

Survey response	
Please indicate: [Name:]	German Judges Association
Please indicate: [State:]	Germany
Please indicate: [Region:]	Europe
Please indicate: [Affiliation:]	Professional Association
Please indicate your profession:	Judge
Do you have practical expertise in cross-border civil or commercial litigation:	Yes
Press "Next" to continue	
1.1 What are your views on the scope of the Draft Text?	<p>A convention on the competence of courts in cross-border litigation is a highly desired instrument. Crossborder litigation becomes more and more frequent, for European Union Member States also with Non-European-Union-Member States. As the Brussels I-bis Regulations covers the crossborder proceedings in the EU, a uniform and predictable procedure throughout the world could bring legal certainty and predictability for both businesses and citizens. Whether this Draft text can meet the expectations remains to be seen. As most provisions are of a discretionary character and the approach by using connecting factors is not the approach that is common in Germany or established by the Brussels I-bis Regulation it might be doubted that the future Convention will have the intended impact. On the other hand: it is worth trying to find a compromise between a Civil Law approach and common law. Nonetheless, the Draft text needs to be revised as it does not meet the requirements stated in the German Basis Law, the ECHR or developed by the European Court of Justice (ECJ). Pursuant to Art. 103 Basic Law of Germany and Art. 47 ECHR every citizen has the right to be heard before a competent court. The future instrument does not follow the continental European Law tradition of Civil Law jurisdiction. It tries to find a compromise between two systems - the jurisdiction system and the common law system. It seems that the tradition of the continental European System could not prevail its advantages. For judges and litigants in Germany over centuries clear rules on jurisdiction turned out to be an advantage: in time, costs of litigation and the predestination of the competent court. The</p>

	<p>instrument will replace those rules that have given legal security for citizens and businesses with the rules in Art. 10 and 11 Draft text. In our view the high predictability of jurisdiction for the parties and their right to be heard before a court will be replaced by discretion and, thus, lead to unpredictability. For German litigants this would be a disadvantage. As there is no case law in Germany regarding connecting factors in Art. 10 a jurisdictional praxis would have to be established. But the German Association of Judges would prefer a different approach. The objective should be to avoid a discretionary displacement of jurisdiction rules towards rules of forum non conveniens and connecting factors. It would take a certain time to establish the required predictability if the Draft text would lead to a Convention.</p>
<p>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?</p>	<p>The German Association of Judges answers this question with a careful yes and if the preoccupations are met in the end. As the convention means a new approach it is hard to say whether at all and how it would work out. So far, parallel proceedings are not really a problem in Germany because jurisdiction is determined by law. Parties know which court is the competent court beforehand. Moreover, with the Brussels I-bis Regulation there has been a clear system regarding the court's competence. Art. 29 Brussels I-bis Regulation are rarely to be applied.</p>
<p>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)?</p>	<p>No objections.</p>
<p>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).</p>	<p>No objections.</p>
<p>2. 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.</p>	<p>Art. 3 par. 1 lit. a): We agree, that the most appropriate approach for parallel proceedings would be the party identity. Art. 3 par. 1 lit. b): The definition on related actions is regarded as problematic. It is not clear what is meant by "connected to each other" (lit. i). This wording could refer to a lot of potential connections, as geographical connections, residence connections, business connections Lit. iii)</p>

	<p>is seen as a problematic provision. The decision whether a question or fact might create a risk of irreconcilable findings is already a decision on the substance of the matter. At the time a judge can decide whether his judgement might lead to inconsistency with another judgement the proceeding will be advanced already. Therefore the intended impact of the Convention to avoid double litigation cannot be achieved with this provision. Moreover, the decision pursuant to Art. 12 cannot be made early. Regarding the wording of "same parties" we want to mention that according to the case law of the ECJ party identity can also exist when different persons are involved in a proceeding, whose interests regarding the subject matter of two legal disputes are identical and inseparably linked. Thus, the interests of an insurer and its policyholder regarding the subject matter of two legal disputes may coincide to such an extent that a judgment rendered against one would have res judicata effect on the other (see ECJ, judgment of 19 May 1998 – C-351/96, paras. 19, 23, 25). Whether this problem has been seen is not clear.</p>
3. What are your views on Article 4?	No objections.
4. What are your views on Article 5?	<p>It is positive that the fact that a case that is pending in a foreign court can no longer lead to the dismissal of the action as inadmissible before the other, second court until the requirements in Art. 5 par. 2 Draft text are met. We presume, that the legal remedies against a Court's decision are up to national law? Otherwise we would recommend a possibility to legal remedies. Additionally we would like to mention, that it is not yet said, that the scope of legal effects must be limited by public policy. Art. 21 should include Art. 5. Art. 5 par. 1: As judges, we have to consider the fundamental rights of access to justice pursuant to Art. 101 German Basic Law and Art. 47 ECHR. To ensure that parties get access to justice as soon as possible. "As soon as possible" is not an appropriate definition. We would recommend to replace the wording by "without undue delay". Art. 5 par. 3 is necessary so that the domestic plaintiff can achieve his legal objective before the foreign</p>

	<p>court in doubtful cases (e.g. in the case of a negative declaratory judgment action there and the expiry of the time limit for a counterclaim), the domestic proceedings must be able to be continued, contrary to the wording of the law.</p>
<p>5. What are your views on Articles 6 – 8 including how they will work in practice?</p>	<p>Art. 6 par. 1 is corresponding to Art. 24 No. 1 Brussels I-bis Regulation. It should be stated, that this jurisdiction is exclusive and not partial. There seems to be an inconsistency with Art. 8 lit. f). If jurisdiction for rights in rem in Art. 6 is exclusive there is no need for lit. f in Art. 8. We do not recommend a provision that just states priority jurisdiction. Art. 7 par. 3: Since rights in rem should be subject to exclusive jurisdiction, differing agreements on jurisdiction and submissions without objection would also be irrelevant. This provision could be deleted. Art. 8 par. 1: Instead of a "reasonable timeframe" we recommend "without undue delay", should be defined. If the foreign decision is delayed beyond a period that is no longer tolerable under Article 6 ECHR and Article 47 par. 2 ECHR, a German or EU-Member-state court would be obliged to provide access to justice (ECJ, Judgement 9. Dec. 2003 - Rs. C-116/02 Erich Gasser GmbH/MISAT Srl). The brackets for the request of a party should be deleted.</p>
<p>6.1 What are your views on the 'jurisdiction / connection' list in Article 8(2)?</p>	<p>The German Association of Judges consents with the jurisdiction provisions in Art. 8 par 2. General rules on jurisdiction are welcomed. For uniformity of interpretation more clarification of the general understanding will be important, eg in a report. The habitual residence and place of business as the connecting factor (lit. a) to c)) are focused on continuity and stability. Most important, these provisions are similar to Art. 4 and 63 Brussels I-bis Regulation. Nonetheless, Art. 8 par. 2 lit. c might be problematic regarding the capacity to be a party to legal proceedings. It is possible that foreign legal entities will not be recognized as such within Germany, for instance if organized as a Limited Company by British Law. The decisive factor is that the statute of the registered office or the statute of incorporation must be applied pursuant to the Private International Law of the state. Under German PIL, the question of whether a foreign</p>

	<p>company has legal capacity and the capacity to be a party to legal proceedings is to be assessed according to the company law of the state in which the company has its actual registered office ("seat theory"). As an example: Following the ruling of the Federal Court of Justice (BGH) of February 16, 2021 (II ZB 25/17), the BGH decided that after the United Kingdom's withdrawal from the EU and the end of the transition period on December 31, 2020, British Limited companies can no longer invoke the freedom of establishment under EU law from the perspective of German law and are therefore no longer eligible for recognition as legal entities under German law if they have their actual place of business in Germany. The consequence of applying the seat theory to British limited companies with their administrative headquarters in Germany is that German law applies to these companies from the date of Brexit. Since German substantive company law does not recognize a Limited Company, these companies are classified as partnerships. If there are multiple partners, they become a civil law partnership (GbR). If a commercial enterprise exists, the Limited company transforms into a sole proprietorship or a general partnership. Lit. f) does not seem to be necessary if jurisdiction pursuant to Art. 6 is exclusive.</p>
<p>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?</p>	<p>If there must be factors, these factors are useful.</p>
<p>6.3 Are there any additional factors that you believe should be included?</p>	<p>It would be useful to implement the Brussels I-bis-System. But it is understood that this objective is not achievable.</p>
<p>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?</p>	<p>The idea that the court first seized shall generally be the competent court is welcomed.</p>
<p>7.2 What are your views on how the two approaches may work in practice?</p>	<p>Artt. 29 and 31 Brussels I-bis Regulation have the approach that, the proceedings before the court subsequently seized shall be stayed if actions concerning the same claim are brought between the same parties before courts of</p>

	<p>different Member States, until the jurisdiction of the court first seized is determined. This idea is reflected in Art. 8 Draft text. This is a clear provision and a good combination of predictability, efficiency, and equity in all circumstances. Contrary, Art. 8 Draft text considers connecting factors in Art. 10. This approach goes farther than Art. 29 Brussels I-bis Regulation. It would be for the defendant to establish a more appropriate forum, and for the plaintiff to bear the burden of showing that justice requires the court first seized to accept jurisdiction regardless. That will mean that a time- and money-consuming procedure will be established. The plaintiff bears a considerable risk. Therefore this approach is highly disadvantageous for the plaintiff. There could be a judicial discretion to refuse a stay at the court first seized. In the light of the fundamental rights described above Art. 8 in combination with Art. 10 seems to be problematic.</p>
<p>7.3 Do you have a preference for either approach? If so, please explain why.</p>	<p>As in every case the factors in Art. 10 are to be applied the outcome in practice is not predictable. The provisions differ from the provisions in Art. 29 Brussels I-bis Regulation and are of a discretionary character. It is questionable, that a similar outcome in all contracting states applying the more appropriate forum test is certain due to different legal traditions. Consequently, it could lead to a kind of jurisdictional immunity for some businesses by using those factors. Plaintiffs may be deterred by the uncertainty of the rules in Art. 10 Draft text, the cost of lengthy appeals, and consequently motivated to settle out of court or forego legal proceedings altogether. Furthermore, delay can be more than a mere inconvenience or financial barrier. It leads to uncertainty whether justice can be obtained in due time. Connecting factors pursuant to Art. 10 Draft text might lead to the inequality of arms between natural and legal persons, the changing nature of business relations, and the complexity of the corporate structure of some corporations. Additionally, the changed nature of business relations in an increasingly globalised world has allowed legal persons to outsource or offshore their riskier activities. This reduces the already limited</p>

	<p>liability of legal persons, and consequently further disempowers foreign claimants from holding corporations responsible for injuries sustained by transnational operations. For individual plaintiffs this provision might create an insurmountable conceptual barrier to justice. Furthermore, the Draft text lacks a provision that ensures the right to legal and effective remedies or the possibility to continue proceedings.</p>
<p>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)?</p>	<p>The German Association of Judges regards Art. 10 as problematic (see above No. 7.). As the background of the civil law system in Germany is a clear and predictable jurisdiction it seems neither constitutional nor appropriate to define the competence of a court through connecting factors. For several reasons: In Germany Art. 101 par. 1 Basic Law states: "No one may be deprived of their legally appointed judge." The connecting factors mean a so called more appropriate forum test pursuant to the forum non conveniens doctrine (fnc). It is doubted whether fnc meets the requirements of the Basic Law. If it is up to a court to determine the competent court, and this is not specified by law, such a regulation would be problematic. The doctrine of forum non conveniens is therefore also prohibited within the scope of the Brussels I-bis Regulation (ECJ, Judgement of 01. 03. 2005, Rs. C-281/02 (Owusu u.a. ./ Jackson), No. 37 ff.). Applying Art. 10 would directly contradict the main objective of the national and EU-Law, which is to improve legal protection for citizens and businesses and to make judicial jurisdiction predictable. The ECJ states in Owusu (ECJ, Judgement of 1. March 2005 – C-281/02, par. 32): "The principle of legal certainty, which is one of the objectives of the Brussels Convention (see, inter alia, judgments of 28 September 1999 in Case C-440/97, GIE Groupe Concorde and Others, ECR 1999, I-6307, paragraph 23, and of 19 February 2002 in Case C-256/00, Besix, paragraph 24), would not be fully guaranteed if a court having jurisdiction under that Convention were to be granted the right to apply the objection of forum non conveniens." So, the German Association of Judges does not see any difference between Brussels I Regulation and</p>

	<p>the current instrument. With the instrument, the question where to litigate will become arbitrarily. The ECJ further states: "The legal protection of persons established in the Community would also be undermined. First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he may be sued. Second, where a plea is raised on the basis that a foreign court is a more appropriate forum to trial the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or, if the court seized decides to allow the plea, that the foreign court has in fact no jurisdiction to trial the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost entailed by the bringing of a fresh action before a court of another State and the prolongation of the procedural time-limits." Regarding Art. 10 lit. c) it might even be, that there are several applicable laws, eg. for tort or contract. It remains unclear how such a conflict is to be solved. In general, the application of Article 10 will significantly slow down the processes because many examination steps precede the legal review of the case. the Draft text does not fulfil the requirements stated by the ECJ. Therefore, the German Association of Judges concludes that this provision can lead to arbitration. It does not reduce discretion afforded to the court. If connecting factors are to be used in the instrument the decision whether to suspend proceedings shouldn't be mandatory in Art. 9. The German Association of judges recommends to check whether provisions could be established whereas the court first seized is a clearly appropriate forum if jurisdictional rules are met.</p>
<p>8.2 Do you have any views on how Article 10 might work in practice?</p>	<p>So far, the application of Art. 10 might not be constitutional. The functioning of Art. 10 will be difficult (apart from constitutional problems). As there are no judgements regarding the appropriation of courts these factors are new.</p>

<p>8.3 Are there additional considerations that, in your view, should be taken into account?</p>	<p>Jurisdiction should not be determined by exorbitant grounds. It might be more straightforward to implement a general rule based on the defendant's domicile strictly construed or allowing for limited and exhaustive exceptions. The more narrowly or strictly construed a rule is the greater certainty afforded to both plaintiffs and defendants.</p>
<p>9. 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.</p>	<p>See above.</p>
<p>10. 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.</p>	<p>See above. It is important that the Draft text makes a difference between parallel proceedings and related actions.</p>
<p>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?</p>	<p>No objections.</p>
<p>11.2 Are there particular advantages and challenges you foresee in applying these methods?</p>	<p>Neither nor.</p>
<p>12. 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?</p>	<p>It is necessary to name the safeguards. Nonetheless, every judge must, of course, grant the rights arising from Articles 101 and 103 Basic Law and should not use the future instrument in the event of a potential violation.</p>
<p>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.</p>	<p>In general, the doctrine of fnc gained little footing in the civil law world, which prefers the approach of lis alibi pendens (see Brussels I-bis Regulation). The civil law jurisdictions generally base jurisdiction on the residence of the defendant and on choice of law rules favouring the habitual residence of the parties, the lex situs, and the lex loci solutionis. This reflects an expectation that a defendant should be sued at his "own" courts, modified to reflect different priorities in certain types of cases.</p>

13.2 Do you have any views on whether the proposed rules set out in the Draft Text would improve the status quo?	As Art. 14 allows the continuation of the proceedings in certain circumstances the effect of the instrument could be limited.
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, the mere fact that another forum could be more convenient will lead to more risks regarding satellite litigation or forum shopping than today.
14. What other comments, if any, do you have?	The intended instrument could cut down properly established jurisdiction.