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Please indicate your profession:

- ☐ Practitioner
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- ☐ Others, please specify: Click or tap here to enter text.

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?

The narrow definition of parallel proceedings and related actions (limited to proceedings/actions in contracting states) necessarily means that parallel proceedings and related actions in a non-contracting state will not be considered, even if that state might be the most appropriate forum. As a result the proposed convention is unlikely to be capable of effectively eliminating uncertainty or reducing cost. On the contrary, it will likely (a) introduce an additional layer of regulation which will not necessarily result in the litigation being resolved in the most appropriate forum; (b) provide almost infinite scope for the tactical and pre-emptive commencement of proceedings leading to wasteful threshold procedural litigation and (c) vastly increase costs and delay.

Given that all states have their own rules for addressing the problem of parallel proceedings and related actions which seem to operate perfectly well in practice, it is unclear why such a convention is needed or why it will be beneficial unless it can provide an assurance that litigation will be confined to the most appropriate forum and not simply the more appropriate forum as between two or more contracting states

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?

It is inevitable that the proposed convention will be used as an effective source of jurisdiction, even though that is not its primary objective. Accordingly, any deviation from the Judgments Convention as regards subject matter (or, indeed, in any other respect) is undesirable since it will mean that states party to both conventions will be bound by separate sets of potentially discrepant rules, thereby creating further complexity and scope for tactical litigation.

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 whether or not the proposed arbitration exclusion covers a dispute about the validity or application of an arbitration agreement.

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).

The more narrowly the scope of the convention is drawn, the less likely it is to be in achieving its objectives. On the other hand, if it applies wherever any defendant is habitually resident in a contracting state, there is obvious scope for abuse and tactical joinder of parties simply in order to establish jurisdiction.

See also the answers to 1.1 above and 13 below.

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.

Any definition of parallel proceedings and related actions should mirror the definitions in the Judgments Convention.

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

It seems unsatisfactory for court A to be determining when court B is seised by reference to only two criteria which possibly may not correspond exactly to the criteria applied by court B itself. Is it not possible simply to state that a court shall be deemed to be seised when it is seised in accordance with its own rules of practice and procedure?

Question 4 on Article 5 obligations

What are your views on Article 5?

As a judge, I would find it invidious to be required to determine whether or not another court had rendered a judgment within a reasonable time. I would effectively be sitting in judgment on that court without first-hand knowledge of all the facts and circumstances. At best, this could lead to embarrassment; at worst, it could cause serious offence and would not be conducive to harmonious co-operation in the future.

Question 5 on priority jurisdiction / connection

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

Even if this is not the purpose of the convention, it will inevitably be used as a source of jurisdiction, leading to potential overlap or even conflict with the Judgments Convention. It would be better if Article 8 covered situations where the court in question either has jurisdiction according to the criteria set out in the Judgments Convention, or would have jurisdiction if it were a party to that convention.

If a court otherwise has jurisdiction, a mandatory requirement to suspend or dismiss proceedings because they were not commenced within a reasonable time seems unnecessarily prescriptive and insufficiently nuanced to cater for the variety of reasons why that might have been the case.

The proviso to Article 8(2)(d) is difficult to understand. It is likely to give rise to unproductive satellite litigation where there are potentially different acts of performance and there is a dispute as to whether any one of those acts is sufficiently connected to the state in question.

With regard to Article 8(2)(j), if there are good and proper reasons why the objection to the jurisdiction would not have been successful, why should the court be required to decline jurisdiction?

Multi-party claims and multi-issue claims do not fit easily within the proposed framework. Moreover, there does not appear to be any provision for joinder of an additional party whose presence is necessary and/or proper in order to arrive at a just resolution of the dispute. Nor does it give any consideration to express choice of law as a basis of jurisdiction. It is also unclear how subrogated claims or claims for contribution would fit into the proposed scheme.

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

6.1 What are your views on the 'jurisdiction / connection' list in Article 8(2)?
See the answer to question 5 above.

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?

A purely temporal test does not seem to be a particularly suitable means of determining the most appropriate forum, especially given the scope offered by the proposed convention for tactical and pre-emptive litigation. As such, Option 1 would appear to be preferable, whereby the court first seised carries out a determination as to whether any other contracting state is a more appropriate forum. However, in practice it is likely to lead to unproductive delay – especially where there is competing litigation in the courts of a non-contracting state.

The proviso to Article 9(5)(b) is difficult to fathom since it runs entirely counter to the logic of requiring the court first seised to carry out the determination under Article 9(1). What is the point of a determination under Art. 9(1) if it can be overridden on the say-so of another court applying the same criteria?

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 factors set out are appropriate in themselves save for (f) which appears to cut across the Judgments Convention in an unhelpful manner. Questions of enforcement should be left to the court being asked to enforce a judgment.

However, in so far as the draft convention does not appear to recognise the possibility that a non-contracting state might be the most appropriate forum, the entire scheme is unsatisfactory.

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.

See the doubts expressed above and below as to whether the draft convention is likely to be effective in meeting its stipulated objectives.

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.

The proposed regime for related actions suffers from the same drawbacks as the regime for parallel proceedings, with the added risk of unnecessary and unproductive fragmentation and satellite litigation in relation to "parts of proceedings".

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?

The suggestion of an inter-court communication mechanism is novel. However, if communication has to take place through official channels, it may well lead to delay and additional expense, particularly where translations have to be obtained into one or more languages. Added to that is the inevitable difficulty for serving judges to find time in their already busy schedules to engage with the communication process, especially where different time zones are involved. Differences between legal systems may also mean that it is difficult to reach agreement on particular matters.

However, the most fundamental objection is the complete lack of transparency that would surround such a process, leaving judges open to accusations of collusion and bias.

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?

The safeguards in Articles 19-21 will almost certainly cut across the existing rules that undoubtedly exist in each state already. As such it is difficult to see what they add, other than an additional layer of regulation and complexity.

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 draft convention seems to be a solution in search of a problem. Nearly all states have their own rules for dealing with parallel proceedings and related actions and I am not aware that there have been any particular problems in practice with the operation of these rules, save in respect of certain serial offenders (Russia, for example) who are unlikely to subscribe to any convention which will curtail their activities. I would be interested to know what evidence there is that there have been difficulties which might be addressed by this proposal.

In so far as the proposed convention seeks to enhance certainty, predictability and access to justice by reducing costs and mitigating the risks of inconsistent judgments, I do not believe that it will succeed. Indeed, it may well have the opposite effect by increasing cost

and complexity without necessarily leading to proceedings being resolved in the most appropriate forum. It will also leave the door wide open to tactical and pre-emptive proceedings with the corresponding need for expensive and time-consuming satellite litigation.

As already stated, it is difficult to see how the stipulated objectives can be achieved unless the position of non-contracting states is also brought into consideration. Since the proposed convention only applies between contracting states, it can only ever achieve a partial solution. On the one hand, this leaves it open to parties to litigate in inappropriate non-contracting states which are unlikely to subscribe to the convention, while simultaneously excluding the possibility that a non-contracting state might actually be the most appropriate forum for a dispute. Further litigation would no doubt then ensue in the non-contracting state which might (at best) lead to a final single forum or (at worst) irreconcilable judgements in different fora. The convention will not and cannot avoid this possibility and will only have added an unnecessary additional layer of procedural litigation and expense.

It is tentatively suggested that a more productive approach might therefore be to step away from the idea of allocating priority between contracting states and instead to consider simply harmonising the rules and principles that contracting states should apply when considering parallel proceedings and related actions, irrespective of where those proceedings/actions are taking place. In that way, proper consideration could be given to the appropriateness of a non-contracting state as a forum for the litigation while ensuring that all contracting states approach the matter in the same way. In that way a considerable degree of certainty and predictability could be achieved while not seeking to prescribe any particular outcome.

13.2 Do you have any views on whether the proposed rules set out in the Draft Text would improve the status quo?
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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?
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Question 14 - comments

What other comments, if any, do you have?
Click or tap here to enter text.