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PROGRAMME DE TRAVAIL DU BUREAU PERMANENT POUR LE PROCHAIN EXERCICE FINANCIER (PREMIER JUILLET 2010 – 30 JUIN 2011)

établi par le Bureau Permanent

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WORK PROGRAMME OF THE PERMANENT BUREAU FOR THE NEXT FINANCIAL YEAR (1 JULY 2010 - 30 JUNE 2011)

drawn up by the Permanent Bureau

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PROGRAMME DE TRAVAIL DU BUREAU PERMANENT
POUR LE PROCHAIN EXERCICE FINANCIER
(PREMIER JUILLET 2010 – 30 JUIN 2011)

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WORK PROGRAMME OF THE PERMANENT BUREAU
FOR THE NEXT FINANCIAL YEAR
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INTRODUCTION

1. Last year's preparation of a Note on the work programme of the Permanent Bureau was welcomed by the Council on General Affairs and Policy. Therefore, the Permanent Bureau again submits a draft for consideration to the April 2010 meeting of the Council. The challenge remains for the Council on General Affairs and Policy 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 process (Inter-American Specialized Conference on Private International Law) 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. It was pointed out in last year's Note that 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 time. With the expansion of the global reach of the Conference and its work, 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 later). 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 just one, would seem desirable. The current situation, in which 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 between two buildings (main building at Scheveningseweg and offices in the Academy building). The Council, at its meeting last year, gave some initial thought to this problem, which it may wish to continue at the next meeting. The present Note will focus on the programme for the year to come.

PROGRAMME FOR 2010-2011

A. New topics

5. The Conclusions of the April 2009 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) desirability and feasibility of a 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 above.

Topic 1 – Mediation in cross-border family matters

8. The Council on General Affairs and Policy last year approved plans for the development of a Guide to Good Practice on Mediation in the context of the 1980 Hague Convention, to be submitted eventually for approval by the Special Commission to review the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, which is expected to meet during 2011.

9. The Council also authorised the establishment of a Working Party to promote the development of mediation structures to help resolve cross-border disputes concerning custody of or contact with children, involving States Parties to the 1980 Hague Convention and non-States Parties.

10. In a separate note, the Permanent Bureau reports on progress in relation to both projects.[2] With regard to the Guide to Good Practice, it remains the intention to have the work completed in time for the 2011 Special Commission. As for the "Malta" mediation project, it is hoped that the initial work of the Working Party will be concluded during the second half of 2010.

[2] Prel. Doc. No 11 of February 2010.

11. The Council is reminded that the work on the Guide to Good Practice under the 1980 Hague Convention, as well as work on the "Malta" mediation project, will raise many of the issues which are relevant in the broader context of mediation in cross-border family matters, and may well help to indicate whether the development of an international instrument is necessary or desirable.

12. 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 monitoring and involvement, including the drafting skills, of a senior lawyer.

Topic 2 – Choice of law in international contracts

13. In a separate Note,[3] the Permanent Bureau reports on its continuing work on this topic, in particular the setting up and first meeting of the Working Group to facilitate the development of a draft non-binding instrument with a view to promoting party autonomy. The Note also reports on the outcome of that meeting held in January 2010 and recommends future steps in the progressive preparation and elaboration of the draft instrument.

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

- follow-up research and drafting of proposals on the themes discussed by the Expert Group in January 2010;
- regular and frequent consultations by e-mail and by means of an electronic discussion platform, co-ordinated by the Permanent Bureau, to advance the drafting process;
- a second meeting of the Expert Group is scheduled for mid-November 2010. Research by the Permanent Bureau will focus, *inter alia*, on the consolidation and limits of party autonomy, and the role of mandatory rules.

15. 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 Council meeting, or first to a Special Commission of governmental experts (not before the second semester of 2011) and then to a Council meeting (not before 2012).

16. The work on choice of law in international contracts is currently being directed by a senior lawyer, with a part-time consultant (20% FTE) and the temporary involvement of Permanent Bureau interns. The project will require the continued monitoring and 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[4] the Permanent Bureau reported in March 2009 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 drew 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.

[3] Prel. Doc. No 6 of March 2010.
[4] Prel. Doc. No 11 of March 2009.

18. During the past year, the Permanent Bureau undertook consultations with Members to solicit their views on their needs for an instrument in this area. These consultations did not yet provide a clear lead for convening an Expert meeting. The next Council meeting will provide a new opportunity for Members to consult and decide on this subject.

19. In summary, the Preliminary Document of March 2009 suggested that a future 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 in-depth information on complex legal questions in specific areas (*e.g.*, insolvency or inheritance) or in the course of complex litigation that involves the interface of multiple areas of foreign and / or local law(s). Here, one might think of a series of networks of qualified organisations (bar associations, comparative law institutes, organisations of notaries and other specialists, whose services would not be free) administered via the Permanent Bureau.

20. The second chapter, in particular, would require sustained administrative and / or judicial cross-border co-operation. It would seem that a binding instrument in the form of a new Hague Convention would provide an appropriate framework for effective co-operation as well as enable regular Special Commission review meetings and monitoring by the Permanent Bureau. The first and possibly a third chapter could set out some basic directives to ensure and maintain the high quality of information available through the Internet and through networks of experts or experts' institutes, respectively.

21. 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 as with the potential users. This would require the monitoring and 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 2013 or 2014.

Topic 4 – Desirability and feasibility of a Protocol to the Child Abduction Convention

22. At its meeting of March-April 2009, the Council authorised the Permanent Bureau to engage in preliminary consultations concerning the desirability and feasibility of a Protocol to the 1980 Hague Child Abduction Convention containing auxiliary rules to improve the operation of the Convention. The Permanent Bureau was further mandated to prepare a report on these consultations, which should be discussed by the Special Commission to review the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* at its next meeting in 2011.

23. The process of consultation has begun. During the course of this year views will be sought from a number of academics and judicial and other professional experts. This will be followed by a Questionnaire to Members and to all States Parties to the 1980 and 1996 Hague Conventions. A Report will then be drawn up by the Permanent Bureau on these consultations and submitted for discussion to the 2011 Special Commission. It is understood that any decision on the question of a Protocol can only be taken by the Council.

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

24. In a separate document, the Permanent Bureau provides additional information on this subject.[5] A questionnaire[6] was circulated to Members in May 2009 soliciting their views on the feasibility of a Protocol to deal with the international recovery of maintenance in respect of vulnerable persons. The results were submitted to the Special Commission on the implementation of the Convention (10-17 November 2009).[7] The Special Commission formulated a recommendation to be considered by the Council at its April 2010 meeting, which reads as follows:

> "The Special Commission recognised the importance of ensuring that vulnerable persons are in a position to benefit from the provisions of the Convention. The Special Commission was of the opinion that the core scope of the Convention already covers a number of categories of maintenance obligations in respect of vulnerable persons. Moreover, the Convention contains sufficient flexibility, particularly within the provisions on scope, to enable States to bring other categories by declaration within the scope of the Convention. The Permanent Bureau should, nevertheless, continue to monitor the situation and, if experience reveals that there exist categories of maintenance obligation towards vulnerable persons which cannot be brought within the scope of the Convention under Article 2(3), or that special rules are needed in respect of vulnerable persons, this should be brought to the attention of the Council on General Affairs and Policy of the Conference."

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[5] See "Feasibility of Developing a Protocol to the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* to deal with the International Recovery of Maintenance in Respect of Vulnerable Persons", Prel. Doc. No 3C of February 2010 for the attention of the Council of April 2010 on General Affairs and Policy of the Conference, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs".

[6] See "Questionnaire on the Feasibility of Developing a Protocol to the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* to deal with the International Recovery of Maintenance in Respect of Vulnerable Persons", Prel. Doc. No 1 of May 2009 for the attention of the Special Commission of November 2009 on the implementation of the 2007 Child Support Convention and of the 2007 Protocol on the Law Applicable to Maintenance Obligations, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Maintenance Obligations".

[7] See "Summary and Compilation of Responses to the Questionnaire on the Feasibility of Developing a Protocol to the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* to deal with the International Recovery of Maintenance in Respect of Vulnerable Persons", Prel. Doc. No 8 of November 2009 for the attention of the Special Commission of November 2009 on the implementation of the 2007 Child Support Convention and of the 2007 Protocol on the Law Applicable to Maintenance Obligations, available on the Hague Conference website, *ibid*.

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

25. In a separate Note,[8] the Permanent Bureau will provide a further update of its 2006 Note. The proposal is to establish a co-operative mechanism that would not modify substantive law requirements, and would impact upon neither 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).

B. Other topics

27. The "other topics" listed in the Conclusions of the March-April 2009 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 topics a), c), d) and e); as regards topic b), reference is made to the Permanent Bureau's suggestion to reflect on the merits, if any, of examining the topic of civil liability for environmental damage from a somewhat different angle.[9]

29. A certain number of additional topics may lend themselves to further work (see draft Agenda, No 11, and its Annex A).

30. In a separate Note,[10] the Permanent Bureau suggests several options to continue the work undertaken in the area of litigation following on the adoption of the Choice of Court Convention (the "Judgments Project"), should the Council consider that the time is ripe to resume the process of examining the feasibility and desirability of new multilateral work on jurisdiction and / or recognition and enforcement of judgments in civil and commercial matters.

31. As a first step, the Permanent Bureau recommends the possibility of convening a group of experts, possibly after the entry into force of the Choice of Court Convention, at the international level, to advise on the areas where it might be feasible to resume work on judgments and where consensus might be possible. If this suggestion is followed, the preparation and support of the work conducted by the Experts Group should begin in the near future and would require the continued monitoring and involvement (including the

[8] Prel. Doc. No 7 of February 2010.
[9] Should the Hague Conference revisit the scope and nature of possible work in the field of civil liability for environmental damage? Preliminary Document No 12 of February 2010.
[10] Prel. Doc. No 14 of February 2010.

drafting skills) of a senior lawyer and the assistance of a junior lawyer working full-time on international litigation.

32. Finally, Preliminary Document No 13 reports on recent developments on cross-border data protection issues and recommends that the topic be included in the agenda of the Hague Conference for further examination.

C. Post-Convention work

33. 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
- 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).

34. The Council meeting of 2009 expressly "recognised the additional future work for the Permanent Bureau arising from the Conclusions and Recommendations" of the 2009 Special Commission on the practical operation of the Hague Apostille, Service, Evidence and Access to Justice Conventions. Work in this field is ongoing. The Permanent Bureau will report orally on developments in this field.

35. Separate Notes will set out the range of activities planned for 2010-2011.[11]

CONCLUSION

36. In accordance with the decisions already taken by the Council, the Permanent Bureau will continue to work on the following matters:

– preparation of a Guide to Good Practice for Mediation in the context of the 1980 Convention to be submitted to a Special Commission in 2011, as well as the development of mediation structures applicable to cross-border disputes over children involving States Parties to the 1980 Hague Convention and non-States Parties (topic 1 *supra*);

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

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

37. The Council may wish to give further consideration to the following:

– 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*); or alternatively

– convening a group of experts to examine the possibility of a further instrument in the area of judgments in civil and commercial matters (paras 30-31 *supra*).

[11] Prel. Docs. Nos 5 and 15 of February 2010.

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

39. 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 the International Centre for Judicial Studies and Technical Assistance and its programmes.