

Rise of the Phoenix? Reviving the London Convention

Paper submitted for the third semi-final of the Themis Competition taking place in Luxembourg between June 9th and June 12th 2015, on the subject of European Cooperation In Civil Matters.

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“The application of foreign law by domestic courts is a sign of tolerance of the legal order; it indicates a progress of human civilization.”¹

I. Introduction

1. After World War II, Europe entered a new golden age. During this time, in 1958, the European Economic Community was founded. Ever since, what is now the European Union has grown, both in scope – the EU now unifies 28 countries, from Finland to Cyprus, from Ireland to Romania – and in depth as several new treaties have been deepened European integration.

Even before World War II, cross-border contracts or international personal statements were growing more common, but the foundation of the European Union accelerated this process.

Perhaps the most significant treaty in this regard was the Schengen Agreement (1985)², creating a Europe without internal borders. This agreement was later incorporated by the Maastricht Treaty (1992), leading to free movement of goods, capital, services and persons.

2. From the Four Freedoms new legal issues emerged: which country’s law should apply to civil matters? Which court should be competent to deal with litigations? These issues were not new, but as the European Union grew, so did the importance of these questions, mainly in contractual and personal matters.

3. Since the 1980 Rome Convention³ on the law applicable to contractual obligations, for example it’s commonly accepted that the contractors may, with some exceptions⁴, choose both the law applicable to the contract and the competent judge in case of litigation.

This means that in some cases a court from a state “A” may need to apply the law of a foreign state “B”, sometimes very different from its own legal order.⁵

¹ J. BASEDOW, *“The Application of Foreign Law – Comparative Remarks on the Practical Side of Private International Law”*, Max Planck Private Law Research Paper No. 14/17, 96.

² Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 14 June 1985.

³ Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ L 266 of 9 October 1980. This Convention was modified and integrated in a Regulation n° 593/2008 of the European Parliament and of the Council of 17 June 2008 “on the law applicable to contractual obligations (Rome I)”.

⁴ For example, with respect to consumer protection or labour law.

In cases dealing with personal matters, EU-Regulation 2201/2003 (27/11/2003)⁶ concerning “*jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*” applies. As is the case with the Rome Convention a judge may have to apply the law from a different country.

4. Globalisation was not limited to the European Union, however. Free trade agreements, association agreements (with Turkey, for example) the establishment of the WTO and an increase in global immigration mean that judges are now confronted with questions of foreign law originating well beyond the borders of the European Union.

5. Furthermore, several jurisdictions require the courts to apply foreign law as it is applied in its native jurisdiction.⁷ In many cases, the court will not simply need to apply foreign legislation, but should apply it as a foreign court would, taking into account other sources of law, such as case law or common law.⁸

The litigants play a quintessential role in providing the judge with information, but often the courts cannot base its decision on these information solely. Hence, firstly, they will need to have access to foreign legislation, case law and jurisprudence.

But even if the court does find the legal materials it needs, it still needs to apply them to the case at hand. As DE BOER writes, this is difficult in practice:

"Like a language, foreign law is difficult to learn by anyone who has not been born and bred in the social environment in which it is used. (...) Most judges dealing with foreign law in a conflicts case are unaccustomed to its vernacular, unaware of its various lay-

⁵ R. SALZNUTGER, « *Contrats internationaux: quel droit s'applique?* », in *Espaces-Entreprises du Barreau de Liège* », ed. 01/2013; K. J. HOOD, 'Drawing inspiration ? Reconsidering the procedural treatment of foreign law', *Journal of Private International Law* 2006, 181-182.

⁶ Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 [2003] OJ L338 .

⁷ See for example: Belgian Cour de Cassation, 9 October 1980 or Code of International Private Law §15; French Cour de Cassation (in civil matters), 25 May 1948, 24 November 1998, 19 October 1999; 18 september 2002; German Code of Civil Procedure §293.

⁸ See, for Belgium, Cour de Cassation 18 March 2013, nr. C.12.0031.F.

*ers of meaning, insensitive to its subtleties, ignorant of its usage, oblivious to its context.*⁹

It is therefore not surprising that even when judges apply foreign law, their reasoning is often limited to citing the applicable legislation. VERHELLEN found this to be true in paternity cases. In practice, this meant that judges seldom denied a demand for paternity.¹⁰

Judges reported that it was difficult to apply foreign law, often because they find that foreign law is inaccessible.¹¹ They may rely on an Certificate of Foreign Law,¹² with sometimes a very relative probative value, or, more often these days, on the Internet. But they noted that it was hard to know if the materials found on the Web were not outdated or misused.¹³

6. Although it is perhaps still not as widely known as it should,¹⁴ several judges reported positively on the European Judicial Network (EJN).¹⁵ However, they also pointed out that the EJN is limited to information on the legal systems of the member states of the European Union only.¹⁶

II. The London Convention

A. *Genesis*

7. Above, we discussed some of the issues that judges face when applying foreign law.

These problems are not recent. As early as the 1960's, the Council of Europe asked a Committee of Governmental Experts to prepare a treaty on "*the question of information on foreign*

⁹ T.M. DE BOER, "Facultative Choice of Law: The Procedural Status of Choice-of-Law Rules and Foreign Law", Recueil des cours de l'academie de droit International de La Haye, tome 257, The Hague, Brill-Nijhof, 1996, 271-72.

¹⁰ J. VERHELLEN, *Het Belgisch Wetboek IPR in familiezaken*, Brugge, Die Keure, 2012, 107.

¹¹ *Ibid.*, 107.

¹² I.e. a certificate issued by a lawyer in one country to be used in another. However, in practice, these are often unreliable. This system was mostly in French-speaking countries ("*certificat de coutume*").

¹³ *Ibid.*, 108.

¹⁴ M. PERTEGAS SENDER, "Artikel 15. Toepassing van buitenlands recht", in: J. ERAUW, M. FALLON, E. GULDIX, J. MEEUSEN, M. PERTEGAS SENDER, H. VAN HOUTTE, N. WATTE and P. WAUTELET (eds.), *Het Wetboek Internationaal Privaatrecht becommentarieerd – Le Code de Droit International Privé commenté*, Antwerp-Oxford, Intersentia, 2006, 86.

¹⁵ Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters [2001] OJ L174, 27 June 2001, p. 25–31.

¹⁶ J. VERHELLEN, *Het Belgisch Wetboek IPR in familiezaken*, Brugge, Die Keure 2012, 112.

law".¹⁷ The Explanatory Report explains that the Council was aware that “[at a time] when the movement of persons and goods across the European frontiers is increasing daily, the development of international exchanges and economic and social relations is resulting in an interpenetration of laws and the attendant need to take foreign law into consideration”.¹⁸

Thus the European Convention on Information on Foreign Law (hereinafter referred to as the “London Convention”) was signed on 7 June 1968 in London, entering into force on 17 December 1969. As explained in its heading, it aims to “[create] a system of international mutual assistance in order to facilitate the task of judicial authorities in obtaining information on foreign law by providing information about law and procedure in civil and commercial fields as well as on judicial organisation to member states”.¹⁹

8. As of 2015, 41 of the 47 members of the Council of Europe have signed and - bar Croatia - ratified the London Convention.²⁰ Five member states - Andorra, Armenia, Ireland, Monaco and San Marino - have yet to sign it. Meanwhile, four non-members of the Council, Belarus, Costa Rica, Mexico and Morocco, have ratified the London Convention.²¹

9. An Additional Protocol, about cooperation in criminal fields, was signed in Strasbourg on 15 March 1978. 38 members of the Council of Europe have signed and ratified it, plus Belarus, Mexico and Morocco.

B. The procedure

10. Applying the London Convention starts with a question on foreign law in the civil or commercial field (article 1, §1) arising before a *judicial authority* while *proceedings have actually been instituted* (article 3, §1). What constitutes a judicial authority is left up to the signatory states.²² Although lawyers have been known to try and use the Convention,²³ this means

¹⁷ *Ibid.*, 2.

¹⁸ Explanatory report to the European Convention on Information on Foreign Law, 1.

¹⁹ Considerations of the Convention.

²⁰ For the list of signatories, see

<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=062&CM=8&DF=18/09/2013&CL=ENG>

²¹ Although Belarus was a member, the Council of Europe barred it in 1997 for disrespect of human rights.

²² Explanatory report to the European Convention on Information on Foreign Law, 4.

²³ J. VERHELLEN, *Het Belgisch Wetboek IPR in familiezaken*, Brugge, Die Keure, 2012, 113.

that the use of the Convention is limited to courts and prosecuting authorities,²⁴ although the member states are allowed to extend to non-judicial bodies the access to the Convention's agencies (article 3, §2).²⁵ Secondly, a question must arise from actual proceedings, both contentious and non-contentious.²⁶ The Explanatory report stresses that a request for information should be essential for the settlement of the case, barring unnecessary questions.²⁷

11. The request for information is then sent to the competent signatory state. To this end, member states have the possibility to set up a *transmitting agency* (article 2, §2) and have the obligation to set up a *receiving agency* (article 2, §1). The transmitting agency receives requests for information from its judicial authorities and transmits them to the competent foreign receiving agency (article 2, §2 and article 5). The receiving agency receives the request made in application of the London Convention by the court of another signatory state (article 2, §1), either by the transmitting agency or directly by the judicial authority. In practice, most member states have opted to create both agencies.²⁸

The receiving agency may be appointed as a transmitting agency (article 2, §2) and most signatory states have opted for this possibility – bar Belgium, whose transmitting agency is the Ministry of Foreign Affairs, whilst its receiving agency is the Ministry of Justice.²⁹

12. There is no standard form to make a request. The London Convention specifies that a request shall (1) state the judicial authority from which it emanates as well as the nature of the case, (article 4, §2) (2) specify as exactly as possible the questions on which information concerning the law of the requested State is desired, and where there is more than one legal system in the requested State, the system of the law on which information is requested (article 4, §1) and shall (3) state the facts necessary both for its proper understanding and for the formulation of an exact and precise reply (article 4, §2). Copies of documents may be attached where necessary to clarify the scope of the request (*Ibid.*).

²⁴ The additional protocol explicitly extends this to the prosecutor's office (article 3).

²⁵ No such agreements are known to us.

²⁶ Explanatory report to the European Convention on Information on Foreign Law, 4.

²⁷ *Ibid.*

²⁸ See the list of declarations made with respect to treaty No. 062, <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=062&CM=1&DF=&CL=ENG&VL=1>.

²⁹ *Ibid.*

13. The receiving agency has a duty to reply (article 11), unless its interests are at stake in the proceedings or unless it feels its sovereignty or security may be compromised.. It may either draw up the reply itself or transmit the request to another State or official body to draw up the reply (article 6, §1). It may also transmit the request to a private body or to a qualified lawyer (article 6, §2). The reply *“shall (...) give information in an objective³⁰ and impartial manner on the law of the requested State to the judicial authority from which the request emanated. The reply shall contain, as appropriate, relevant legal texts and relevant judicial decisions. It shall be accompanied, to the extent deemed necessary for the proper information of the requesting authority, by any additional documents, such as extracts from doctrinal works and travaux préparatoires. It may also be accompanied by explanatory commentaries.”* (article 7).

14. The receiving agency shall send the reply *“as rapidly as possible”* and inform the transmitting agency or the requesting judicial authority if there is an undue delay (article 12). It may request additional information if the request is not sufficiently clear (article 13).

15. If applicable, the transmitting agency will then forward the reply to the requesting judicial authority. The information thus received shall mostly be drafted in the language of the receiving agency (article 14) and will thus need to be translated. There are no costs involved in the procedure (article 15), unless, with the explicit consent of the requesting judicial authority (article 6, §3), the reply has been drafted by a private body or a qualified lawyer in application of article 6, §2.

16. Lastly, it is important to note that the reply is not binding to the requesting court (article 8).

8). Evaluating the London Convention

³⁰ I.e. it must refrain from suggesting a settlement of the case which has given rise to the request (Explanatory report to the European Convention on Information on Foreign Law, 5).

III. Evaluating the London Convention

A. *Introduction*

17. The Council of Europe has yet to conduct a formal evaluation of the London Convention,³¹ at least according to the information we received.³² No official statistics are available regarding its application.³³

We believe that such an evaluation should take place, as it is a prerequisite for any revision of the treaty.

18. Even so, although the London Convention has been a significant innovation in setting up mechanisms to facilitate access to information on foreign law, we can conclude it has not been very successful. Based on the responses to the questionnaire prepared by the Permanent Bureau of the Hague Conference on Private International Law, contracting parties received on average only ten requests in 2006.³⁴ Some scholars have called the London Convention ‘semi-dead letter’.³⁵

19. This chapter gives an overview of the most important problems hindering an efficient and frequent use of the London Convention as reported by the The Hague Conference³⁶ and legal scholars.

³¹ E-mail by the Council of Europe, received on March 27th 2015: “*About evaluation: In accordance with its terms of reference, in particular the decisions made by the Committee of Ministers in 2013, the European Committee on Legal Co-operation (CDCJ) is entrusted to carry out, at regular intervals, within the limits of the available resources and bearing in mind its priorities, an examination of some or all of the conventions for which it has been given responsibility. Please note that ETS No. 62 and its additional protocol (ETS No. 97) are under the responsibility of CDCJ. Very largely ratified by Council of Europe member states (and by 4 non-member states), ETS No. 62 has not been evaluated by CDCJ and it is not intended at this time that CDCJ initiate such an evaluation.*”

³² It seems a formal evaluation might have been conducted in 2002 by E. DESCH. It is cited by S. LALANI, “A Proposed Model to Facilitate Access to Foreign Law”, in: A. BONOMI and G.P. ROMANO, *Yearbook of Private International Law 2011*, München, SELP, 2011, 301, but the URL cited is dead as of 2015. The Council of Europe has not responded to our request to provide a copy.

³³ *Ibid.*: “*About statistics: The Council of Europe does not have any data on the number of requests made through the application of the convention.*”

³⁴ Feasibility Study on the treatment of foreign law – summary of the responses to the questionnaire prepared by the Permanent Bureau, Hague Conference on Private International Law, Prel. Doc. No. 9A, <http://www.hcch.net/>, 11 – more recent numbers are unfortunately lacking.

³⁵ H. JESSURUN D’OLIVIERA, “Het verdrag van Londen (1968): een halfdode letter”, in: G. SCHMIDT and J. FREEDBERG-SWARTZBURG (eds.), *Het NIPR geannoteerd. Annotaties opgedragen aan Dr. Mathilde Sumampouw*, Den Haag, Asser Instituut, 1996, 13-19.

³⁶ In 2007, the Permanent Bureau of the Hague Conference on Private International Law conducted a questionnaire amongst its members with a view to identify practical difficulties in accessing the content of foreign law and determining the areas of foreign law for which infor-

B. Lack of publicity

20. One of the main reasons for the limited use of the London Convention is the lack of publicity. As early as 1981, ERAUW pointed out that the Convention was ‘yet’ to be discovered by the courts,³⁷ but even today it appears that some judicial authorities are not even aware of the existence of the London Convention. In 1998, RODGER called the Convention a “*significant innovation*” and a “*qualified success*”, but found no transmitted requests from courts in the UK.³⁸ Receiving and transmitting agencies are generally not investing in raising the general awareness around the London Convention. In this respect, the Belgian receiving agency reported that they were not hoping for any additional publicity on the London Convention since they would not have sufficient resources to provide adequate replies on numerous requests.³⁹

21. Another reason might be that there is no obligation for the courts to use the treaty, even when confronted with difficult issues of foreign law. In Belgium, the *Cour de Cassation* has ruled that there is no obligation to rely on the treaty and that the court may instead rely on the expert advice provided by a foreign lawyer.⁴⁰

C. Time-limit for replies

22. Another criticism is the lengthy time it sometimes takes to receive replies to requests. Article 12 of the London Convention imposes that the reply to a request should be furnished as rapidly as possible but does not provide for obligatory terms for execution of the requests.

mation is required. The questionnaire also dealt with the shortcomings that contracting parties reported with regard to the London Convention. See Feasibility Study on the treatment of foreign law – summary of the responses to the questionnaire prepared by the Permanent Bureau, Hague Conference on Private International Law, Prel. Doc. No. 9A and 9B, <http://www.hcch.net/>.

³⁷ J. ERAUW, “De eerste Belgische ervaringen met het Europees verdrag inzake inlichtingen over buitenlands recht”, *RW* 1981-82, 1507.

³⁸ B. RODGER, “Implementing the London Convention in a devolved Scotland”, *Scotland Law Times*, 1998, vol. 11, 82.

³⁹ J. VERHELLEN, *Het Belgisch Wetboek IPR in familiezaken*, Brugge, Die Keure, 2012, 357.

⁴⁰ Belgian Cour de Cassation, 7 December 2002, nr. C.12.0017.N/1.

The delay of replies ranges from 1 week to 24 weeks, the average being nine weeks.⁴¹ However, waiting periods of over 12 months have also been reported.⁴²

23. Although article 12 of the London Convention stipulates that the receiving agency should inform the requesting foreign authority and indicate a probable date on which the reply will be communicated in the event that the preparation of the reply requires a long time, it appears that the notice of delay or potential delay is often not communicated in practice. This leads to even greater uncertainty for the requesting party on the timing within which it shall receive the response.

D. Territorial scope

24. Although all countries can freely accede to the London Convention, it is currently only in force in 46 States. It is doubtful that it shall attain global reach, especially since only 4 non-Member States of the Council of Europe are currently a party to it (Belarus, Costa Rica, Mexico and Morocco).

E. Material scope

25. Pursuant to article 1.1 of the London Convention, contracting parties undertake to supply to one another information on their law and procedure in civil and commercial fields and on their judicial organization. Although two or more contracting parties may decide to extend the scope of the London Convention to fields other than civil and commercial matters in accordance with its article 2, some contracting parties complain that the material scope of the London Convention is too limited and should by default also apply to criminal and administrative law.⁴³

⁴¹ Feasibility Study on the treatment of foreign law – summary of the responses to the questionnaire prepared by the Permanent Bureau, Hague Conference on Private International Law, Prel. Doc. No. 9A, <http://www.hcch.net/>, 8.

⁴² Feasibility Study on the Treatment of Foreign Law – Report on the meeting of 23-24 February 2007 prepared by the Permanent Bureau, Hague Conference on Private International Law, Prel. Doc. No. 21 A, Annex II, <http://www.hcch.net/>, 18.

⁴³ Feasibility Study on the treatment of foreign law – summary of the responses to the questionnaire prepared by the Permanent Bureau, Hague Conference on Private International Law, Prel. Doc. No. 9A, <http://www.hcch.net/>, 12.

F. Lack of clarity on the allocation of costs

26. Another concern reported by the contracting parties is that the procedure for the allocation of costs is not clearly set out in the London Convention. According to its article 15.1, the reply should in principle not entail any payment of charges or expenses for the requesting authority. However, pursuant to article 15.2, contracting parties may derogate from this principle. In addition, article 6.3, as well as article 15.1 state that when the receiving agency transmits the request to a private body or a qualified lawyer to draw up the reply and this is likely to involve costs, the receiving agency should inform the requesting authority as accurately as possible on the probable cost, and request its consent. Some contracting parties reported however that they find it problematic when a receiving authority asks the requesting authority for reimbursement for its services.⁴⁴

G. Language difficulties

27. Another issue are the language difficulties arising under the London Convention.

Some countries reported that the provisions of article 14 of the London Convention are simply being disregarded and that the requests are not translated into the language of the requested State, contrary to the spirit and wording of the London Convention.⁴⁵

28. Other countries reported that the translations are not always sufficiently clear or of poor quality which makes it difficult to answer the questions received.⁴⁶ Contracting parties could however overcome this problem by applying article 13 which provides that the receiving agency may request the authority from which the request emanates to provide additional information it deems necessary to draw up the reply. This will of course have a negative impact on the delay of the replies.

⁴⁴ Feasibility Study on the treatment of foreign law – summary of the responses to the questionnaire prepared by the Permanent Bureau, Hague Conference on Private International Law, Prel. Doc. No. 9A, <http://www.hcch.net/>, 11.

⁴⁵ J. VAN DOORN and B. J. RODGER, "Proof of foreign law: the impact of the London Convention", *International & Comparative Law Quarterly*, 1997, 8 (Turkey, Iceland and Greece).

⁴⁶ *Ibid.*, 8 (United Kingdom); S. LALANI, "A Proposed Model to Facilitate Access to Foreign Law", in: A. BONOMI and G.P. ROMANO, *Yearbook of Private International Law 2011*, München, SELP, 2011, 306.

29. High translation costs may also hinder the use of the London Convention. Pursuant to article 15, such costs are to be borne by the State from which the request emanates. Contracting parties may, however, decide to derogate in mutual agreement from this provision. This leads us back to the criticism that there is not sufficient clarity on the procedure for the allocation of costs and the observation that some contracting parties find it problematic when a receiving authority asks the requesting authority for reimbursement for its services (as set out in point 26 above). Other authorities indicated that they employed translation services (e.g. Spain and Hungary) or that they are well equipped internally to deal with any language difficulties (e.g. Greek Hellenic Institute).⁴⁷

H. Complicated procedure

30. The procedure for transmitting requests and receiving replies under the London Convention is (perceived as being) too complicated by the contracting parties for several reasons.

31. A first reason is the lack of uniformity in the agencies set up in the different contracting states. As explained above, article 2 of the London Convention provides for the mandatory constitution by each contracting party of receiving agency but gives discretion to set up a transmitting agency. Furthermore, article 16 of the Convention offers the possibility to confer certain functions of the receiving agency to other state bodies for constitutional reasons. For example, in Germany, separate transmitting agencies for requests emanating from the tribunals of a Land have been set up. These provisions, though allowing for flexibility, appear to have resulted in a lack of uniformity.

32. Secondly, there is a lack of transparency in the operation of the London Convention. Some countries report that it is often difficult to identify the body which effectively draws up the reply. In accordance with article 6, the receiving agency may either draw up the reply itself or transmit the request to another state or official body and even to a private body or qualified lawyer. Hence, the receiving agency is not necessarily the authority which draws up

⁴⁷ J. VAN DOORN and B. J. RODGER, "Proof of foreign law: the impact of the London Convention", *International & Comparative Law Quarterly*, 1997, 8.

the reply and is usually only the first staging post upon receipt of the request.⁴⁸ Cyprus reported for example that the requests are usually forwarded to a separate authority upon receipt.

33. A third reason why the procedure is considered as being too complicated is the lack of a standardized way in formulating questions under the London Convention. Article 4 provides that the request should specify as exactly as possible the questions on which information is desired and should state the facts necessary both for its proper understanding and for the formulation of an exact and precise reply. These criteria on the contents of a request for information are considered as being too general as a lot of contracting parties complain that the requests do not always include sufficient details on the facts of the case or a precise question. Another concern is that it is generally not made clear how much knowledge the requesting authority already possesses.⁴⁹ In this respect, France regrets that the London Convention does not provide for a standardized request form, which could permit the identification of the level of information needed from the requested country.⁵⁰

34. A fourth reason why the procedure is considered as burdensome is the manner in which the questions have to be sent to the receiving agencies. The London Convention was conceived in 1968, a few years before Ray Tomlinson invented e-mail as we know it. Ever since however, most member states do not provide an e-mail address which can be used to receive information requests. On the 'List of declarations made with respect to treaty No. 062',⁵¹ only one country – Sweden - provides an e-mail address. Some other countries mention a fax or a phone number, but a lot of times a sending country will have to resort to a good old fashioned letter.

⁴⁸ *Ibid.*, 7.

⁴⁹ Feasibility Study on the treatment of foreign law – summary of the responses to the questionnaire prepared by the Permanent Bureau, Hague Conference on Private International Law, Prel. Doc. No. 9A, <http://www.hcch.net/>, 12.

⁵⁰ *Ibid.*, 11.

⁵¹ <http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=062&CM=8&DF=18/09/2013&CL=ENG&VL=1>, consulted on 23 April, 2015.

I. The Convention is not useful in complicated cases

35. Some contracting states reported that it is difficult to apply the London Convention in the context of complex commercial litigation and in complex litigation generally. They often find it difficult to formulate the legal questions that form the substance of the request in an abstract manner. Moreover, questions are sometimes formulated in an unclear manner or poorly translated (cf. *supra*).

36. This concern is adhered to by some legal scholars who submit that the London Convention cannot be used in complicated cases because the receiving agency does not receive the entire file of the case:

“The Convention has proved useful in simple cases, the solution of which directly flows from statutory law. However, in more complicated cases the requesting court, being unaware of the foreign law, is often unable to identify the facts of the case which are relevant for the foreign receiving agency. That agency does not receive the file of the case and has to draw up its reply on the basis of a potentially misleading statement of facts and abstract questions resulting from that statement of facts. Communication problems arise between the sender and the receiver, both trained in different legal systems and dependent on interpreters for understanding each other.”⁵²

This is problematic. As SIEHR remarks, the quality of the reply depends on whether the request contains sufficient facts necessary for the proper understanding and for the formulation of an exact and precise reply.⁵³

J. Non-binding character of the information

37. Another criticism is that the London Convention only gives evidentiary weight to information on foreign law. Although the replies given by the receiving agencies are authoritative, objective and impartial, the information is still non-binding for the judicial authority from which

⁵² J. BASEDOW, “*The Application of Foreign Law – Comparative Remarks on the Practical Side of Private International Law*”, Max Planck Private Law Research Paper No. 14/17, 92.

⁵³ K. SIEHR, “Special Courts for Conflict Cases: A German Experiment”, *The American Journal Of Comparative Law*, 1977, 671-672.

the request emanated according to article 8 of the London Convention. Some are therefore of the opinion that added weight should be given to the information provided by the requested state. They suggest to give greater probative value or *prima facie* validity of the information in the requesting state.⁵⁴ Others are, however, concerned that giving a more binding character to the information might interfere with judicial discretion since judges would be compelled to accept the information for the truth of its content.⁵⁵ LALANI stresses the importance of the non-binding character of the information provided, as this rules out any liability for opinions expressed by the authorities of the receiving agency.⁵⁶

IV. Rise of the phoenix: reviving the London Convention?

38. Above, we have argued that whilst the London Convention has been criticized, we, and with us several legal scholars,⁵⁷ also believe that it has the potential to be a powerful instrument for the application of foreign law. Below, we discuss two steps that could be taken to revive the London Convention.

A. Implementing a direct judicial communications model

39. We submit that the current system could be replaced by a direct judicial communications model.⁵⁸ Under this model, a court in the sending country ('*sending court*') would send a question with regard to the interpretation of foreign law to the receiving agency, where it would be answered by a court of the receiving country ('*receiving court*').

This system would be comparable to the preliminary rulings issued by the European Court of Justice,⁵⁹ the Benelux Court⁶⁰ or the EFTA Court of Justice.⁶¹

⁵⁴ Feasibility Study on the Treatment of Foreign Law – Report on the meeting of 23-24 February 2007 prepared by the Permanent Bureau, Hague Conference on Private International Law, Prel. Doc. No. 21 A, <http://www.hcch.net/>, 5.

⁵⁵ *Ibid.*, 5.

⁵⁶ S. LALANI, "A Proposed Model to Facilitate Access to Foreign Law", in: A. BONOMI and G.P. ROMANO, *Yearbook of Private International Law 2011*, München, SELP, 2011, 306.

⁵⁷ A. WOLF, "Das Europäische Übereinkommen v. 7. 6. 1968 betreffend Auskünfte über ausländisches Recht", *Neue Juristisches Wochenschrift*, nr. 35, 1586; B. RODGER, "Implementing the London Convention in a devolved Scotland", *Scotland Law Times*, 1998, vol. 11, 82; R. PERL, "European Convention on Information on Foreign Law", *International Journal of Law Libraries*, 1980, vol. 8, no. 4, 153.

⁵⁸ We draw the term from Feasibility Study on the treatment of foreign law – summary of the responses to the questionnaire prepared by the Permanent Bureau, Hague Conference on Private International Law, Prel. Doc. No. 9A, <http://www.hcch.net/>.

⁵⁹ Article 267 TFEU.

The proposed system would add transparency to the London Convention. As we have discussed above, the receiving agency may either draw up the reply itself or transmit the request to another state or official body and even to a private body or qualified lawyer. As such, it is difficult for the requesting judge to identify the body which effectively draws up the reply and to assess the quality of the answer he receives. The direct judicial communications model would address this issue.

Secondly, having a judge answer the questions will act as a safeguard to the right to fair trial of the parties. Unlike the current system, questions of foreign law – which can often make or break a case – will be answered by an impartial entity.

40. We do not believe that such a system should include binding replies. As the parties before the sending court are not parties before the receiving court, they should be able to contest the reply the sending court receives. Secondly, following the *X. v. Belgium and the Netherlands*⁶² case, a state might be found liable by the European Court for Human Rights even when applying foreign law, and should thus be able, following the reasoning of the *Drozd and Janousek v. France and Spain* case⁶³ to verify whether there has been a flagrant denial of justice.⁶⁴

Thus, whilst some have suggest to give greater probative value or *prima facie* validity of the information in the requesting state,⁶⁵ we believe that in practice, this *prima facie* validity will follow from the authority of the receiving court.⁶⁶ Secondly, because of the reasons discussed

⁶⁰ Established by the Treaty of 31 March 1965 concerning the establishment and on the basic act of a Benelux Court. The court is competent to hand preliminary rulings in matters like IP or execution of judgments.

⁶¹ Established by the agreement between the EFTA States on the establishment of a surveillance authority and a Court of Justice, OJ L 344, 31 December 1994.

⁶² EComHR 20 July 1975, *DR 6, X v. Belgium and the Netherlands*.

⁶³ ECHR 26 June 1992, n. 12747/87.

⁶⁴ However, only to a certain extent. “*To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 (art. 6) would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned.*” (§110)

⁶⁵ Feasibility Study on the Treatment of Foreign Law – Report on the meeting of 23-24 February 2007 prepared by the Permanent Bureau, Hague Conference on Private International Law, Prel. Doc. No. 21 A, <http://www.hcch.net/>, 5.

⁶⁶ In this regard, it can be pointed out that the preliminary rulings given by the EFTA Court are not legally binding, but nevertheless are seldom not followed.

above, even under the current system it seems unlikely that a judge would feel comfortable overruling an expert on a legal system that is not his own.

41. The 'direct judicial communications model' was discussed during the 23-24 February 2007 meeting of the The Hague Conference on Private International Law.⁶⁷ A majority of the gathered experts had reservations. Some highlighted the fact that judges might be reluctant to provide other judges with information, whilst others thought such a system would touch upon national procedural law and create liabilities for judges.

We do not agree with this assessment, which seems to suffer from neophobia. More experience and training are needed. In this regard, the The Hague Conference on Private International Law has developed a brochure on "Direct Judicial Communications".⁶⁸ We can also draw upon the experience other courts have had in dealing with requests for preliminary rulings.⁶⁹

42. Furthermore, the 'direct judicial communications model' has been successfully put into practice by the Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.⁷⁰ Under this directive, courts in one member state may request the competent court of another Member State to take evidence or request to take evidence directly in another Member State (article 1 of the Regulation). Standardized forms are available online.⁷¹ A 2007 study conducted at the request of the European Commission found that legal practitioners were broadly positive, even though the Regulation was still little known at the time.⁷²

⁶⁷ *Ibid.*, 5.

⁶⁸ Available at http://www.hcch.net/upload/brochure_djc_en.pdf (as of May 8th 2015).

⁶⁹ See, e.g., the Information Note on references from national courts for a preliminary ruling issued by the ECJ, OJ L 5 December 2009, §29.

⁷⁰ Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001]OJ L174/1 ,

⁷¹ https://e-justice.europa.eu/content_taking_of_evidence_forms-160-en.do.

⁷² Study on the application of Council Regulation (EC) 1206/2001, on cooperation between the courts of the member states in the taking of evidence in civil or commercial matter, March 2007, available online at http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf.

B. Reforming the procedure

43. As discussed above, the procedure laid out in the London Convention can be burdensome. We propose reforming the procedure by reducing the number of steps. This means cutting out the transmitting agency, which seems to have lost its usefulness now that every court can now look up the address of the receiving agency on the European Council's website. The receiving agency should still exist, as it should remain with the States to decide which court should reply to requests for information.

Secondly, going digital, and asking the parties to provide an e-mail address for the receiving agency, would lower the time and costs needed to send and receive a request through the treaty. E. DESCH even proposed to create some sort of intranet system.⁷³ Perhaps some inspiration could be found in the *Internal Market Information System*, which is implemented by the European Union to allow authorities to exchange information between people and businesses.⁷⁴

Thirdly, this means that the receiving court would be able to send its reply directly to the requesting court, thus cutting out the middleman. To this end, the sending court should also include an e-mail address in its request, so that the receiving court can send its answer directly to it.

44. Standard forms should be created to allow for a uniform way of sending requests for information.

We also believe that the sending court should also include the case file or at least the relevant parts. This would greatly improve the relevance and quality of the replies given.⁷⁵

45. Seen on European level, the proposed system would save costs. As we explained above, judges find it hard to find and apply foreign law. But whilst a French judge might spend a few hours answering a question of Bulgarian contract law, a Bulgarian judge might

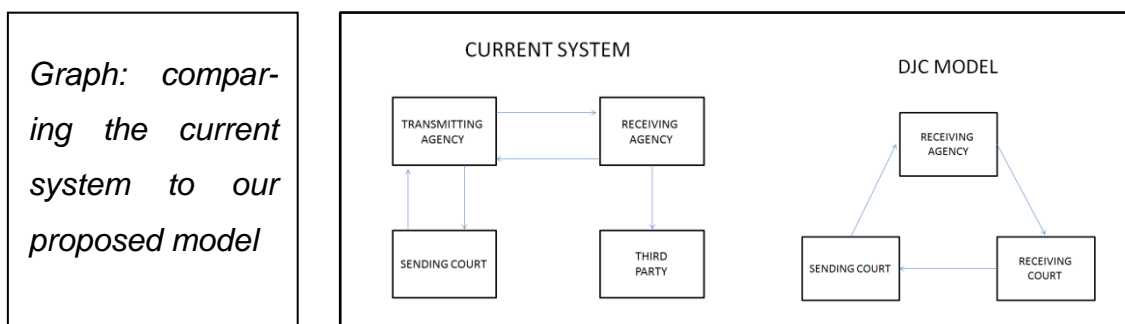
⁷³ Cited by S. LALANI, "A Proposed Model to Facilitate Access to Foreign Law", in: A. BONOMI and G.P. ROMANO, *Yearbook of Private International Law 2011*, München, SELP, 2011, 301. See also footnote 32..

⁷⁴ See http://ec.europa.eu/internal_market/imi-net/index_en.htm.

⁷⁵ In this regard, see also the Information Note on references from national courts for a preliminary ruling issued by the ECJ, , OJ L 5 December 2009, §29.

have seen a similar case a few dozen times and might be able to provide an answer in half an hour. That same Bulgarian judge might save a few hours of work on a question of French adoption law. Hence, the direct judicial communications model will in effect save costs. The extra work that falls on the receiving judiciary is thus compensated by the fact that they too can use the London Convention when faced with issues of foreign law.⁷⁶

Finally, allowing the receiving judge to assess the case file will improve the quality and usefulness of the answers. It will eliminate the need to formulate abstract questions, which, as we explained above, has proven difficult in complex cases.



V. Conclusion

46. The London Convention is, as PERL puts it, “a natural outgrowth of a world in which transnational trade and travel have become a daily norm.”⁷⁷ As he points out, ensuring that its laws will not be misconstrued by foreign courts helps countries protect their business interest. The London Convention is thus a vehicle for economic stability.⁷⁸

We agree. The London Convention has a lot of unused potential. As we have discussed, this is not only the result of a lack publicity, but also of some flaws imbedded into the Convention’s structure.

We believe that a revised London Convention could be a powerful instrument. We hope that the Council of Europe will start a formal evaluation, which, in the end, could lead to a revised Convention.

⁷⁶ A. WOLF, “Das Europäische Übereinkommen v. 7. 6. 1968 betreffend Auskünfte über ausländisches Recht”, *Neue Juristisches Wochenschrift*, nr. 35, 1586.

⁷⁷ R. PERL, “European Convention on Information on Foreign Law”, *International Journal of Law Libraries*, 1980, vol. 8, no. 4, 153.

⁷⁸ *Ibid.*

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