



## **Meeting Report**

### **Access to Foreign Law in Civil and Commercial Matters**

**Approximately 130 legal professionals from more than 35 States representing all continents gathered from 15 to 17 February 2012 in Brussels, Belgium to discuss “Access to Foreign Law in Civil and Commercial Matters” in a Joint Conference of the European Commission and the Hague Conference on Private International Law. The professionals with various backgrounds – judges, notaries, lawyers, public sector officials, legal academics and legal librarians – from diverse countries and regions, different cultures and legal traditions (e.g., common law and civil law systems, etc.) voiced the same trend:**

- Due to globalisation, migration and increasing cross-border commerce there is a need to access foreign law, and this need is likely to increase in the future;**
- Access to foreign law is an important component of access to justice, strengthens the rule of law, and is fundamental to the proper administration of justice;**
- There is a need for global co-operative mechanisms to facilitate access to foreign law;**
- Information and Communication Technology (ICT) is a unique tool for making law available in the cross-border context (bearing in mind questions of access to authoritative electronic documents, a State’s responsibility to provide historical legal materials and to conserve legal texts, etc.).**

***This conference offers a unique opportunity to meet experts from all over the world who deal with the practical challenges associated with accessing foreign law in civil and commercial matters.***” Paraskevi Michou, Director of Directorate A, “Civil Justice,” European Commission, Directorate General Justice

***“Global interdependence of economies, societies and cultures, and regional integration increasingly question the traditional model of life and business being confined within the parameters of a single legal system.”*** Hans van Loon, Secretary General, Hague Conference on Private International Law

***“The need to access foreign law is indeed ever-growing for a number of reasons [...] There are about 200 countries in the world and so inevitably 200 legal systems worldwide and, as a matter of fact, even more since quite a number of states are federal and composed of entities with their own law, sometimes combining intricate mixed legal systems under one legal roof.”*** Holger Knudsen, Library Director, Max Planck Institute for Comparative and International Private Law

## **DAY 1 : Wednesday 15 February 2012**

### **Welcoming Words**

“The European Commission is delighted to collaborate with the Hague Conference on Private International Law,” commented **Paraskevi Michou**, Director of Directorate A, “Civil Justice Policy,” of the European Commission, as she welcomed participants. Since the last joint conference organised in 2009, the importance of the subject of access to foreign law in civil and commercial matters has been constantly increasing, especially in the area of family law. “We saw already in 2007 evidence of need for work in this area and asked the Hague Conference on Private International Law to work on the subject,” Michou said. People go abroad for work, or do business abroad, and thus international cases are increasing, along with the corresponding need for access to foreign law. “Courts are looking beyond national law in a global society,” she said, outlining core values such as the right to an effective remedy and to a fair trial, expressed in article 47 of the European Union Charter of Fundamental Rights. Work in the

area of justice and law within the EU should make life easier for its citizens, but Michou mentioned persisting obstacles such as the burden of proving or ascertaining foreign law. The challenges of the application and ascertainment of foreign law *ex officio* by judges or by parties affects the efficiency of justice and legal security. It is necessary to provide tools for accessing foreign law. In order to foster growth and to cut red tape, it is necessary for businesses to have legal certainty in order to trade cross-border. Other aspects to discuss are high costs and language barriers to accessing foreign law. The aim of the conference is how to achieve improved access to foreign law. The first part of the conference would set out a horizontal overview in defining the problem, and also give the floor to national perspectives, common law and civil law systems alike. A second part would then address the status quo of the current mechanisms in this area which already exist (*e.g.*, the London and Montevideo Conventions), before working on a third day to chart possible ways forward, elaborating creative and effective options in order to tackle this issue.

**Hans van Loon**, Secretary General of the Hague Conference on Private International Law, recognised fruitful collaboration between the European Commission and the Hague Conference over past years, and thanked the Commission for the financial and logistical support in relation to the Joint Conference on Access to Foreign Law in Civil and Commercial Matters. “Why this joint conference?,” the Secretary General remarked, “In a nutshell the answer is because global interdependence of economies, societies and cultures, and regional integration increasingly question the traditional model of life and business being confined within the parameters of a single legal system. Personal and family or commercial situations connected with more than one country, and with more than one legal system, are now commonplace. As a result, information on foreign laws, notably in the civil and commercial field, is becoming progressively more a basic resource within the toolkit of ensuring cross-border legal certainty and security.” The Secretary General also noted developments in important global and regional private international law instruments which have further given rise to an increased need for access to foreign law in civil and commercial matters, including a range of international Hague Conventions and regional instruments.

## **Panel I – Theme 1 – The Global Need for Accessing the Content of Foreign Law – A Reality**

**Chair: Salla Saastamoinen, Head of Unit A1 “Civil Justice Policy,” European Commission, Directorate General Justice**

Responsible government and effective public administration, the rule of law and effective legislation, transparency and access to law are just some of the policy goals the United Nations (UN) is promoting all over the world. **Gherardo Casini**, Head of the UN Department of Economic and Social Affairs (UN / DESA) Office in Rome gave a speech on “Access to Legal Information including Foreign Law – A Foundation for Access to Justice, the Rule of Law and Proper Administration of Justice.”

Preserving and building democracies includes notions of human security, development and human rights. When shaping a democracy, the rule of law is a key principle of governance, which translates into an accountable, independent State, answerable to law and committed to transparency and free access to the State’s law. More international work needs to be done on these principles and on building this reality, according to Casini.

Casini highlighted the right of access to information, including legal information, especially in the light of the potentialities of modern Information and Communication Technologies (ICT). At a global level, two trends seem clear which are relevant to the topic of the joint conference: the ongoing implications of the World Summit on the Information Society<sup>1</sup> and initiatives in the area of the rule of law, as 40 UN agencies are involved in rule of law issues. Casini

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<sup>1</sup> The UN General Assembly [Resolution 56/183](http://www.un.org/News/Press/docs/2001/200112/20011218.htm) (21 December 2001) endorsed the holding of the **World Summit on the Information Society (WSIS)** in two phases. The first phase took place in Geneva from 10 to 12 December 2003 and the second phase took place in Tunis, from 16 to 18 November 2005 (see: <http://www.itu.int/wsis/basic/about.html>, and regarding the WSIS Forum 2012, see: <http://groups.itu.int/wsis-forum2012/Home.aspx>). “The **digital revolution**, fired by the engines of Information and Communication Technologies, has fundamentally changed the way people think, behave, communicate, work and earn their livelihood. It has forged new ways to create knowledge, educate people and disseminate information. It has restructured the way the world conducts economic and business practices, runs governments and engages politically. It has provided for the speedy delivery of humanitarian aid and healthcare, and a new vision for environmental protection. It has even created new avenues for entertainment and leisure. As access to information and knowledge is a prerequisite to achieving the Millennium Development Goals – or MDGs -, it has the capacity to improve living standards for millions of people around the world. Moreover, better communication between peoples helps resolve conflicts and attain world peace.” ( Source: <http://www.itu.int/wsis/basic/why.html>)

mentioned that since 2006 the joint UN and IPU initiative “Global Centre for ICT in Parliament” is assisting legislatures worldwide to make more effective use of ICT tools to provide the public with a more accessible law-making process and outputs. In this light, Casini outlined the need to use open document standards to disseminate machine-readable documentation. Casini saw an opportunity for greater collaboration among all stakeholders to promote access to legal information, including through the use of ICT, as he saw a global gap in this field which future work coming out of the joint conference could address.

**Daria Solenik**, Legal Research Associate, Swiss Institute of Comparative Law took the floor to speak about “Assessment on the Basis of Empirical Research – Study of Foreign Law and Perspectives for the Future at the European Level.” In a research study contracted out by the European Commission to the Swiss Institute of Comparative Law, the Institute analysed, over a period of 18 months, the need for accessing foreign law in the 27 EU Member States by conducting 576 interviews via a standard questionnaire distributed to legal professionals. Less than 25% of the professionals have no need to access foreign law, and 75% of the professionals needed access to foreign law, mainly in areas related to the free movement of goods and persons (e.g., family law, successions, and commercial and contracts law). The study revealed that lawyers seem to have more need to access foreign law than judges. Solenik confirmed that the need to access foreign law is increasing, mentioning the successive enlargements of the European Union. Solenik mentioned that the demand for access to foreign law is higher than the means to access the foreign law (e.g., availability online, etc.). The questionnaire also asked about the non-application of foreign law (“*pratiques d’éviction du droit étranger*”): 55% of the practitioners claimed never to avoid the application of foreign law; 35% admitted avoiding applying foreign law, even if there were legal prohibitions to do so. Solenik mentioned difficulties in accessing foreign law: in some cases, lawyers seemed to advise clients not to mention “foreign law elements” to avoid high costs and other barriers to access foreign law.

**Maja Groff**, sharing the paper of speaker **Akbar Khan** in his absence, presented the activities of the Commonwealth Secretariat in the field of access to legal information and foreign law. The Legal and Constitutional Affairs Division of the Commonwealth Secretariat supports Member States by providing

assistance with law reform projects, and in capacity-building programs meant to develop effective laws and justice institutions and processes. A key component of these activities, and a traditional activity of the Commonwealth Secretariat, is the sharing of legal information among countries throughout the Commonwealth. The launch of a new online portal with this goal is planned. The need for access to foreign legal information by small Commonwealth States, which may have fewer resources, is particularly acute.

"Access to Legal Information including Foreign Law – The Perspective of the International Organisation of La Francophonie" was presented by **Michel Carrié**, Head of Programs, *Délégation aux droits de l'Homme, à la démocratie et la paix*, La Francophonie. This organisation was established in 1970 and represents one of the biggest linguistic zones in the world. French is also the official language, or one of the official languages, of several EU Member States (France, Luxembourg, Belgium). Carrié shared La Francophonie's robust programme for the dissemination of legal information (project "*Diffusion du droit*"), including through the use of ICT, within and among French-speaking countries. He emphasised the strong support that Francophonie governments had given to work in this area, as it is considered fundamental to the strengthening of democracy, the rule of law, and the maintenance of a peaceful social order, without which development is not possible.

**Philippe Lortie**, First Secretary at the Hague Conference on Private International Law, took the floor to speak about "The Evolution of Work on Foreign Law at the Hague Conference on Private International Law." Work on the topic started in April 2006 with a mandate for a feasibility study on the development of a new instrument for cross-border co-operation concerning the treatment of foreign law. However, a global expert meeting (February 2007) revealed that it was 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." Nevertheless, the experts agreed that there was "clearly a need to facilitate access to foreign law."

A Hague Conference questionnaire sent in 2007 to Members of the organisation (31 in total replied) reported that:

- States receive and send between 0 and 38 requests on foreign law per year, under bilateral or multilateral treaties;
- On average, a reply to such a request comes within 12 weeks;
- Some Members reported satisfaction with the existing instruments, while some criticised the time delay in receiving a reply and the usefulness of such instruments in cases of complex litigation;
- There is an increase in demand for accessing foreign law on a global scale;
- The demand is felt most of all in family law, successions and commercial law;
- Some would appreciate a new treaty and / or effective, flexible mechanisms in this area.

Accessing law via the Internet also has its limits when it comes to understanding the surrounding legal culture and interpretation / practical application of a law: “the Internet does not always provide a solution, as in some cases a practitioner is needed,” Lortie noted.

### **Plenary debate**

Following the presentations, Chair Salla Saastamoinen opened the floor to discussion, allowing participants to express their views.

Is the Internet a privileged source of access to information on foreign law, as it is not 100% reliable? There will not infrequently be problems related to the interpretation of foreign law, suggested some participants. Thomas John (Commonwealth Attorneys-Generals Department, Canberra, Australia) shared that in his view access to foreign legal information is a very real problem as “[a]n increasing demand is there, and requests are increasing,” as noted in the growing number of requests received by his own office. He mentioned that big law firms generally have international partnerships, which translate into better access to foreign law, but that his office “gets requests directly from courts, and the questions are often very specific.” Instead of general questions like “what is Australian contract law like?” the questions nowadays seek detailed legal information. Referring to preliminary proceedings at the European Court of Justice, Marc van Opijnen (Council for the Judiciary, Netherlands) said that case law of other Member States seems to be difficult to find in a translated version. Van Opijnen mentioned the Council of the European Union conclusions of 2010,

setting up a framework for a European case-law identifier,<sup>2</sup> including common meta-data, in order to assist in accessing the case law of EU Member States.

Matthias Heger (*Bundesministerium der Justiz* / Federal Ministry of Justice, Germany) said that information technologies provide a certain basis for access to foreign law, but he suggests a division in questions of *access* to foreign law and the *interpretation* of foreign law. In addition, he noted that in many cases, it is the law of the habitual residence which applies, so fewer cases exist than might be expected in which foreign law is applicable.

A participant from the University of Madrid said that conflict norms in international private law very often entail an *ex ante* view. When expanding into or trading with other countries, companies have questions about legal and taxation issues, about various licenses, etc. The participant focused on the very practical legal problems that businesses are facing. A participant from the University of Lund, Sweden said that access to information is sometimes given, but that a corollary problem exists in accessing a translation of that information into a language that the requested understands.

Daria Solenik (Swiss Institute of Comparative Law) said that the faults noted in legal information available on the Internet are connected to the youth of this medium. The information is there, but there is a deficit in organising this information in a way which encompasses verification of the sources (*e.g.*, to ensure that the information is authentic, reliable, official, has appropriate translations, etc.). The organisation of this information work is task that needs to be done by experts. Solenik said the heart of the problem lies in the application of the foreign law by a given jurisdiction, where the person has no training or access to the culture and background of this foreign law.

Philippe Lortie (Hague Conference) mentioned the need to develop some criteria to verify the authenticity and reliability of information, depending on what information is sought. Also, should a government official in general provide the information? The best actor to deal with the application of a legal norm, however, seems to be a judge. On the other hand, the type of response should be according to the kind of service needed by the requester of legal information.

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<sup>2</sup> European Case Law Identifier (ECLI), Council conclusions (see: <http://register.consilium.europa.eu/pdf/en/10/st16/st16871-re01.en10.pdf>).



Gherardo Casini (UN) added that all legal documents should be in an accessible, open format using standards that ensure the inter-operability of information. He pointed out that there should exist the political will to use new technologies and ICT knowledge, and called for an international partnership in this area where governments globally might find common ground. “Do not underestimate the power of technology,” he noted.

### **Panel II – Theme I – Subtheme 1 – Perspectives from Common Law and Mixed Systems of Law including Common Law**

**Chair: Richard G. Fentiman, Professor of Private International Law, University of Cambridge, Queens College, United Kingdom**

“The common law perspective is not only one perspective, but rather all those perspectives of different countries which practice the common law,” remarked Fentiman in introducing the second panel.

The first speaker, **Justice P.L.G. Brereton**, Judge at the Supreme Court of New South Wales, Australia, set out “A perspective from Australia – The New South Wales MOU framework.” Referring to the discussion of the previous panel, he noted that “two aspects emerged: access to law and the interpretation or application of that law.” In his presentation, he outlined traditional shortcomings in accurately ascertaining foreign law:

- The difficulty of choosing, on satisfactory grounds, between two equally well-qualified, eminent experts in the applicable foreign law who give diametrically opposed opinions;
- The presumption of similarity – when the evidence does not sufficiently prove that the foreign law is different from the domestic, it is presumed to be the same;
- The “lost in translation” problem.

These shortcomings led to the conclusion that the best authority to resolve a disputed question of foreign law is a court of the jurisdiction whose law it is. In response, the Supreme Court of New South Wales in Australia launched a three-pronged reform:

- New Rules of Court allow the Supreme Court, on the application of a party, but only with the consent of all parties, to order the proceedings to be commenced in a foreign court to answer questions as to principles of foreign law or their application (another Rule allows the reverse situation in the case of foreign proceedings for the determination of an issue of Australian Law by the Supreme Court);
- A long-standing procedure for reference of technical questions to a referee was extended to questions of foreign law;
- The memoranda of understanding – one with the Supreme Court of Singapore and one with the Chief Judge of the State of New York – which stipulate that the other will provide an answer to a question of law submitted by the requesting jurisdiction.

Whilst the costs to litigants may be the same or less, he concluded by indicating that the “benefits really lie in the quality of the decision making-process”. The court who is best equipped to answer a reference of a question of law best assures litigants of the correct answer.

**Peter D. Trooboff**, Senior Counsel, Covington & Burling LLP, Washington D.C., United States of America, presented “A Perspective from the U.S.A. – Rule 44.1 of the Federal Rules of Civil Procedure.” In the United States of America, foreign law is considered as law and not as fact. Trooboff confirmed that an international instrument could be useful in facilitating better access to foreign law. A key issue is to shape the instrument properly, as “the devil is in the details [...] and we need to identify the real problems,” he said. Trooboff sees such an instrument as particularly useful to the many “middle-class” litigants – parties in cases that do not justify hiring large law firms and expending substantial legal fees – and others needing to know foreign law. Further, in view of continuing globalisation and the needs of countries with fewer library resources, basic access to foreign law is not yet available and needs to be assured for the laws of every country. He sees two main approaches a new instrument could take: improving general access to the domestic law of each country (including interpretation of foreign law) and establishing a means for referring questions to foreign courts. He notes the difficulties in working out the details on how such a consultation process work. “Judges prefer to hear from other judges,” remarked Trooboff. The

Washington practitioner raised the question of how to shape an instrument in order to facilitate timely answers to questions in a cost-effective way.

**Philana Mugenyi** (replacing **Amos Wako** a member of the International Law Commission) presented "A Perspective from Kenya." "The primary source of law in Kenya is the Constitution," she said. Since August 2010, Kenya has had a new Constitution, which provides that any international law ratified by Kenya is considered as national law. The constitution also allows citizens to possess two nationalities, which might result in an increase of conflict of law issues. She provided a practical example on child custody, involving Belgian and Kenyan courts, illustrating cultural and legal differences between the two jurisdictions. She mentioned that access to Kenyan law has recently been provided for free and is available online. However, with respect to Kenyan judges and other legal practitioners accessing foreign law, she sees financial barriers as, for instance, big firms may have preferential access to expensive resources such as LexisNexis, and some small firms or sole practitioners may not have Internet access at all.

"A perspective from India" was presented by **Sushma Nagaraj**, replacing **Justice Dhananjaya Y. Chandrachud**, Judge at the Bombay High Court, India. In India, foreign law is considered as a question of fact which should be proven, and if it is not, Indian law applies. The Indian Evidence Act applies to the proof of foreign law. Indian case law is still marked by English law due to India's colonial history, and the proof of English law in India is still a question of law, not of fact, and as such is an exception to the general rule. She referred to a study she carried out amongst judges, practitioners and academics, between October and November 2011, which revealed that most stakeholders would support a new global instrument on access to foreign law. The study also provided ideas on how to facilitate access of foreign law such as allowing foreign lawyers to argue in courts on the foreign law, putting more legal information online, or changing approaches to prove foreign law in other ways, such as with the court-to-court reference question mechanism pioneered by the New South Wales Supreme Court in Australia.

**Simon Chester**, Litigation and Business Law expert, Partner / Heenan Blaikie SRL/LLP, Toronto, Canada provided an overview of a "Perspective from Canada –

Including Networking and Intelligent Tools.” He mentioned that, within Canada there were two official languages, French and English, and two legal systems, civil law and common law. He confirmed that “globalization will increase the need to access foreign law.” Some of the areas of law where issues of foreign law arise frequently include family law, conglomerate restructuring, major commercial disputes, multi-jurisdictional class actions and insolvencies. Chester noted that small versus larger corporate litigants may face differential access to foreign law because of differences in financial and other resources. Chair Fentiman concluded “Canada has a mixed system; however, even if the concepts we are using are different, we are facing the same problem.”

## **DAY 2 : Thursday, 16 February 2012**

### **Panel III – Theme I – Subtheme 2 – Perspectives from Civil Law and Mixed Systems of Law including Civil Law**

**Chair: Andrea Bonomi, Professor of Private International Law at the University of Lausanne, Switzerland**

“Yesterday’s session on common law jurisdictions showed that there is not one single approach taken by common law jurisdictions,” introduced Chair Andrea Bonomi. “It is the same for civil law jurisdictions, but common trends can be seen in both legal traditions,” he said.

**Yuko Nishitani**, Professor at Kyushu University, Law Faculty, Fukuoka, Japan, set out a perspective from Japan. Foreign law has the same value as domestic law in Japan, and it is applied and investigated ex officio by the judge. Mistakes in the application of foreign law are subject to an appeal to the Supreme Court. Nishitani acknowledged an increase in cross-border relations also in the Asian region which lead to more cross-border legal disputes. “A judge often asks parties to help in the assessment of foreign law,” she said. In commercial cases, parties are generally willing to provide the information requested. Sometimes, the Ministry of Foreign Affairs or the Japanese embassies abroad are contacted to obtain more information. “This is though time-consuming, and does not always provide the result expected,” Nishitani said. According to her, it would be useful to have an international instrument to access foreign law. Internet

resources are one way to access foreign law, but not sufficient. Language problems remain when it comes to direct communication between judges. Hence, assistance through administrative cooperation would be a more suitable solution for Japan. With reference to the London Convention, the professor said it had "some drawbacks and improvements are necessary." This would include a clear timeframe to accelerate responses to requests, the possibility for a judge to ask a direct question to an authority (as he or she needs clear information), and to open such an instrument not only to judges, but also to parties, notaries, arbitrators, etc.

**Michael Stürner**, Professor of Civil Law, Private International Law and Comparative Law at the European University Viadrina at Frankfurt / Oder, Germany presented "A Perspective from Germany," where judges are obliged to apply foreign law as a matter of law, not of fact. Courts have several possibilities to access foreign law, such as to rely on acquired expertise, manuals in specific areas of law or databases. Parties to a conflict have a duty to help the judge to ascertain the foreign law; however, the judge remains ultimately responsible for ascertaining the content of the law. Referring to the London Convention he mentioned that answers received are sometimes "too abstract, and not related to the practical case." In Germany, a question on foreign law is often referred to an expert: court files are for instance sent to the Max-Planck-Institute for Comparative and International Private Law,<sup>3</sup> in order to receive an expert opinion. This is however time-consuming, as "there is only one Max-Planck-Institute in Germany, and an answer might take up to a year," Stürner said. The advantage of the Institute is the receipt of an answer by bilingual persons, so no translation costs arise.

**Diego Fernandez Arroyo**, Professor of Law, Science Po Law School Paris, France and Member of the Curatorium of the Hague Academy of International Law, provided "A Perspective from Latin America." He gave an overview perspective of all Latin-American countries, which include 20 independent States. Substantive law in Cuba and Chile are different, and the same applies for approaches to access to foreign law: there are certain tendencies, but not one

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<sup>3</sup> Max-Planck-Institut für ausländisches und internationales Privatrecht  
[http://www.mpipriv.de/ww/de/pub/welcome\\_center.cfm](http://www.mpipriv.de/ww/de/pub/welcome_center.cfm)

single approach in Latin America. He affirmed the need to improve access to foreign law, and set out reasons for this increased need:

- Very high levels of migration within Latin America as well as out of Latin America, mainly to Spain and Italy;
- E-commerce;
- Increasing economic integration.

He noted that “The Montevideo Convention [1979] was created at a time when there was no access to the Internet”. He then suggested existing private international law instruments raised awareness of the necessity to apply foreign law, but the application of foreign law is in general done in an “amateur way.” According to him, other bodies in addition to courts should have access to instruments which assist in ascertaining the content of foreign law. The application ex officio of foreign law is not obligatory in every Latin American country, but there is a trend that this should be the case. Fernandez Arroyo also provided several recent practical examples from Latin America, both in civil law matters. A court in Costa Rica applied Nicaraguan law in a family law case, communicating with a Nicaraguan court to ascertain the content of the foreign law, and setting out in the judgment the relevant e-mail exchange between the courts. In a Venezuelan case, the judge was asked to apply Swedish law, a language that he or she did not speak. This judge made use of resources in the Spanish language on the European Judicial Network in civil and commercial matters<sup>4</sup>, also posing a question to a relevant Swedish institution. “There is a need for a global instrument,” he said. “The conditions exist and it might be the right time now to agree on such an instrument.”

**Yujun Guo**, Professor of Law at the Wuhan University, Hubei, China, provided “A Perspective from China, including the Use of Bilateral Treaties,” confirming the general trend that foreign-related cases are increasing, and that in China 90% concern litigation in civil and commercial matters. The duty of parties to prove foreign law was discussed: some judges do not apply foreign law when not provided by parties, while some do their own research (which is time-consuming). She confirmed the urgent need for China to have access to foreign

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<sup>4</sup> <http://ec.europa.eu/civiljustice/>

law. Although the Internet is there, that does not mean foreign law is easy to access, and expertise is also needed.

**Rashid Hamed Al-Balushi**, Lawyer-Attorney Mohammed El Murtada & Co, Barristers & Legal Consultants, Assistant Dean for University Studies, College of Law, Sultanate of Oman, presented "A Perspective from Oman and other Gulf Co-operation Council States." "Gulf countries follow the general principle of civil law" he said. Only in Saudi Arabia does Islamic law apply. Some Gulf region countries apply foreign law ex officio, others do not. For example, in Kuwait, the court must find the foreign law while in Bahrain the parties have to provide the information on foreign law. He mentioned, as did most speakers, the increase of cases involving foreign law, due to, among other things, the very high rates of migration to the Gulf region in particular. Al-Balushi concluded indicating that he supports the need for a new global instrument to facilitate access to the content of foreign law and underlined that before that we must bear in mind the specificity of each country, especially in matters of personal status.

The debate after the speaker's presentations highlighted the following points:

One participant mentioned the Riyadh Arab Agreement for Judicial Cooperation (1983) and related networks: through the Arab judicial network (*réseau juridique arabe*) one could find all national laws of Members of the Arab League and there is a judicial cooperation network which is currently being developed. He mentioned that there is not only a problem in accessing foreign law, but also in accessing foreign judges.

A Spanish-speaking participant highlighted the difference between accessing foreign law and the application of this law. This participant said that "international instruments have a great scientific background, but there are practical problems": in reality, people would like to have a quick process, and what works in practice are judicial networks. She pointed out that each country should have expert judges in foreign law, and a national / international network where judges can communicate directly. Linguistic and cultural barriers could also be reduced with such a network.

Mrs Françoise Monéger (French *Cour de Cassation*) mentioned that French law makes a difference between "droits disponibles" ("available law") and "droits

indisponibles" ("unavailable law"). Even if a party raises an available law, the judge is obliged to search for the foreign law, and if he does not apply that law, he needs to justify the reason for non-application.

Daria Solenik (Swiss Institute of Comparative Law) mentioned that she is astonished at differences in treatment between foreign and national law. Conflict rules and connecting factors are facts, and when those are not discovered on time, the relevant foreign law may not be applied. She suggested that this may constitute a failure of the system.

## **Theme II – Current International Landscape of Facilitation of Access to Foreign Law and Challenges / Gaps**

### **Panel IV – Theme II – Subtheme 1 – Administrative and Judicial Cooperation: Existing Systems and Challenges**

**Chair: Milos Hatapka, Director, Private International Law Division, Ministry of Justice of the Slovak Republic**

**Eberhard Desch**, Head of Division of International Law, Federal Ministry of Justice of Germany, Chair of the European Committee on Legal Co-operation, Council of Europe, spoke about the "European Convention of 7<sup>th</sup> June 1968 on Information on Foreign Law" (the "London Convention"). He described the need for access to foreign law and that it is a question of human rights to have a mechanism to ensure this aspect of access to justice. "The London Convention is not very well known by judges, but this can be changed," he said. He suggested that language and translation remains the main issue with the Convention, which should be kept in mind when designing a future instrument. He also mentioned issues of how to appropriately frame the legal question under the Convention, if the scope of the Convention should be widened, and about developing minimum standards to make and answer a request, including time-limits for a reply.

**Eugenio Hernandez-Breton**, Professor of Private International Law, Faculty of Law Central University of Venezuela, Partner, Baker & McKenzie, Caracas, Venezuela, spoke about "The Inter-American Convention of 8 May 1979 on Proof and Information on Foreign Law" (the "Montevideo Convention"). He mentioned that the Convention is not very well known amongst judges and practitioners,



and as a result not very much applied in practice. More education of judges and other actors would be needed in order for the Convention to be used more frequently for its intended purpose.

**Niovi Ringou**, Deputy Head of Unit, Unit A1 “Civil Justice Policy” (European Commission, Directorate General Justice), spoke about “The European Judicial Network in Civil and Commercial Matters.” “This is a flexible, non bureaucratic structure, an informal way of acting.” She explained that the European Judicial Network (EJN)<sup>5</sup> provides a wide range of information on EU and national law in EU Member States. Created by a Council decision of 2001, the network has operated since December 2002. “Today, the EJN is an important tool for courts and contributes to a genuine area of justice in Europe,” she said. The network today includes 512 members from all areas of justice, including professional associations, and holds six meetings per year, which provides a platform for discussion. National contact points ensure easy access to national law. In September 2011, a set of recommendations was elaborated on how to deal with requests.

**Gintarė Janikūnaitė**, Chief Specialist, Division of Legal Co-operation, International Law Department, Ministry of Justice, Lithuania gave a “Perspective from a State Party to the 1968 London Convention.” There are approximately five requests per year registered under the London Convention in Lithuania, with more outgoing than incoming requests. The reasons for few requests might be, according to Janikūnaitė, that judges use other bilateral conventions, courts use EJN channels or direct communication, parties are entitled to provide information on foreign law or that there is a lack of information or familiarity with the London Convention. Referring to the language regime of the London Convention (Art. 14) she said that incoming requests are often in English (or other language), not in Lithuanian (as it should be according to the provisions of the Convention).

**Rebecca A. Cochran**, Professor of Law at the Dayton School of Law, Former Private Practitioner and Assistant Prosecuting Attorney (Montgomery County, Ohio), reported on “Judicial Co-operation within the United States of America – Federal Court Certification of Questions of State Law to State Courts.” In cross-border cases within the United States, access to law for U.S. courts is simplified

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<sup>5</sup> EJN : [http://ec.europa.eu/civiljustice/network/network\\_en.htm](http://ec.europa.eu/civiljustice/network/network_en.htm)

by a common language and a similar legal background. Further, she described a process whereby a U.S. federal court can certify questions of law to state courts, in order to receive an authoritative, binding answer to a legal question.

In the debate following the panel, several points were raised:

- Regarding non-binding answers according to Article 8 of the London Convention: from a human rights perspective, a court must be independent and assume full jurisdiction. Therefore, an answer or opinion on foreign law should not be binding on the requesting court. (Desch)
- Why is the Montevideo Convention not used in practice? Is an international instrument a better solution, and what are the missing aspects of the Montevideo Convention? (Hatapka). The situation in private international law has dramatically changed in Latin America over the years, as legal frameworks have been put in place and education on the topic has increased. In Venezuela, a master's degree in private international law was established only in 1997, in 2000 a thesis on the proof of foreign law was submitted, etc. When the Montevideo Convention was created, there was not the current status quo. (Bréton)
- Would U.S. federal courts also pose questions on foreign law to courts of other countries? (Hatapka) In terms of time and resources, it would be difficult to accept questions from outside the U.S. (Cochran) Workload is indeed a global problem. (Hatapka) An agreement rests on mutuality: there are incoming requests, but one can also send requests (a win-win situation / *quid pro quo*). However, when a question is not certified, the workload less burdensome.
- The London Convention is not sufficiently known. We (Ministry of Justice, Germany) receive about 50-60 incoming requests per year, and send out the same number. (Heger).
- The London Convention deals with "middle class" requests. (Desch) Simpler or shorter requests may be best answered by way of a network such as the EJN, whereas the more complicated "Rolls-Royce" of requests can be best dealt by expert institutes like the Max-Planck-Institute. A reply under the London Convention is more official, whereas replies within the EJN are not formal, nor binding. The mechanism of the Convention should be faster, and translation issues should be discussed (e.g.,

establishing relay languages), and the Convention should be opened to others than courts. Other ways should be explored, but the structure of the London Convention itself is promising. (Heger)

- What about the role of the parties? Do they need to receive all documents, which would involve costs of translations, would be time-consuming, etc.? Does the requested court need to hold a hearing in which the parties present arguments on the proposed answer? (Trooboff)
- Judges are not aware of the London Convention; sometimes the problem lies in the formulation of the original question. (Participant from Greece)  
The answer is only as good as the question. (Hatapka)
- The London Convention is very general as it deals with *information* requests. When a government official provides an answer, is there a possibility for appeal? This could create practical problems. (Participant)
- If a global instrument is going to be created, it shouldn't be a global London Convention. The instrument should be more ambitious, to explore new ways to facilitate access to foreign law. (Participant)
- The binding or non-binding nature of the answers is not the problem. Rather, the concern is procedural rights. What if the losing party would have preferred a conventional method of ascertaining the foreign law (i.e. an expert, not a reference question)? This also involves costs to the parties, and should not be paid by taxpayers, using public money. (Beaumont)
- Regarding the binding or non-binding nature of an answer to a request, there are different needs in various countries; the question is how to meet these various needs in a new convention? (Desch)
- A new Convention should be user-friendly. The real centre of the international convention has to be the *person*, not the State. (Participant)
- The main challenge is the language regime, which should be cost effective. (Janikūnaite)

There is the important notion of reciprocity. The U.S. system allows the federal court to ask the state court, but not the other way around. That is why some states would like to narrow questions down which can be asked. (Cochran)

**Panel V – Theme II – Subtheme 2 – Availability of Online Legal Information on National Laws; Some of the Existing Systems and Challenges Addressing Language Barriers, Interoperability, Authenticity, Up-datedness and Historical Information**

**Chair: Daniel Poulin, Director, LexUM, University of Montreal, Faculty of Law, Montreal, Canada**

“Free access to online legal information has existed for more or less 20 years,” commented Chair Daniel Poulin, Director, LexUM, University of Montréal, Faculty of Law, Canada. According to him, access to legal information online does not resolve everything, but it helps. Free access to law should be provided by governments. He also mentioned the “Open Data Movement” which facilitates access to information. In addition, Poulin described the database “CanLII,”<sup>6</sup> providing free access to Canadian law. “CanLII is the primary source of information for legal professionals,” he said.

**Jean Maïa**, Head of Legislative Services and Quality of Law, *Secrétaire général du Gouvernement de France*, Paris, France, shared the “Experience from a Government Service Provider with an Emphasis on Reliability, Authenticity, Up-datedness, Historical Information and Language Barriers,” referring to the example of “légifrance.fr.” The website contains French laws and conventions. The French official journal in electronic form is authentic and legally binding, and the website also offers some translations. A political decision was made in the 90’s 2000’s to provide organised, practical online access to legal information. Maïa explained that the website contains the normative laws adopted by the State but doctrine, commentaries, etc. are still published by commercial editors. He mentioned that the “Open Data Movement” involves a great deal of work. Access to law also involves questions of quality of indexation and linguistic issues, according to Maïa. Translations have no legal value and there is further work to do for a thesaurus, glossary etc. on Légifrance.

**David Mao**, working at the Law Library of Congress, Global Legal Information Network (GLIN), Washington D.C., United States of America, set out “A Possible

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<sup>6</sup> <http://www.ijcan.org/en/index.php>

Recipe to Address Language Barriers – The Global Legal Information network (GLIN) Experience.” The Global Legal Information Network (GLIN) is a public database of official texts of laws, regulations, judicial decisions, and other complementary legal resources contributed by governmental agencies and international organisations.<sup>7</sup> GLIN enables citizens to access law in their own language and to find the law of other countries, as well as introducing search terms in their own language and summaries of legal texts in English. However, no official translations are provided. Foreign legal concepts are described in English words. “GLIN accepts only official — that means governmental — sources” said Mao, to ensure authentic and trustworthy, certified texts.

**Yves Steinitz**, Director at the Publications Office of the European Union presented “Terminology, Thesauri and Metadata: Managing Road Signs on the EU Law Knowledge Map.” Eur-Lex,<sup>8</sup> the European Union database, provides access to legislation and related documents in 23 languages. N-Lex<sup>9</sup> provides access to information on national law from EU Member States. Eurovoc<sup>10</sup> is a multilingual thesaurus, containing approximately 7000 terms in 22 languages.

**Tom M. van Engers**, Professor of Legal Knowledge Management, Leibniz Center for Law, University of Amsterdam, Faculty of Law, Netherlands introduced “The CEN-MetaLex Initiative – A Solution for Interoperability and Authenticity.” He questioned whether there is enough of a true “legal marketplace” developing; pay-for-use commercial databases are targeted at lawyers, but access to law should not be a financial question. He suggested that technical standards are not a problem, but the question now is how to structure the content.

**Graham Greenleaf**, Professor of Law, Faculty of Law, University of New South Wales, Co-Director, Australasian Legal Information Institute (AustLII)- provided via Skype “Experiences from the Free Access to Law Movement and the Networks of Legal Information Institutes (with an emphasis on Reliability, Authenticity, Up-datedness, Historical Information and a System’s

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<sup>7</sup> These GLIN members contribute the full texts of their published documents to the database in their original languages. Each document is accompanied by a summary in English and, in many cases in additional languages, plus subject terms selected from the multilingual index to GLIN. All summaries are available to the public, and public access to full texts is also available for most jurisdictions. Source: <http://www.glin.gov/search.action>

<sup>8</sup> <http://eur-lex.europa.eu/en/index.htm>

<sup>9</sup> [http://eur-lex.europa.eu/n-lex/index\\_en.htm](http://eur-lex.europa.eu/n-lex/index_en.htm)

<sup>10</sup> <http://eurovoc.europa.eu/>

Interoperability).” He said that the network of global Legal Information Institutes (LIIs) are substantial in the information they provide, and are heavily consulted. They provide free access and different features from government systems which provide online legal information, including more information and additional data. LII information comes from official sources.

**Michael Houghton**, President, Uniform Law Commission (ULC), United States of America, presented “The Work of the Uniform Law Commission in Relation to the Authentication and Preservation of State Electronic Legal Materials and the 2011 Uniform Electronic Legal Material Act (UELMA).” The ULC’s aim is to “provide states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”<sup>11</sup> The increasing availability of legislation and related information online also “increases transparency and responsibility,” said Houghton. Questions involved in the shift toward more online legal information include how to ensure authenticity (is the legal material official and authentic government data which has not been altered?) and how to preserve the information for coming generations (*i.e.* the obligation to preserve legal acts for public access in 10, 50 or 100 years).<sup>12</sup> Houghton mentioned recent rapid technical developments and the fact that information / legislation needs to remain preserved in case of disasters. In addition, publishing legal information in the traditional paper form is less cost effective. However, issues such as the “digital divide” are also very important: how to ensure that all citizens can access legal information / legislation (the poor, elderly persons, various regions, developing countries, etc.).

During the following general discussion, the following points were raised:

- Questions of paying for information. *E.g.*, Wikipedia is for free, but the quality of information varies: users might pay for value added to information. (van Engers)
- Questions of translation; if legislation is not available in the language of a judge. (Participant)

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<sup>11</sup> <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC>

<sup>12</sup> Electronic Legal Material Act Summary (available at: <http://www.uniformlaws.org/ActSummary.aspx?title=Electronic%20Legal%20Material%20Act> ).

- Questions of “authentication,” to guarantee that the public and other users receive an authentic or authoritative copy of the law. (Participant)
- The Indian Right of Information Act (RIA) was cited as important Indian legislation related to the right of citizens to access governmental information, including legal information. The Act obliges the government to digitise and disseminate types of government information and archives. (Participant from India)
- Open legal data is important. However, there is a risk when opening data, as there are “cowboys” on the Internet hijacking information; some make users pay for legal texts / judgments which are available for free on governmental sites. How do we ensure that citizens have the right to up-to-date unchanged / official information? (van Opinjen)
- Eurovoc, the multilingual EU thesaurus should be opened to legal professionals in EU Member States. (Rokas) It is already free and open for all users. (Steinitz)

**Panel VI – Theme II- Subtheme 3 – Access to Tailored Legal Information and Experts / Expertise: Some of the Existing Systems and Challenges**

**Chair and Moderator: Peter Lown, Director, Alberta Law Reform Institute, Edmonton, Canada**

**Lukas Heckendorn Urscheler**, Vice-Director and Head of the Legal Division, Swiss Institute of Comparative Law spoke about “The Ins and Outs of a Provider of Tailored Legal Information at the Domestic and International Levels – The Perspectives of the Swiss Institute of Comparative Law.” With a relatively small team of lawyers (approx. 13), and library and administrative staff, the Swiss Institute of Comparative Law provides information on foreign laws. All lawyers have different legal backgrounds.<sup>13</sup> Heckendorn Urscheler confirmed the increasing need to access foreign law; requests to the Institute are increasing (they receive approx. 700 per year). Main areas of requests concern civil procedure laws, but also penal law procedures to a minor extent. Other areas concern asylum law, family law, commercial registration of companies and registrations of births, marriages and death, and succession. Heckendorn

<sup>13</sup> <http://www.isdc.ch/en/institut.asp/4-0-10105-5-4-0/>

Urscheler set out the following challenges: finding access to the legal information of different countries such as those in Asia and Africa (in terms of language and the accessibility of information), finding reliable experts, and access to jurisprudence. In addition, according to his experience, sometimes “the question asked is not the right one to find the solution” and “asking the right question is not easy.” In the light of different jurisdictions, the question needs to be sometimes “translated,” not only in terms of language but in terms of its concepts.

**Holger Knudsen**, Library Director of the Max-Planck-Institute for Comparative and international Private Law (*Max-Planck-Institut für ausländisches und internationales Privatrecht*), Hamburg, Germany, Chair of the Law Libraries Section of the International Federation of Library Associations gave an overview of “The Ins and Outs of a Provider of Tailored Legal Information at the Domestic and International Level – The Perspective of the Max Planck Institute.” There is not one single “Max Planck Institute,” but a variety of independent research institutions.<sup>14</sup> The overall research aim of the Institute for Comparative and International Private Law “is a systematic and comparative examination of foreign, European and international private law, commercial law, economic law and civil procedure inclusive of their neighboring fields.”<sup>15</sup> “In a global village, there is a need to know foreign law,” Knudsen said, remarking that some countries are still quite difficult to access when it comes to foreign law (e.g., African, Caribbean countries, Asia / Laos, Cambodia, etc). In addition, Knudsen mentioned language problems in view of the many languages spoken around the world. In view of progressing digitisation, he mentioned that lawyers are conservative personalities who love to publish articles in well-respected publications, often in print, so that it might take time before everything is available online (however, he cited the open access movement).

**Emanuele Calò**, Legal Consultant, Responsible for the UINL (International Union of Notaries) World Notaries Network , spoke about “The New World

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<sup>14</sup> <http://www.mpg.de/institutes>

<sup>15</sup> <http://www.mpipriv.de/ww/en/pub/news.cfm>



Notaries Network established within the International Union of Notaries.” He described a system where, through a special online tool, national coordinators are the link between notaries to find, among other things, relevant information on foreign law. A notary can contact his national coordinator (in country A), who then contacts the national coordinator of the requested country (country B) who will respond with the relevant information to the country A coordinator. In this way, the notary of country A receives information on a foreign law and its application. Calò underlined the “human element”: it is not only a question of finding the information, but of also finding an expert who is able to apply a law; notaries do have the necessary know how to provide reliable legal information. According to Calò, the main advantage of a global network lies in the fact that people receive the same level of information on foreign law in all countries, regardless of the economic resources of each country member of the 80 countries member UINL, each one deserves the same attention and the same quality level.

**Michael Burke**, Chair, Section of International Law of the American Bar Association (ABA) presented “The Perspective of a National Bar Association / an ABA Member on the Use of Private Databases, other Electronic Tools or Networks to find Legal Experts in a Cross-border Setting.” He remarked that previously, “a Kansas lawyer would never have thought he would have to do something with international law.” But in a world getting smaller, with, for example, “a client selling goods to other countries,” international and foreign law has become important. Burke spoke about a recent questionnaire on access to foreign law sent out to ABA members. He mentioned that 40% of those responding to the questionnaire said that they would need, at a certain time, more information on European law and other nations, due to increasing trade between the United States of America, Europe and the rest of the world. At the same time, 69% said that they do not have enough (human and financial) resources to access foreign law. Many small law firms exist, although the United States of America’s market can appear to be dominated by big law firms.

**Jonathan Goldsmith**, Secretary General, Council of Bars and Law Societies of Europe (CCBE) spoke about “The Perspective of the CCBE on the Use of the e-Justice Portal Database, other Electronic Tools or Networks to Find Legal Experts in a European Union Setting.” Goldsmith described a database to “Search for a

European Lawyer,” available on the CCBE website<sup>16</sup> and to be developed in a new format for the new EU e-Justice Portal. The current database links to different sources of information on how to find a lawyer through their bars and law societies. The disadvantage is that the person researching needs to speak the language where the lawyer is sought. Goldsmith mentioned that the CCBE is developing a new system with common search criteria. He mentioned as well the e-CODEX project,<sup>17</sup> which will link national e-justice systems. The CCBE hopes that developments under e-CODEX will help with facilitating exchange of information on a lawyer’s credentials and mandate within the European Union.

In the following general discussion, several points were raised, including:

- If there were a “wish list” developed for a new global instrument / mechanisms to facilitate access to foreign law, it would be helpful to find a way to identify trustworthy foreign law experts. Regarding an international instrument: there may still be a problem to access the foreign law of countries not ratifying a convention. In addition, it would be best to keep an element of interactivity between the person who needs the information and the person providing that information. (Heckendorn Urscheler)
- One should keep in mind a “dual track” approach, namely that governmental discussions should take place alongside discussions about the role that bar associations could play. (Burke)
- In a world of overpopulation, civil wars, and environmental crises, in some countries facilitating access to law is not a priority. It might be best to use existing tools for approaches of how to access foreign law, as this may be the best we can currently do. (Knudsen)

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<sup>16</sup> <http://www.ccbe.eu/index.php?id=140&L=0>

<sup>17</sup> E-codex project information available at :<http://www.e-codex.eu/>.

**Friday, 17<sup>th</sup> February**

**Panel VII – Theme III – Ways Forward: Binding and Non-Binding Solutions?**

**Chairs: Salla Saastamoinen, Head of Unit A1 “Civil Justice Policy,” European Commission, Directorate General Justice, Christophe Bernasconi (Deputy Secretary General of the Hague Conference on Private International Law)**

**Alexandra Thein**, Member of the European Parliament, Group of the Alliance of Liberals and Democrats for Europe, was the first speaker to share her views on ways forward to access foreign law at a global level. Her background is that of a notary, and she is a member of the legal affairs committee of the European Parliament. Thein shared developments within the European Union to harmonise international private law, mentioning binding regulations Brussels I and II, as well as Rome I, II and III. She mentioned also non-binding developments in other legal areas such as European consumer contract law.<sup>18</sup> There are still large differences among Member States, but there are some concerns that national law will disappear, according to Thein. Some questions remain such as if European contract law should apply to businesses only, to citizens only, or to both.

**Richard G. Fentiman**, Professor of Private International Law, University of Cambridge, Queens College, Cambridge, United Kingdom mentioned the following points:

- What resources do we need for access to foreign law in contentious and non-contentious cases? These are two different aspects of the problem. Non-contentious matters could for instance concern the legal information needed to decide whether to do business in another country;
- In the case of a dispute, it is important that a judge could consult a foreign judge;
- Whatever is done in the future, there should be a range of choices and the mechanisms should be optional.

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<sup>18</sup> [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/index\\_en.htm](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm)

**Andrea Bonomi**, Professor of Private International Law, Faculty of Law, Université of Lausanne, Switzerland was impressed by “the conference contributions and the clear openness with respect to the application of foreign law.” There is a strong need for an instrument, which should provide for a range of options: legal information online is not in itself sufficient, as expertise and / or traditional judicial cooperation are also very important. He mentioned that cases are different, as well as the countries and legal cultures involved, and that a future instrument should serve judges and parties, and that the options it offers could be complementary. In addition, Bonomi recalled that legal information has costs: “We should be realistic: in some areas of litigation, means are available. Access to foreign law cannot be entirely free.” He emphasised the value of consulting experts for information, perhaps in the context of a system where costs do not need to be very high (*e.g.*, involving retired judges, young lawyers, etc.) “One needs to be innovative in this area,” he said. “Judicial cooperation is a very useful tool, when it is informal,” he added, being skeptical about certification of questions, involving more costs for translation and a heavier workload.

**Milos Hatapka**, Director Private International Law Division, Ministry of Justice of the Slovak Republic remarked:

- Why not strive for a complete solution? Not different solutions in different States, or for civil law and common law systems, but rather solutions which work for all systems;
- There may be issues of the imbalance between demand for information on foreign law and what is offered;
- The above-mentioned aspects could be solved only by a binding instrument;
- There is clear need for a global instrument which is binding, plus maybe other non-binding mechanisms, complementing each other;
- The binding solution should have a variety of means, so every system can find in it what it is looking for.

**Daniel Poulin**, Director, LexUM, University of Montreal, Faculty of Law, Montreal, Canada mentioned that:

- The foreign law of one State is the national law of the other;

- Access to the legal information of a foreign jurisdiction is different from access to an opinion or advice;
- Questions to discuss: the desirability of establishing one single source of national legal information, preferably by the government; the obligation of the government to provide authentic, trustworthy texts and to preserve the documents over time; and linguistic barriers;
- There is a strong consensus that ICT has great potential to facilitate access to foreign law.

**Peter Lown**, Director Alberta Law Reform Institute, Edmonton, Canada, gave a sense of “the bigger picture,” including:

- Several contemporary trends: the increased availability of information, more mobile populations, increasing cross-border issues, and thus increasing demand for reliable information on other legal systems;
- A description of a continuum of information on foreign law which is sought: there is the supply of pure legal data or legal information, then of data with professional advice / judgment (*i.e.* the application of foreign law to certain facts or circumstances), and then, at the other end of the continuum, of data plus conclusion(s) for the purposes of dispute resolution.

In the following general discussion, the following points were raised:

- What about the opportunity for cross-examination in receiving a response on foreign law, in order that the judge / parties get a “well-rounded” overview, and not only a report? Cross-examination is an important element within the legal system of the United States of America. (Trooboff)
- Whether an instrument should be binding or non-binding is an interesting question. However, there are practical problems, for example costs. Who pays? That is the question that public administrations will ask first. (Spanish Participant)
- Awareness about foreign law and its application is not very high among lawyers, even with respect to existing conventions. More education on this topic is needed. (Swedish Participant)

- How do we, the courts and lawyers in one country, help others to understand our law? A practical starting point of potentially great utility would be a global Internet portal containing information on the domestic law of every State, and pointers on how a country treats and seeks information on foreign law. (Trooboff)
- An initiative pertaining to the development of such a portal, in a first pilot form, has been suggested at the Hague Conference but Member States did not agree to continue with this work at this time. (Bernasconi)
- The London Convention is not necessarily for free (there is an option to raise costs under certain conditions). The question is: what does the person making the request have in mind? Under the London Convention, there is information on foreign law, but no dialogue, which is very important. (Heger)
- Not only within the Montevideo or London Conventions, but there should also be open global dialogue in order to better understand foreign laws. Regarding the costs, it should be borne in mind that access to justice should be free of charge. Foreign law is not necessarily applied *ex officio*, so this might be a problem when costs are involved and parties are responsible for raising and proving foreign law. (Participant from Venezuela)
- In Uruguay, a small office composed of four lawyers ensures access to foreign law: if this is possible for such a small country, why is it not possible in other countries? There is a need to differentiate between information and analysis. It is better to take modest steps, and to proceed incrementally, using the instruments which already exist, developing best practices, etc. over time. (Participant from Uruguay)
- What will be the scope of such a new instrument? Will it deal only with facilitating the manner in which the content of foreign law is established? Or will it also regulate the question whether the application of foreign law is to be raised by the court *ex officio* or is to be pleaded by parties? At the European level, this issue is not yet harmonised, and it reflects differences in underlying notions of the procedural systems of the Member States. It would be preferable if the new instrument was to deal only with facilitating the manner in which the content of foreign law is established. (Participant from Malta)

- Today, there is much more inter-connection than a 100 years ago, information is globalised. (Chester)
- No one should ignore the law, including judges—foreign law should be accessible for them. There should be an option to provide technical support for States that have not enough resources in this field. (Participant)
- It is important to keep in mind that there are limited resources in the public sector, along with other governmental priorities. One should use and build up on existing tools (“we will be measured by our achievements”). (John)
- Notaries collaborate within Spain, and there is an obligation to provide free consultations; there exists in fact an effective and efficient, open collaboration amongst regions. (Gomez)
- One size does not fit all, as there are diverse legal systems, in which various issues must be handled. In terms of creating another international instrument, if created, it should benefit the United Kingdom. Efforts are needed to find solutions that fit all systems, both common and civil law. (Beaumont)

### **Conclusions and Recommendations**

Conclusions and Recommendations for the meeting were discussed among all participants and agreed upon by consensus. The final versions (in English and French) have been posted on the websites of the European Commission and of the Hague Conference on Private International Law.