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

- Yes
- No

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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?

Because the Convention would apply only where parallel proceedings exist in Contracting States, it would be liable to result in proliferation of litigation, where a party finds it necessary to start proceedings in a second Contracting State in order to benefit from the rules in the Convention. It may also result, in practice, in courts retaining jurisdiction even where the court of a third Contracting State, or a non-Contracting State, would be the most appropriate forum (e.g. because it is the parties' contractually agreed forum).

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?

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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)?

It is unclear how Articles 2(2) and (3) would operate where there is a dispute about the validity or applicability of an arbitration agreement, which often arises as a preliminary matter in the context of court proceedings.

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).

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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.

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Question 3 on when a court is deemed to be seised

What are your views on Article 4?

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Question 4 on Article 5 obligations

What are your views on Article 5?

The provision in Article 5(3) allowing a court to resume proceedings if the other country's court has not rendered/is unlikely to render a judgment on the merits "within a reasonable time" is highly subjective, and undesirable.

Question 5 on priority jurisdiction / connection

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

A number of aspects of Article 7 (Party autonomy) are unclear or overly restricted.

(1) Parties sometimes agree that one party must sue in a particular court but that the other party can sue in any court of competent jurisdiction (a so-called asymmetric jurisdiction clause). There may be good commercial reasons for such a provision. Party autonomy would indicate that such a clause should be given effect, but it is not clear that Article 7 achieves this.

(2) Non-parties to a contract may seek to take the benefit of the contract, for example under rights of subrogation. In such cases, fairness to the counterparty, and the policy of upholding bargains, should generally disentitle the non-party from suing elsewhere than in the court (or arbitral tribunal) on whom the parties to the contract have conferred exclusive jurisdiction. Article 7 as currently drafted may not achieve this.

(3) Parties often agree that a particular court shall have non-exclusive jurisdiction, but that any party sued in that court will not seek to challenge proceedings brought against it in that court, for example on forum non conveniens ground. In order to give effect to such agreements, a qualification to Article 9 would need to be built into Article 7 (or into Article 9 itself).

(4) Article 7(2) states that Article 7(1) does not apply to exclusive choice of court agreements. However, the Convention does not seem to spell out explicitly how its rules apply where there is an exclusive choice of court agreement. Presumably any other court of a Contracting State must then decline jurisdiction, but Articles 7 to 9 do not say so in clear terms.

(5) Further, and specifically, it is not clear whether the Convention would allow a court to grant an injunction in order to restrain a party from suing (a) in breach of an exclusive or asymmetric jurisdiction clause, (b) in breach of an arbitration clause or (c) otherwise in a manner that is vexatious and oppressive (for example, by seeking to circumvent a jurisdiction or arbitration clause by suing an affiliate of the counterparty to the contract, or causing its own affiliate to sue the counterparty to the contract). The ability to grant such injunctions is an important means of protecting party autonomy by preventing proxy litigation that, though notionally by/against a non-party to the contract, in reality seeks to litigate in a non-chosen forum a dispute which the parties have agreed should be resolved only in a particular forum.

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

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

The list of connecting factors is too limited, and would oblige courts to suspend or dismiss claims even where the dispute should most appropriately be resolved by them.

(1) The list does not allow a court to assume jurisdiction over a related claim, against another party or even against the same party, that is connected to a claim properly before the court (the latter claim having an Article 8(2) connecting factor). Similarly, it does not cater for parties joining third parties to the proceedings e.g. to make a contribution claim. Both omissions would lead to highly undesirable fragmentation of litigation.

(2) By agreeing that their relationship shall be governed by the law of a particular country, parties often envisage that any dispute will be resolved by the courts of that country. More broadly, if a dispute is governed by the law of a particular country (whether by party choice or otherwise), it will often be appropriate for that country's courts to resolve the dispute (subject to the party autonomy considerations addressed under Article 7).

(3) It is logical for a court to be able accept jurisdiction where a claim is made for an injunction requiring an act to be done/not done within its territorial jurisdiction.

(4) The current list does not cater for claims for an interim remedy in support of proceedings overseas: an omission which may restrict courts' ability to assist proceedings in other courts.

(5) In Article 8(2)(d) (place of performance of contractual obligation), the "purposeful and substantial connection" exception is unclear. It is unclear why an obligation to perform the relevant obligation in the country in question is not in itself a purposeful and substantial

connection. The exception would tend to hinder international commerce if, for example, buyers could argue that the court of the place where they are obliged to make payment to the seller does not have a sufficient connection to allow it to accept jurisdiction.

(6) In Article 8(2)(j) (submission to jurisdiction), the exception for cases where no objection is taken to the relevant court's jurisdiction but any such objection would have failed is highly undesirable. It would open the way to defendants 'gaming' the system by making late jurisdiction objections only after the proceedings seem to be going against them.

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?

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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?

(1) The primacy given to the court first seised is hard to justify, particularly when proceedings may have been started pre-emptively and/or tactically in an inappropriate forum which may, however, be reluctant to decline jurisdiction.

(2) The potential provision in Article 9(5)(b), allowing a court first seised to resume proceedings "to guarantee effective access to justice", is unclear and open to misuse.

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

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

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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 list of factors, whilst non-exhaustive, omits the parties having agreed a non-exclusive choice of jurisdiction in favour of the court in question: party autonomy considerations indicate that that factor should be given significant weight.

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

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

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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.

I believe that, overall, the regime set out in the draft Convention would be undesirable and counter-productive.

(1) Generally, it would provide an incentive for parties to 'race to the courthouse', in order to ensure that their preferred forum is the court first seised. This would be likely to lead to proliferation of litigation and increased numbers of jurisdiction disputes, creating delays and costs for parties and clogging up already crowded court lists. It would also result in greater pressure on courts to expedite hearings, in cases where two courts both decide to retain jurisdiction, so that a party can reach judgment first in its preferred court.

(2) It gives too little effect to party autonomy: see response to Question 5 above.

(3) In important respects it would unduly restrict courts from retaining jurisdiction where they should properly be permitted to do so resulting in fragmentation of litigation and hence extra cost and waste of resources: see response to Question 6 above.

(4) Conversely, it would make it too easy for courts to retain jurisdiction inappropriately: see response to Question 12 below.

(5) It is unnecessary. Most civil and commercial courts (at least from countries who might in practice become Contracting States) have developed workable rules as to jurisdiction and *lis alibi pendens* which by and large operate effectively.

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.

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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?

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

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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?

Articles 19 (denial of justice) and 21 (public policy) could allow a court to retain jurisdiction in circumstances where that would be inconsistent with the parties' agreements and/or inappropriate given the lack of connecting factors with that court. For example, the concept of 'denial of justice' is potentially highly subjective, and plainly open to strained or interpretations.

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.

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

In my view it would be a retrograde step, for the reasons given in my previous responses.

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?

The risks would be increased: please see my previous responses.

Question 14 - comments

What other comments, if any, do you have?

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