

Working Group on Jurisdiction Chair's Summary of the First Meeting Monday 11 – Friday 15 October 2021

I. Introduction

- 1 At its meeting of 1 to 5 March 2021, the Council on General Affairs and Policy (CGAP) of the HCCH mandated the establishment of a Working Group on matters related to jurisdiction in transnational civil or commercial litigation (WG), and invited Professor Keisuke Takeshita (Japan) to chair the Working Group.¹
- 2 CGAP mandated
 - a. The Working Group to develop draft provisions on matters related to jurisdiction in civil or commercial matters, including rules for concurrent proceedings, to further inform policy considerations and decisions in relation to the scope and type of any new instrument.”
 - b. The Working Group to proceed in an inclusive and holistic manner, with an initial focus on developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims), and acknowledging the primary role of both jurisdictional rules and the doctrine of *forum non conveniens*, notwithstanding other possible factors, in developing such rules.
 - c. The Working Group to explore how flexible mechanisms for judicial coordination and cooperation can support the operation of any future instrument on concurrent proceedings and jurisdiction in transnational civil or commercial litigation.
 - d. The PB to make arrangements for two Working Group meetings before the 2022 meeting of CGAP, with intersessional work, to maintain momentum. If possible, one meeting will be held after the northern hemisphere summer of 2021, and another in early 2022, with a preference, where possible, for hosting in-person meetings.”²
- 3 The WG, as mandated, held its first meeting from 11 to 15 October 2021 via videoconference, under the chairmanship of Professor Keisuke Takeshita (Japan). This first meeting of the WG was attended by 62 participants, of which 6 were designated as alternates, as the WG convened through videoconferencing. The participants represented 27 Member States from various regions, one Regional Economic Integration Organisation, and two Observers.
- 4 This summary is not intended to fully reflect all aspects of the discussions, nor all the views expressed. It records the main points of the discussion of the WG, with a view to assisting the Chair in the preparations for the second meeting, envisaged to take place in February 2022, preferably in person (or in hybrid form). Following the second meeting, a Report of the Chair on the work conducted by the WG in the relevant reporting period (from CGAP 2021 to CGAP 2022) will be submitted to CGAP.

¹ C&D No 8 of CGAP 2021.

² *Id.*, No 9.

II. Working methods

- 5 The WG adopted more flexible methods than the methods set out in the Draft Agenda. The following points were agreed by the WG.
- 6 “Negotiated” Working Documents (WD) proposed by more than two delegations were, in principle, to be given priority for the discussion in this first meeting.
- 7 WDs from one delegation could also be submitted. In principle, they were not to be given priority, and as a result, because of time constraints, might not be considered in this first meeting. However, it was also confirmed that WDs which were not discussed in this first meeting would be discussed in future meetings of the WG.
- 8 The Chair would consider how best each WD could be dealt with in the WG. The Chair might change the sequential order of the discussion in the interest of efficiency.
- 9 The Chair encouraged informal discussions and negotiations among participants outside the meetings of the WG. It was further noted that joint WDs from delegations of different legal cultures were encouraged and would be highly appreciated.

III. Definitions

- 10 The WG discussed the definition of the three concepts of “proceedings” by using the drafted text in Annex I of the Agenda. As regards the definition of “parallel proceedings”, there were different views. There were arguments for clarifying the definition by adding words (in particular, to explain the risk of inconsistency or irreconcilability of the future judgments), but there were also arguments against it to avoid the risk of adding words, explaining that the possibility or risk of inconsistency or irreconcilability of the future judgements is evident. The term “on the same subject matter” was highlighted in the discussion. Although it was used in Article 7(1)(f) and (2) of the 2019 Judgments Convention, the WG would need to pay due attention to the difference of the point of time between the two situations (the situation of parallel proceedings before the judgment and the situation of recognition or enforcement of judgments). The WG decided to use the definition for now, putting the term “on the same subject matter” in brackets to indicate the need for further consideration.
- 11 The definition of “related proceeding” and “related actions or claims” was deleted from the text for the moment because it is deemed not necessary for the rules, which only deal with “parallel proceedings”. However, it was also confirmed that, for the Chair’s inter-sessional work, the definition in Annex I of the Agenda would be used for drafting provisions on related proceedings.
- 12 The definition of “concurrent proceedings” was also deleted because the rules in the drafted text of Annex I only deal with parallel proceedings.
- 13 In discussing definitions, it was also highlighted that the WG needs to define the problems that will be dealt with by the rules on each type of concurrent proceedings.

IV. Objectives

- 14 The WG discussed several oral proposals for the text of the objectives in the Agenda. The Chair suggested that, as the objectives were not in the drafted text itself and the general understanding of the objectives seemed to be shared by the WG (though views on the revision by the proposals varied), the WG should leave it for future discussion. The following text is the tentative explanation of the objectives:

“to enhance legal certainty, predictability, and access to justice, to reduce the risks and [unnecessary] costs associated with multiplicity of proceedings [by creating concrete rules for domestic courts], and to [prevent] [[reduce] [mitigate] the risk of] inconsistent judgments in transnational civil or commercial litigation.”

V. Scope

- 15 As the term “transnational” in Article 1(1) might be redundant, it was agreed to delete it from the text.
- 16 It was agreed that the rules should be applied to parallel proceedings in different Contracting States. However, it was also noted that the WG needs to consider further cases involving proceedings in non-Contracting States even if the basic rules for parallel proceedings are not intended to apply to those cases. For example, it was noted that in developing a rule which allows courts to discretionarily decline the exercise of jurisdiction, it might be necessary to allow courts of Contracting States to do so when parallel proceedings are pending before a court of a non-Contracting State.
- 17 The restriction of the application by the habitual residence of the defendant was also discussed and the WG could not reach consensus on the issue. The problems arising from such restriction were pointed out, such as a possible imbalance between the parties, and the difficulty of applying this restriction to complex litigation with multiple defendants. However, there were arguments to retain the restriction. It was pointed out that, as such restriction is necessary for the rules of jurisdiction, it would also be appropriate for the rules of parallel proceedings in that they are closely related to the rules of jurisdiction. The Chair suggested to put this restriction in brackets and pointed out the need for further consideration on this point.
- 18 It was proposed that the words “and jurisdiction” should be added after the word “proceedings” in Article 1(2). However, this was not adopted by the WG, though the Chair confirmed the possibility of revisiting the issue once the WG makes clear the basic rules for parallel proceedings (or the entirety of the rules of the new instrument).
- 19 As for the exclusions from scope, the need for coherence between the new rules and the 2019 Convention was pointed out, and it was argued that many matters excluded from the 2019 Convention were related to certain States’ interests and those matters should also be excluded from the new rules. However, as some matters were excluded from the scope of the 2019 Convention based on the existence of international instruments dealing with those matters, those matters might not need to be excluded from the scope of the new rules if there are no such instruments that might conflict with the new rules.
- 20 The Chair asked the PB to conduct research into the existing international instruments to clarify this point. It was noted that the WG should carefully consider (i) the difference in the lists of exclusions of the 2005 and 2019 Conventions and (ii) the relationship with the 2005 Convention, which includes rules for avoiding parallel proceedings (how to deal with cases in which parties concluded exclusive choice of court agreements).
- 21 Participants also pointed out matters that were not listed in Article 2 but should be excluded from the scope, such as consumer contracts, individual contracts of employment, and interim measures of protection.
- 22 WDs No 1 and 2 were submitted and discussed. It was decided that the proposed texts in both WDs should be included in the text of Annex I with brackets as markers for future discussions.

VI. General discussion on the roles of the jurisdictional rules and the doctrine of *forum non conveniens* (FNC)

- 23 The WG had a general discussion on the roles of the jurisdictional rules and the doctrine of FNC, comparing the texts in Annex I and Annex II. The importance of the balance between the jurisdictional rules and the doctrine of FNC in the rules for parallel proceedings was expressed in the meeting.

- 24 As for the text in Annex I, it was argued that the rules based on the rules of jurisdiction and those based on the doctrine of FNC were well-balanced and the WG should use the text as the starting point of the discussion. However, different views were also expressed. In particular, it was noted that the rules of jurisdiction would not properly work for prioritising the forum because, in many cases, both courts would have jurisdiction based on Article 5 in Annex I.
- 25 As for the text in Annex II, it was noted that the text did not include jurisdictional rules. However, it was argued that the “connecting factor” in Article 1(3) in Annex II would take a similar role to that of Article 5 in Annex I.
- 26 In this discussion, the possibility of prioritising certain jurisdictional bases was discussed. There were arguments against it. It was argued that a certain hierarchy exists in the current world (for example, exclusive jurisdiction) and the new rules should also use such hierarchy to provide greater certainty and predictability as to how to deal with cases of parallel proceedings.
- 27 During the meeting, a two-staged process was also mentioned as a possible structure for the rules for parallel proceedings. In this structure, as the first process, the jurisdictional ground (or connecting factor) should be investigated. If both courts have jurisdiction under the instrument or neither court has jurisdiction, then as a second process, courts would determine which court is more appropriate to proceed with the case, in accordance with FNC considerations which would be detailed in the instrument.
- 28 The Chair asked for views on the possibility of merging the two texts into one. There were participants who expressed the view that such merger would be possible and useful. However, the differences between the two texts (conceptual differences, difference in structure, and difference of application in practice) were also pointed out. The Chair agreed that the merging of the two texts was not possible at this stage and the WG should continue to use the texts in both Annex I and Annex II for the discussion. The Chair also confirmed that participants may submit proposals in this regard.
- 29 The Chair noted that the cases where parallel proceedings are pending in courts of different Contracting States should be divided into three categories: (i) where both courts have jurisdiction or connection under Article 5 in Annex I, (ii) where one court has jurisdiction or connection under Article 5, but the other does not have such jurisdiction or connection, and (iii) where neither court has jurisdiction or connection under Article 5. Based on this categorisation, the Chair proposed that the WG should discuss each category of cases individually, and it was agreed to proceed with the discussion in this way.
- 30 As for the cases of category (ii), participants of the WG supported the view that the court having jurisdiction or connection under Article 5 should, in principle, be given priority over other courts that do not have jurisdiction or connection. It was noted that the relationship of the provisions in the text with national rules on exclusive jurisdiction should further be explored.
- 31 However, regarding the cases of categories (i) and (iii), participants expressed different views. With regard to the former, views were varied in terms of which approach should be adopted, the “first-in-time” rule or the better forum approach. It was also noted that mutual consultation and coordination would play a certain role in determining which court should proceed with the case. It was also proposed that the WG explore an approach whereby the better forum would be considered first, leaving the first in time rule for cases where the courts come to a different determination as to which court is the better forum. The view not to deal with the cases of category (iii) in the text was also expressed in the meeting, though there were also arguments against such a view.
- 32 It was further noted that, in particular in category (iii) situations, the question of the exclusion of exorbitant grounds of jurisdiction / negative priority should be also discussed.

- 33 The need for having a clause which would exceptionally allow courts to depart from the basic rules was also argued (See Article 2 in Annex II). However, the WG did not reach consensus on this point.

VII. The role of the jurisdictional rules

- 34 As it was not clear that Annex II can be said to have rules of jurisdiction, the WG explored the role of the jurisdictional rules as connecting factors for determining parallel proceedings by using the drafted text in Annex I.
- 35 In exploring the role of jurisdiction, participants discussed that, if jurisdictional or connecting factors are used as a threshold, if one court has jurisdiction under Article 5 of Annex I and the other court does not, the proceedings of the former court should be prioritised irrespective of which court is seised first, although, in some situations, a certain exception to this basic structure might be necessary.
- 36 Participants also discussed the issue of the prognosis of recognition and enforcement of the future judgment of the court first seised for the rules of parallel proceedings. The WG acknowledged that Article 4(3) causes problems when a Contracting State does not recognise or enforce foreign judgments under national law. As a result, Article 4(3) was tentatively deleted from the text. However, there was no consensus on whether the prognosis should play a role in the development of provisions concerning the obligation of the court other than the court first seised. In addition, in considering such role of the prognosis, it was highlighted that the WG needs to distinguish the prognosis of recognition from the prognosis of enforcement. The Chair confirmed that the WG should investigate this issue further.
- 37 Concerning Article 3(1) in Annex I, the use of the term “shall” was discussed because there were participants who considered that the obligation expressed by “shall” was too strong, even if Article 3(2) allows courts to discretionarily suspend the proceedings. The Chair noted the need for further consideration on this point.
- 38 There was discussion on the use of the word “jurisdiction”. As there seemed to be different understandings among participants, it was proposed that the rules should not use the word “jurisdiction”, and alternatives, such as connecting factors, would better reflect the role that jurisdictional rules served in the draft. However, it was also stressed that Article 5 in Annex I deals with the matter of jurisdiction, and it was argued that the word “jurisdiction” should be retained in the text.
- 39 Because of time constraints, the provisions in Article 5 were not discussed. Although one approach would be to include grounds of jurisdiction as connecting factors, it was also stressed that the grounds of jurisdiction could not be included in the list of factors to determine the more appropriate forum.

VIII. The role of the doctrine of *forum non conveniens* (FNC)

- 40 The WG explored the role of the doctrine of FNC. It was pointed out that the doctrine of FNC should be a source of inspiration for the factors used to determine which court is the better forum. It was explained that the text in Annex II was mainly based on the better forum approach, though it allowed for the inclusion of certain jurisdictional rules as connecting factors in it.
- 41 As for the text in Annex I, Article 3(2) and Article 4(5) were supported as they would realise the adjudication of the better forum, although it was also stressed that the determination by the courts set out in each provision should be the same determination. It was also noted that such provisions might have to be accepted to compromise various positions, stressing that they were unknown to some legal systems and the judges of those systems would have difficulty in applying the provisions.

There were different views as to whether the brackets in Article 4(5) should be deleted and, in the same context, on the need for consistency between this provision and Article 3(2).

42 It was stressed that the doctrine of FNC has another role, that of realising justice (access to justice). The Chair recognised such role and noted that the need for an article on the realisation of justice (avoiding the denial of justice) should be considered in the future discussion.

43 Concerning the factors to be applied in determining the more appropriate forum, it was argued that it would be appropriate to include certain factors from Article 1(2) of Annex II in Article 6 of Annex I, though the need for careful consideration was also expressed. The WG did not have sufficient time to discuss this point and this matter was left to the future meetings.

IX. Future work

44 At the last session of the meeting, participants expressed their views on the revised draft text and on future work. For example, it was suggested that the WG should focus on parallel proceedings in the second meeting before moving forward to the discussion on related proceedings. However, there were also participants who expressed the view that the WG should discuss other issues in the second meeting, such as the rules for direct jurisdiction. The Chair noted that he would consider further the structure of the discussion in the following meeting, with the support of the Friends of the Chair.