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Note: This response was prepared by certain members of AAPrIL. Professor Mary Keyes, President of AAPrIL and member of the Jurisdiction Working Group, was not involved in the preparation of this response.

Please indicate your profession:

- Practitioner
- Judge
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Do you have practical expertise in cross-border civil or commercial litigation:

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Questions

Consultation on the draft text of a possible convention on parallel proceedings and related actions

Question 1 on the scope of the Draft Text

- 1.1 What are your views on the scope of the Draft Text?
- 1.2 Does the subject matter scope of the Draft Text cover those matters for which rules on parallel proceedings and related actions would be beneficial?
- 1.3 What are your views on the subject matter exclusions in particular, and how they would work in practice? For example, what are your views on the formulation of the arbitration exclusion in Article 2(3)?
An issue concerning the scope of the draft text is whether the 'consumer' exclusion is restricted to claims based on consumer contracts or whether it also extends to non-contractual claims by consumers against manufacturers or other traders.
- 1.4 What are your views on the geographical scope of the Draft Text and how it would work in practice? (See paragraph 16 for further information).

Question 2 on definitions

What are your views on the definitions of parallel proceedings and related actions? In particular, please share your views on how these definitions might operate, and be applied by parties and courts, in practice.

The expression 'the same subject matter' may need clarification; particularly in comparison with the test of 'relatedness' in the context of related actions. This should be done on an autonomous basis within the treaty to prevent the intrusion of diverse domestic laws on the issue.

Also, the expression 'the same parties' warrants further explanation in the context of related corporate entities and group actions involving representative members.

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

For clarification the phrase 'under the law of the state court' (which is used in article 8(2)(j)) should be added. Also, given the importance of the concept of 'the court first seised' in article 9, this expression could also be defined in Article 4.

Another issue is the interrelationship between the instrument and the domestic law rules on jurisdiction. Do the rules in article 4 require a national court to apply the instrument before it has determined whether it would have jurisdiction under its own rules?

Question 4 on Article 5 obligations

What are your views on Article 5?

Question 5 on priority jurisdiction / connection

What are your views on Articles 6 – 8 including how they will work in practice?

A general question that arises in relation to all these articles is: which court decides whether the article in question is satisfied? For example, if court B is asked to suspend its proceedings because

court A satisfies article 6, is it court B that must decide whether the proceedings have as their main object rights in rem in immovable property so as to bring court A within article 6?

Further, should there be a requirement that the second proceeding be brought and the first court asked to suspend its proceeding prior to the first court determining whether it has jurisdiction under its domestic rules?

Also, the hierarchical and sequential application of Articles 6-8 could perhaps be made more explicit in the text of the instrument.

Specifically in relation to article 7(1), the approach of avoiding overlap with the 2005 Choice of Court Convention may produce odd results. A court would be obliged to suspend proceedings based on a non-exclusive choice of court agreement but not based on an exclusive agreement. There was a general concern among members regarding the exclusion of exclusive choice of court agreements from the instrument.

Also concerning article 7(1), the Commentary to the instrument should make it clear that asymmetric choice of court agreements are included within the provision as well as more common non-exclusive choice of court agreements.

The language of article 7(1) could also perhaps be clarified. Arguably the intention of identifying a non-exclusive choice of court agreement could have been more simply and directly expressed. In particular, the expression 'unless such agreement states that it does not deprive any other court or courts of jurisdiction' is obscure and perhaps unnecessary.

Question 6 on Article 8(2) jurisdiction / connection requirements

6.1 What are your views on the 'jurisdiction / connection' list in Article 8(2)?

In relation to the jurisdiction/connecting factors in article 8(2), some members of the Association suggested that the list could be expanded to give more operation to the appropriate forum mechanism in Article 9. An example would be where a corporation is carrying on business in a Contracting State, a ground commonly found in common law countries.

Clarification of the relationship between articles 8(2)(f) and 6 would also be useful: does article 6 include contractual claims secured by rights in rem in immovable property?

6.2 Based on your experience, do you consider these factors appropriate for parallel proceedings i.e. for obliging courts to suspend or dismiss proceedings if they are not seised on the basis of one of these? Why or why not?

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6.3 Are there any additional factors that you believe should be included?

Question 7 on the determination of the more appropriate court

7.1 What are your views on the approaches proposed in Article 9 for determining which court should adjudicate the dispute in cases of parallel proceedings which Articles 6 – 8 have not resolved?

7.2 What are your views on how the two approaches may work in practice?

There was some support among members of the Association for the first approach, which gives the court first seised the power to apply general discretionary principles of appropriateness to determine which court should adjudicate. The second approach, which provides that any court other than the court first seised shall suspend its proceedings in favour of the latter court, was regarded as too narrow and insufficiently flexible to take account of wider circumstances.

7.3 Do you have a preference for either approach? If so, please explain why.

Question 8 on factors to be considered to determine the more appropriate court

8.1 What are your views on the factors listed in Article 10 for determining the more appropriate court in cases of parallel proceedings subject to Article 9 (i.e. that are not resolved by Articles 6 – 8)?

The factors listed under article 10 are well known to common law lawyers as they resemble those employed in forum non conveniens applications. As the Commentary notes, these factors are consistent with the objectives of judicial efficiency and convenience. A question to consider is whether considerations of abuse of process or bad faith litigation should also be examined under article 10, rather than being left to the safeguards in articles 19-21. In common law jurisdictions when a claimant brings a suit in bad faith simply to engage the jurisdiction of a more favourable court and to discourage suit elsewhere, courts have given reduced weight to such choice in the appropriate forum analysis. The question of negative declarations may also be relevant here. While some countries defer to such applications, others decry them as artificial devices to attract jurisdiction.

8.2 Do you have any views on how Article 10 might work in practice?

8.3 Are there additional considerations that, in your view, should be taken into account?

Question 9 on the effectiveness of the framework for parallel proceedings

Do you have an overall view on the effectiveness of the framework developed in the Draft Text for dealing with **parallel proceedings** in an international context? Please explain any advantages and / or disadvantages of the framework, and how you think it will work in practice.

Question 10 on related actions

Do you have a view on the effectiveness of the framework developed in the Draft Text for dealing with **related actions** in an international context? Please explain any advantages or disadvantages of the framework, and how you think it will work in practice.

Question 11 on the communication mechanism

11.1 What are your views on the practical operation (or the effectiveness) of the communication methods set out in Chapter IV of the draft text for use between courts seised, in cases involving parallel proceedings and related actions?

11.2 Are there particular advantages and challenges you foresee in applying these methods?

Question 12 on safeguards

What are your views on the three safeguards provided in the Draft Text (Articles 19-21), particularly as to how they will operate in practice?

Given the potential importance of the three listed safeguards, the terms should be defined in the text of the instrument and also some explanation provided in the Commentary as to how they might apply in the particular context of parallel proceedings.

Question 13 on the objectives of the Draft Instrument

13.1 Would the rules set out in the Draft Text achieve the objectives of a future instrument?

The objective of a future instrument is to enhance legal certainty, predictability and access to justice by reducing litigation costs, and to mitigate inconsistent judgments in transnational litigation in civil or commercial matters.

The assumption underlying the instrument is that parallel proceedings and inconsistent judgments is a serious problem in international litigation practice. Is this correct? Some empirical research would be helpful on this point.

13.2 Do you have any views on whether the proposed rules set out in the Draft Text would improve the status quo?

13.3 Do you consider there are any risks of tactical or satellite litigation arising from any of the provisions, or the overall approach of the Draft Text? Are these risks greater or fewer than those that currently exist? Are there any ways that such risks could be addressed in the Draft Text?

Question 14 - comments

What other comments, if any, do you have?