parties shall ensure that their legal materials, in particular legislation, court and administrative tribunal decisions and international agreements, are available for free access in an electronic form by any persons, including those in foreign jurisdictions.

2. State Parties are also encouraged to make available for free access relevant historical materials, including preparatory work and legislation that has been amended or repealed, as well as relevant explanatory materials.

Reproducing and re-use

3. State Parties are encouraged to permit and facilitate the reproduction and re-use of legal materials, as referred to in paragraphs 1 and 2, by other bodies, in particular for the purpose of securing free public access to the materials, and to remove any impediments to such reproduction and re-use.

Integrity and authoritativeness

4. State Parties are encouraged to make available authoritative versions of their legal materials provided in electronic form.

5. State Parties are encouraged to take all reasonable measures available to them to ensure that authoritative legal materials can be reproduced or re-used by other bodies with clear indications of their origins and integrity (authoritativeness).

6. State Parties are encouraged to remove obstacles to the admissibility of these materials in their courts.

Preservation

7. State Parties are encouraged to ensure long-term preservation and accessibility of their legal materials referred to in paragraphs 1 and 2 above.

Open formats, metadata and knowledge-based systems

8. State Parties are encouraged to make their legal materials available in open and re-usable formats and with such metadata as available.

9. States Parties are encouraged to cooperate in the development of common standards for metadata applicable to legal materials, particularly those intended to enable and encourage interchange.

10. Where State Parties provide knowledge-based systems assisting in the application or interpretation of their legal materials, they are encouraged to make such systems available for free public access, reproducing and re-use.

[9] Principles developed by the experts which met on 19-21 October 2008 at the invitation of the Permanent Bureau of the Hague Conference on Private International Law as part of its feasibility study on the "access to foreign law" project.

Protection of personal data

11. Online publication of court and administrative tribunal decisions and related material should be in accordance with protection of personal data laws of the State of origin. Where names of parties to decisions need to be protected, the texts of such decisions and related material can be anonymized in order to make them available for free access.

Citations

12. State Parties are encouraged to adopt neutral methods of citation of their legal materials, including methods that are medium-neutral, provider-neutral and internationally consistent.

Translations

13. State Parties are encouraged, where possible, to provide translations of their legislation and other materials, in other languages.

14. Where State Parties do provide such translations, they are encouraged to allow them to be reproduced or re-used by other parties, particularly for free public access.

15. State Parties are encouraged to develop multi-lingual access capacities and to co-operate in the development of such capacities.

Support and co-operation

16. State Parties and re-publishers of their legal materials are encouraged to make those legal materials more accessible through various means of interoperability and networking.

17. State Parties are encouraged to assist in sustaining those organisations that fulfil the above objectives and to assist other State Parties in fulfilling their obligations.

18. State Parties are encouraged to co-operate in fulfilling these obligations.