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Please indicate your profession:

- Practitioner
- Judge
- Company/business lawyer
- Government official
- Legal professional in international organisation
- Academia
- 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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Others

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?

Stewarts is the UK's largest litigation-only law firm and specialises in high-value and complex disputes. The firm acts for both corporate and individual clients and has leading and specialist departments in a wide range of areas of commercial litigation, international arbitration, private client disputes including divorce and family matters and claims of personal injuries of the utmost severity.

Stewarts has strategic relationships with other specialist law firms across the world, enabling its clients to take a global approach to litigation. The firm is top ranked in both the Legal 500 and Chambers and Partners, the leading guides to the legal profession in the United Kingdom.

Stewarts welcomes the opportunity to respond to this HCCH consultation and provides responses to this consultation in respect of our personal injury clients only.

Stewarts has seen and had input into the response provided by the Law Society of England and Wales (the Law Society) and supports the responses provided by that organisation.

We consider that the draft text has a very narrow focus (being parallel proceedings and related actions) and therefore will be of very limited (if any) assistance to weaker parties to disputes, notably injury and fatal accident victims. This category of litigant requires enhanced protections and we are of the view that steps should be taken by the HCCH to develop such protections, notably in the field of enforcement if combined rules on both jurisdiction and enforcement are an insurmountable challenge.

To the extent the draft text has the effect of encouraging or facilitating actions for negative declarations, this is also a very bad thing for weaker parties (injury victims) who may be drawn into such proceedings or see action they intend to take stymied by a fight on jurisdiction between potential defendants.

The HCCH consultation paper at para 14 notes that consumer contracts are excluded because “rules in the Draft Text may not be appropriate for consumer and employment matters, as consumers and individual employees are typically weaker parties in litigation.” This seems arbitrary and is not properly explained by the HCCH. In a global economy where consumers rely on cross-border contracts and/or movement giving rise to potential cross-border disputes (be that travel for business or pleasure/vacation), it is unclear why this category of potential litigant should be excluded from an international legal instrument that purports to increase legal certainty, predictability and access to justice: all laudable intentions that should put weaker parties to disputes at the top of the list in terms of trying to achieve these aims, as they are the parties who stand to benefit most from the same.

In any event, and as noted more generally, the proposal has a narrow focus being parallel proceedings and related actions, so does not go anywhere near far enough in providing the protections, certainty, predictability and access to justice needed for weaker parties or indeed litigants in any category.

With respect to the draft text we agree with the Law Society that the Convention may result in a contracting state being obliged to accept jurisdiction where a third state may be the more appropriate jurisdiction to hear a dispute.

It is also unclear how the Convention would impact on the operation of the European regime on jurisdiction provided for in the Brussels Regulations and Lugano Convention: this requires clarification if the HCCH is to take forward the proposed Convention.

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?

We agree with the Law Society's response that the existence of proceedings in multiple jurisdictions is not sufficiently problematic or widespread to merit a convention on this topic and may lead to increased delay in resolution of claims, satellite litigation and perverse incentives to issue proceedings/a race to court when emphasis should be on dispute resolution. This is particularly so given the limitations on the scope of the proposed Convention, which does not appear to extend to protecting vulnerable, weaker parties to disputes in such circumstances.

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)?

Stewarts Law LLP is responding to this consultation on behalf of individuals, notably cross-border injury victims, rather than in relation to our commercial clients. Accordingly, we make no comment in relation to article 2(3) save that we have seen and support the Law Society response.

We disagree that more vulnerable litigants such as consumers (Article 2(4)) and employees (Article 2(5)) should be excluded from any additional HCCH legislation. In the modern world more consumers are in the position of entering into the global marketplace by purchasing goods and services provided by a company or companies in a different geographical location and international legal instruments should be developed in such a way that they enhance consumer / weaker party protections, not exclude such parties from certainty that is afforded to commercial parties.

Draft Article 2(1)(f) excludes carriage of passengers and goods. This is a problematic exclusion under Hague 2019, and we note that the draft Convention adopts the same approach. This exclusion would include a claim for damages by a passenger in a car involved in a road traffic accident as well as victims of an air accident/disaster. Perversely, the draft Convention would cover a claim made by a pedestrian injured in the same road traffic incident causing unfairness by putting two innocent victims of the same incident on an unequal footing when seeking to enforce a judgment for damages. The way in which the Convention might be interpreted and the scope of its application remains unclear. However,

carriage of passengers and goods are obvious areas where individuals need protection on jurisdiction (and indeed enforcement given the gaps and uncertainty left by Hague 2019) and yet the draft Convention falls short in this area.

In our view vulnerable individuals (victims, consumers, employees) should not be excluded from the scope of the HCCH conventions that aim to improve legal certainty and access to justice. Such vulnerable individuals/weaker parties are left to rely on domestic law of a signatory state on issues of jurisdiction and enforcement, which has the effect of increasing costs, creates uncertainty and is sometimes an insurmountable barrier to access to justice. Of particular concern is the lack of any predictable and coherent regime on cross-border enforcement for injury victims, who run the lottery of not knowing whether a judgment obtained, say, from State A (which might well exercise jurisdiction over their dispute and a defendant domiciled outside of State A) will then be recognised and enforced in State B where the defendant/its assets are based. This is of heightened concern for UK-based victims following Brexit and in circumstances where current policy is for the UK to rely on the Hague Convention regimes.

- 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).

Stewarts agree with the submissions made by the Law Society that the current drafting is unclear and would welcome clarification.

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?

We agree with the Law Society response that Article 5(3) could give rise to satellite litigation to determine whether a court is "unlikely to render" a judgment on the merits or do so "within a reasonable time" such that the original court which suspended its proceedings should proceed. This is likely to add to the complexity of cross-border litigation, not enhance legal certainty.

Question 5 on priority jurisdiction / connection

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

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

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

We agree with the Law Society response that the jurisdictional grounds are very limited. We are concerned that defendants sued in a Contracting State which does not have an Article 8(2) connection will be able to commence parallel proceedings in a Contracting State which does have an Article 8(2) connection. It appears that the first set of proceedings will then have to be suspended to allow the second court to proceed. Such a mechanism could be used tactically by defendants to derail proceedings brought in the initial court, by bringing parallel proceedings, even where the initial court was the most suitable court to hear the case.

Article 8(2)(g) is of particular concern in an injury/fatal incident context. The law in England & Wales allows such victims to bring proceedings relying on the wide interpretation of the tort gateway and concept of "damage". It is unclear how the concept of "directly causing" the harm would be interpreted under the draft Convention and whether the narrower definition adopted by the CJEU in *Lazar v Allianz*, Case C-350/14 would be applied (which we anticipate is the intention of the draft text for consistency with Hague 2019) or whether the broader concept of "damage" under English law would be allowed (see *FS Cairo (Nile Plaza) LLC (Appellant) v Brownlie* [2021] UKSC 45).

We agree with the Law Society that the Article 8 mechanism is likely to have significant potential to create delay and encourage tactical and satellite litigation.

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?

Choices made by the parties should be given greater weight, as should issues relating to applicable law, although we note that this is a factor which can also sometimes generate satellite litigation and require determination as a preliminary issue before parties can proceed. In the UK/EU, this is achieved with reference to the Rome I and Rome II Regulations, however those are not of universal application in all potential signatory states to HCCH legal instruments giving rise to potential for further uncertainty.

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?

We agree with the Law Society response. The mechanism introduced at the proposed Article 8 has the potential to increase the likelihood of parallel proceedings continuing or being

commenced in an effort to secure a court more favourable to one or other party. It may lead to defendants commencing parallel proceedings simply to try to invoke the provision that the first court's proceedings must be stayed in favour of a more appropriate Contracting State in which an Article 8(2) connection could be asserted.

Tactical litigation would increase costs and uncertainty and introduce delays as well as satellite litigation to determine which Convention State should hear the proceedings. It may also lead to a rush to issue or seek a declaration to try to secure a hearing in a Convention State that a particular party considers would be more favourable. To the extent that an injury victim/fatal accident claimant might be caught up in such tactics, this is a significant concern as it delays the receipt of compensation which is very often needed urgently to meet the needs associated with a life-changing injury.

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

As set out above, we are concerned that the proposed Convention will lead to increases in complexity, delay and uncertainty as well as introducing a significant risk of satellite litigation.

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

Given the narrow focus of the proposed Convention and the exclusions from scope/limited application to weaker parties, we do not have a strong preference for either approach.

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)?

If a Convention of the sort proposed were to be taken forward we agree with the Law Society that the factors for determining the appropriate court require further consideration.

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.

We do not consider that the proposed framework would be effective. As set out above there is increased potential for additional parallel proceedings and satellite litigation to determine which court should proceed.

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.

In our view there is significant potential for there to be no determination as to which court is the most appropriate to hear the case, with one or more courts determining that they are most suitable to hear the case. This could render the Convention meaningless if related actions can continue notwithstanding the Convention's objectives.

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?

We agree with the Law Society that the courts should not communicate privately without the parties having sight of any communication and being able to make representation as to their position.

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?

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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.

We agree with the Law Society that this proposed Convention has the potential to increase the complexity of cross-border litigation which may result in additional parallel and related proceedings, with a significant increase in costs and additional complexity for all parties, without achieving the aim of reducing parallel/related proceedings.

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

As set out above we do not think the proposed Convention would improve the status quo. It certainly would not improve the position for vulnerable/weaker parties/individuals, who are excluded from the scope of the proposed Convention.

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?

Yes, as set out above we consider that the proposed Convention has considerable scope to for tactical and satellite litigation. We support and agree with the points made by the Law Society in response to this question.

Question 14 - comments

What other comments, if any, do you have?

We reiterate our concerns about the exclusion of weaker parties to disputes from the scope of the Convention and the Hague regime more generally, notably Hague 2019 on enforcement of judgments, with many cases involving weaker parties, notably injury victims, falling outside of its scope when it is precisely this class of individual that requires the highest level of protection when seeking to enforce a judgment, domestically or on a cross-border basis. We urge the HCCH to seriously consider these concerns in relation to existing legal instruments and when developing future legislation/reform to ensure those who are most vulnerable can benefit from greater legal certainty and access to justice.