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PROGRAMME DE TRAVAIL DU BUREAU PERMANENT POUR LE PROCHAIN EXERCICE FINANCIER (PREMIER JUILLET 2009 – 30 JUIN 2010)

établi par le Bureau Permanent

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WORK PROGRAMME OF THE PERMANENT BUREAU FOR THE NEXT FINANCIAL YEAR (1 JULY 2009 - 30 JUNE 2010)

drawn up by the Permanent Bureau

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PROGRAMME DE TRAVAIL DU BUREAU PERMANENT
POUR LE PROCHAIN EXERCICE FINANCIER
(PREMIER JUILLET 2009 – 30 JUIN 2010)

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WORK PROGRAMME OF THE PERMANENT BUREAU
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INTRODUCTION

1. One of the main challenges for the next Council on General Affairs and Policy is to decide on a work programme that includes both the development of new instruments (including the assistance provided to other international organisations, such as UNCITRAL, the European Community and the CIDIP (Inter-American Specialized Conference on Private International Law) process of the OAS (Organization of American States)) and "post-Convention work,"[1] and that is realistic in terms of the very limited resources of the Permanent Bureau.

2. Working simultaneously on the development of new instruments, and on post-Convention services (in addition to the other general administrative tasks of the Permanent Bureau) is necessary, but it is a challenge. It is necessary, because the two are interconnected: legislative work is incomplete without post-Convention work, and post-Convention work may lead to new topics for future legislative work. It is a challenge, because the Permanent Bureau was essentially set up for the development of new instruments but post-Convention services (including follow-up work such as the preparation of Guides to Good Practice) now consume an estimated 70% of staff's time. With the expansion of the global reach of the Conference and its work, with the addition of new Conventions, and the expanding needs for technical assistance of developing countries and countries in transition, the need for these services will continue to grow. A situation where post-Convention work would prevent the Permanent Bureau from engaging in new legislative work should, however, be avoided.

3. In the view of the Permanent Bureau, it is essential to continue working towards new instruments and in particular on new Conventions. If the Conference is to maintain its global leadership role in the field of private international law, it must continue to be able to respond promptly and flexibly to new needs for new instruments in the field. Moreover, its structure – including the Statute with its guarantee of funding of Diplomatic Sessions by the host country, the four-year cycle (in principle) between adoption of a proposal and the end product, as well as the organisation of its regular budget – is geared towards the development of new instruments, in particular Conventions. Of course, the preponderant concern in all decisions on future work should be for the Conference to respond to real global needs. In the case of binding multilateral treaties or Conventions, which require formal ratification and, therefore, may take years "to take off", this also requires anticipation of future developments and needs (as they may present themselves many years ahead). In the case of non-binding instruments, the horizon may be shorter.

4. In the years ahead, the range of needs both for global instruments – binding and non-binding – and for post-Convention services, in particular the provision of judicial studies and technical assistance will in all likelihood continue to grow exponentially. Therefore, it will be necessary to start reflecting on the indispensable reforms needed to enable the Conference to continue carrying out its mandate in a globalising world society, including through a presence of the Conference in various regions of the world. Planning and corresponding strategies for funding, extending over several years instead of one year, would seem desirable. The current situation where the salaries of several staff members working in the interest of all Members are dependent on voluntary

[1] For a schematic overview of post-Convention work of the Permanent Bureau see: "Post-Convention work, regional developments and the need for a systematic programme of training", Prel. Doc. No 6 of March 2006 for the attention of the Special Commission of April 2006 on General Affairs and Policy of the Conference, Note by the Permanent Bureau, Annex A. It should be noted, however, that each of the four components (treaty administration, technical assistance, monitoring, review and adaptation, and promotion and development) have expanded considerably since early 2006.

contributions is not sustainable in the long term. Nor is the present division of staff over two buildings (main building at Scheveningseweg and offices in the Academy building). The Council may already wish to give some thought to this problem. The present Note will focus on the programme for the year to come.

PROGRAMME FOR 2009-2010

A. New topics

5. The Conclusions of the April 2008 Council list six topics for future work, in summary:

   a) mediation in cross-border family matters;

   b) choice of law in international contracts;

   c) accessing the content of foreign law;

   d) protocol to the Child Abduction Convention;

   e) feasibility of a Protocol to the new 2007 Convention;

   f) application of the "Hague model" to temporary / circular migration and remittances.

6. In addition, the Council requested the Permanent Bureau to continue following developments in a certain number of other areas, which might also lead to suggestions for new instruments.

7. A short comment will follow on each of the six topics listed *supra.*

Topic 1 – Mediation in cross-border family matters

8. The Council decided that the Permanent Bureau would initially start preparing a Guide to Good Practice for Mediation in the context of the 1980 Convention.

9. The current state of work is as follows:

A group of experts in international mediation is currently being identified and some have already been contacted. The group will be consulted on:

   a) the principal elements to be included in the Guide;

   b) the elements to be included in a questionnaire to be circulated among Contracting States to the 1980 Convention;

   c) a first draft of the Guide, which is to be prepared by the Permanent Bureau.

10. The draft Guide should be completed by the Permanent Bureau by the beginning of 2010 and then circulated to Contracting States for their comments. The draft will be revised by the Permanent Bureau in consultation with the expert group with a view to circulating a final draft to Contracting States in the second half of 2010, for consideration and adoption by the meeting of the Special Commission to review the practical operation of the 1980 Convention in the first part of 2011.

11. The elements currently being considered for inclusion in the Guide, many of which will require further research, include:

a) integration of mediation with Hague proceedings;

b) the forms of mediation;

c) the scope of mediation;

d) qualifications and training of mediators;

e) how to address certain practical problems such as language and costs;

f) involvement of the child in the mediation process;

g) ensuring the enforceability of mediated agreements in the two countries concerned;

h) issues surrounding confidentiality, including the law applicable to such issues;

i) the question of the law applicable to different elements within a mediated agreement;

j) other mechanisms and procedures employed to promote a voluntary return or amicable resolution, including current practices among Central Authorities, within the legal profession (*e.g.*, collaborative law) and within judicial proceedings.

12. It should be noted that this work, though conducted within the context of the 1980 Convention, will raise many of the issues which are relevant in the broader context of cross-border mediation in family matters and may well help to indicate whether the development of an international instrument is necessary or desirable in that context.

13. The work on mediation is currently being directed by a senior lawyer with the assistance of a junior lawyer. The work will require the continued direction by, and the involvement of, including the drafting skills, a senior lawyer.

Topic 2 – Choice of law in international contracts

14. In a separate Note,[2] the Permanent Bureau reports on its work aimed, among others, at obtaining opinions of stakeholders (practitioners, interested international organisations, etc) as to the desirability and working method for elaboration of a non-binding instrument with a view to promoting party autonomy. The Note also presents the Permanent Bureau's conclusions, recommending that the Conference, at least in a first stage, should draw up a non-binding instrument in the form of principles.

15. Subject to the approval of the Council, the current state of planning is as follows:

- The setting up of an Expert Group on international contracts to develop, under the Permanent Bureau supervision;

  a) the nature and scope of the principles;
  b) the consolidation and limits of party autonomy;
  c) the rules in default of choice of law by the parties;
  d) the role of mandatory rules, etc.

– The drafting of the instrument will require very regular consultations by e-mail among the Expert Group and a number of meetings, spread over the

[2] Prel. Doc. No 7 of February 2009.

elaboration process. The emphasis will be on authoritative work rather than a specific time-frame to complete the project.

- A first meeting of the Expert Group could be held by the beginning of 2010. Depending on the resources and time allocated to the project, one could expect that the outcome of the Expert Group's work could be presented to a Special Commission of governmental experts (not before 2011) and then to a Council meeting (probably not before 2012).

16. The work on choice of law in international contracts is currently being directed by a senior lawyer, with the occasional assistance of one junior lawyer and thorough involvement of a number of Permanent Bureau interns. Due to its long-term nature and the additional research and drafting required, the project will require the continued direction by, and the involvement of, a senior lawyer and the additional involvement of a junior lawyer.

Topic 3 – Accessing the content of foreign law

17. In a separate document[3] the Permanent Bureau reports on the outcome of an Expert meeting held in October 2008, as part of the feasibility study on access to foreign law initiated in 2006, and draws conclusions from its preliminary work. These conclusions suggest that there may well be a global need – particularly in a medium and long-term perspective – for an instrument facilitating access to foreign law, particularly in certain areas of civil and commercial law; from a regional, in particular EU, perspective, this need is probably imminent.

18. The Note also suggests that the instrument might essentially consist of two or three parts:

(1) A first chapter would deal with free access to (foreign) law via the multiple legal databases, accessible through the Internet, created in many regions and countries. It could provide for some minimum criteria for reliability, language requirements and other aspects for such sources, and a light monitoring system to facilitate the respect of these criteria.

(2) A second chapter could set up a global system for administrative and / or judicial co-operation to provide a response to concrete questions on the status or the understanding 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 through the Internet is not sufficient.

(3) Finally, since the mechanism for administrative / judicial co-operation will also have its limitations, there may be a need for accessing more indepth 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) administered via the Permanent Bureau.

19. The second chapter, in particular, would require sustained administrative and / or judicial cross-border co-operation. In order to give continuity to such co-operation, ensure regular Special Commission review meetings, and more generally monitoring and adaptation by the Permanent Bureau, the form of a binding instrument, a new Hague

[3] Prel. Doc. No 11 of March 2009.

Convention, providing basic co-operative machinery would seem to be indicated. The first and possibly a third chapter could set out some basic directives to ensure and maintain high level quality of information available through the Internet, and through networks of experts or experts' institutes, respectively.

20. If the Council were to agree on a number of outstanding issues, the work to be carried out would, in addition to further scientific work, consist of thorough consultations with all the different potential providers of information under the new instrument, as well with the potential users. This would require the direction by, and the involvement of, two senior lawyers (one with a focus on Internet access to foreign law, and one with a focus on judicial and administrative co-operation), and the involvement of one or two junior lawyers (full-time or on secondment). The work should in principle follow the four-year cycle and be completed by 2012 or 2013.

Topic 4 - Protocol to the Child Abduction Convention

21. The Permanent Bureau suggests that the time is ripe to begin the process of examining the feasibility and desirability of a Protocol to the 1980 Convention. This matter has most recently been considered in the light of a specific proposal by Switzerland (see Prel. Doc. No 12 of March 2008), as well as in the context of the work carried out by the Conference on Transfrontier Contact (see "General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children"). The elaboration of a Protocol is a considerable undertaking and should not be embarked upon without careful analysis of the possible contents of a Protocol, as well as an assessment of the prospects of achieving consensus among the 81 Contracting States. Within this process, a distinction should be made between, on the one hand, elements in a Protocol which would be designed to complement and supplement the existing provisions of the Convention, and on the other hand, elements which would require alterations in existing Convention provisions. Examples of the former might be provisions which would facilitate transnational contact, arrangements for the safe return of the child, enforcement, direct judicial communications or mediation. Examples of the latter might be amendments to the defences in Article 13 or to the definition of rights of custody in Article 5. The view of the Permanent Bureau is that, at this stage, only provisions in the first category should be contemplated. The principal interest among Contracting States is in provisions that would supplement and complement the Convention. Moreover, a decision to contemplate wider amendments would send a negative signal to States that are currently considering ratification of or accession to the Convention.

22. The Permanent Bureau therefore recommends the following in respect of this topic:

a) that time should be set aside during the meeting of the Special Commission planned for early 2011 to consider proposals for a Protocol to the 1980 Convention;

b) that, in preparation for that discussion, the Permanent Bureau will:

(1) canvas opinion among Contracting States and Member States as to the desirability and possible contents of a Protocol to the 1980 Convention; and,

(2) prepare a paper setting out and discussing possible elements within a Protocol.

23. If work along these lines is undertaken, it should begin in the near future and will involve work by a senior lawyer together with the assistance of a junior lawyer (full-time, part-time or on secondment).

Topic 5 - Feasibility of a Protocol to the new 2007 Convention

24. A questionnaire is under preparation to solicit Members' views on the feasibility of a Protocol to deal with the international recovery of maintenance in respect of vulnerable persons. The results will be submitted to the Special Commission on the implementation of the Convention planned for November 2009. The Special Commission will be invited to formulate recommendations, if it deems fit, for further work, to be considered by the Council at its meeting in the spring of 2010.

Topic 6 - Application of the "Hague model" to temporary / circular migration and remittances

25. In a separate Note,[4] the Permanent Bureau will provide a further update of its 2006 Note. From the point of view of the needs of global governance, of the six topics listed by the Council, this is probably by far the topic most in need of a global legal framework. The proposal is to establish co-operative machinery, that would not modify substantive law requirements, and would not impact upon States' sovereign rights to control the numbers and categories of migrants admitted to their territories nor the duration of their stay.

26. If work along these lines is undertaken, it will require a significant commitment of time by a senior lawyer together with the assistance of a junior lawyer (full-time, part-time or on secondment).

27. The "other topics" listed in the Conclusions of the April 2008 Council meeting are:

a) questions of private international law raised by the information society, including electronic commerce;

b) the conflict of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage;

c) jurisdiction, and recognition and enforcement of decisions in matters of succession upon death;

d) jurisdiction, applicable law, and recognition and enforcement of judgments in respect of unmarried couples;

e) assessment and analysis of transnational legal issues relating to indirectly held securities and security interests, taking into account in particular the work undertaken by other international organisations.

28. The Permanent Bureau will report orally on developments in respect of each of these topics.

29. A certain number of additional topics may lend themselves for further work (see draft Agenda, No 10, and its Annex A.)

B. Post-Convention work

30. As regards post-Convention work, the Council expressed its support for the activities of the Permanent Bureau to promote and to ensure the effective implementation and operation of the Hague Conventions, including through:

- the use and the development of information technology systems in support of Hague Conventions in the areas of legal co-operation and family law; and

[4] Prel. Doc. No 8 of February 2009.

- the development of regional programmes, including those in the areas of education, training and technical assistance in relation to the Hague Conventions, in particular through the (development of the) International Centre for Judicial Studies and Technical Assistance (funded essentially through the Supplementary Budget).

Separate Notes will set out the range of activities planned for 2009-2010.[5]

CONCLUSION

31. Within the limits of the existing resources, it would seem possible, and desirable, for the coming year to concentrate, as regards new topics, on the following four items:

– preparation of a Guide to Good Practice for Mediation in the context of the 1980 Convention to be submitted for consultation to Members by the beginning of 2010 and then to a Special Commission in 2011 (topic 1 *supra*);

– preparation of principles on choice of law in international contracts through an experts' group to be submitted to a Special Commission not before 2011 (topic 2 *supra*);

– preparation of a Convention, possibly on access to foreign law or perhaps on certain aspects of migration, according to the normal cycle of four years (topics 3 and 6 *supra*);

– preparatory work to explore the desirability and feasibility of a Protocol to the 1980 Child Abduction Convention (topic 4 *supra*).

32. All of this is, of course, subject to unexpected new developments and, in particular, the possibility that new topics may come up.

33. In addition, post-Convention work may continue on a range of topics. However, sustainable new solutions will be needed in particular for the funding of judicial studies and technical assistance programmes.

[5] Prel. Docs. Nos 6, 9 and 10 of March 2009.