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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?

2 The Draft we are considering defines the scope of the future instrument, namely to parallel proceedings [and related actions]) in the courts of different Contracting States in civil and commercial matters. Inclusion of related actions and mechanisms for regulation of such proceedings within the scope of the Convention is still pending and has not yet been finally determined.

3 We support a broad approach to the scope of the future instrument, namely, covering by its scope both parallel proceedings and related actions.

In our opinion, the application by the courts of the Contracting States of the mechanisms for regulating parallel proceedings proposed by the Draft will cause much fewer problems than the application of mechanisms for regulating related actions. Therefore, we consider it necessary and reasonable to regulate both blocks in a sole instrument.

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?

4 The subject matter scope of the Draft covers those legal relations, disputes over which may be the subject of parallel proceedings and related actions. These are civil and commercial matters considered in the courts of the Contracting States.

5 However, the Draft does not specify whether it applies to civil and commercial matters with a foreign element only, or whether it is no limited to such matters only.

The exclusions comprising subject matter scope of the Draft will be discussed below.

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)?

6 The exclusions from the scope of the future convention are set out in Art. 2 of the Draft. They are quite typical for the instruments adopted within the framework of the Hague Conference (see, for example, Art. 2(1) of the 2019 Convention). Therefore, in order to maintain a uniform approach to determining the scope of application of international instruments on jurisdiction and the enforcement of judgments in civil and commercial matters adopted under the auspices of the Hague Conference, the exclusions in Art. 2 of the Draft should be left unchanged.

7 In practice, the courts of the Contracting States will apply the provisions of the Convention to civil and commercial matters arising from legal relations that are absent in the list of exceptions in Art. 2 of the Draft. Difficulties may arise only in cases where the matter contains elements of different legal relations, some of which fall, and others do not, within the scope of the Convention.

8 Regarding the wording of the exclusion of arbitration in Article 2(3) of the Draft

9 There is a consensus in regulation by international instruments elaborated by the Hague Conference, and by acts of the European Union of the issues of jurisdiction and enforcement of judgments in civil and commercial matters with a foreign element. This consensus implies

that the specified above acts do not apply to arbitration and related legal proceedings. This approach is based on the fact that there is a 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and it contains provisions relating to regulation of arbitration and related legal proceedings.

10 Art. II of the 1958 Convention establishes the binding nature of an arbitration agreement and provides for a mechanism for ensuring its implementation (Art. II (3) of the 1958 Convention). Art. II of the said Convention establishes the priority of the "jurisdiction" of arbitration, which is based on the arbitration agreement, over the jurisdiction of the courts, which may ground on the rules of national law or an international treaty. Similar provisions are contained in Art. VI of the European Convention on Foreign Commercial Arbitration of 1961, Art. 8 of the UNCITRAL Model Law on International Commercial Arbitration of 1985.

11 However, the provisions of Art. II of the 1958 Convention and Art. VI of the 1961 Convention do not regulate cases of "classical" parallel proceedings, when, for example, an identical claim is filed both with arbitration and with a state court and the question arises as to which of them has priority. Another case may be when one party has filed a claim with a state court, and the other party with arbitration. How the court and arbitration should act in such cases, the 1958 and 1961 Conventions do not specify.

Taking into account this issue, it would probably be useful to regulate such situation in the Draft by treating such proceedings as parallel.

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).

12 Article 1 (2) of the Draft provides: [This Convention shall apply to parallel proceedings [and related actions] if [any of] the defendant[s] in [any of] the proceedings in a court of a Contracting State [is][are] usually resident in another Contracting State.]

13 The first (main) approach of the Draft is to apply the future convention to relevant matters (parallel proceedings and related actions) arising between any parties, regardless of whether they (both or one of them) belong to Contracting States (Art. 1 (1) of the Draft).

14 The main criterion for the application of the convention rests on the jurisdiction of the courts of the Contracting States, where parallel proceedings or related actions arise. This is a completely correct approach (this approach that is without reference to the parties' jurisdiction of the contracting states is enshrined in the 2005 Hague Convention on Choice of Court Agreements).

If it is decided to apply the additional criterion (Article 1 (2) of the Draft) in any of the proposed versions, this would narrow the number of potential parallel proceedings that may fall within the scope of the convention, that, in turns, would reduce its attractiveness in terms of regulating parallel proceedings in civil and commercial matters.

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.

15 The definition of parallel proceedings provided by the Draft (Art. 3 (1)) states that "parallel proceedings" means any proceedings in courts of different Contracting States between the same parties on the same subject matter". The latest version of this definition evidences that the phrase "on the same subject matter" has become an inalienable part of the definition of parallel proceedings.

16 In connection with the definition of parallel proceedings proposed in the Draft, the question arises whether there are sufficient criteria used to define proceedings as parallel?

17 Application of terms in bilateral international treaties of Ukraine on legal assistance in civil and commercial matters.

18 Ukraine has such bilateral treaties with 33 states. A majority of these treaties contain provisions regulating the issue of jurisdiction of disputes with a foreign element (international jurisdiction). The specified treaties, when defining the concept of "parallel proceedings", apply the following definition: "a case between the same participants, on the same subject, on the same grounds".

19 For example, Article 21 (2) of the Treaty between Ukraine and the Czech Republic on Legal Assistance in Civil Matters provides: "If the same case (between the same parties, on the same subject, on the same grounds) has been brought before the courts of both Contracting Parties, the jurisdiction of which is established by this Treaty, the court seised later shall leave it without consideration," or Article 21 (2) of the Treaty between Ukraine and Romania on Legal Assistance establishes: "If a case has been brought before two courts on the same subject and on the same grounds between the same parties , each of which is located in the territory of the other Contracting Party, and the case was brought in accordance with the provisions of this Treaty, the court seised later shall close the case after receiving confirmation that the court that opened the case earlier has declared its jurisdiction . Ukrainian law and the rules of international treaties use three criteria that cases must meet in order to be considered parallel, namely: (a) between the same parties; (b) about the same subject matter; and (c) on the same grounds.

20 The Working Group offers to use only two criteria to define parallel proceedings: (a) between the same parties and (b) concerning the same subject matter.

21 The European Union applies two criteria to define parallel proceedings in civil and commercial matters: "the same cause of action and between the same parties". Thus, Article 29 (1) of Regulation (EU) No 1215/2012 provides the following definition of parallel proceedings: "... where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States...".

22 Given that the basis of the claim is the circumstances (facts) on which the plaintiff bases his claims and the legal rules that confirm them, the question arises as to how important the absence of the specified criterion is and what consequences it will have for the future instrument? In our opinion, the application of only two criteria will significantly expand the range of cases that can be qualified as parallel and the provisions of the future instrument can be applied to them. At the same time, this will create some difficulties for the courts of states that apply three criteria in their law and international treaties.

23 Application of terms in the national law of Ukraine

24 The national law of Ukraine, when regulating relations with a foreign element and regulating the regime for preventing parallel proceedings, applies the following definition of such proceedings: "a case involving a dispute between the same parties, on the same subject and on the same grounds."

25 For example, Article 75 (2) of the Law of Ukraine on Private International Law states: "The court shall refuse to initiate proceedings in a case if a court or other jurisdictional body of a foreign state has a case on a dispute between the same parties, on the same subject and

on the same grounds, and the court became aware of the existence of such grounds before the initiation of proceedings in the case ".

26 A similar definition is contained in the provisions on the grounds for refusal to recognize and enforce foreign court decisions, inter alia, if there is a previously rendered judgement of a court of Ukraine in a dispute between the same parties, on the same subject and on the same grounds, which has entered into legal force, or if there is a case in the proceedings of a court of Ukraine in a dispute between the same parties, on the same subject and on the same grounds, which was initiated before the time of the opening of proceedings in the case in a foreign court (Art. 468 (1) 4) of the Code of Civil Procedure of Ukraine).

27 Conclusion for Ukraine

28 If a convention on parallel proceedings is adopted and Ukraine becomes a party to it, this will result in two regulatory regimes: (1) the one that shall be determined by bilateral treaties on legal assistance and (2) the other that that shall apply to the states parties to the new convention. The first regime will use three criteria to determine the presence/absence of parallel proceedings, the second one (conventional) – two criteria, which will significantly expand the range of proceedings that will be considered parallel.

Since the issue of parallel proceedings is directly related to the enforcement of court decisions and the grounds for refusal of such enforcement, as a result of the application of different regimes, situations may arise where enforcement of a court decision will be refused.

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

29 Article 4 of the Draft is necessary because in any case, a definition of the terms a "court that initiated the proceedings" and a "court hearing the case" must be provided, since the provisions of other articles are related to them.

Between the two options proposed by the Working Group in the Draft for defining the term "court hearing the case", we consider the definition provided in paragraph (a) of Article 4 more appropriate, namely, "when the document instituting the proceedings or an equivalent document is lodged with the court".

Question 4 on Article 5 obligations

What are your views on Article 5?

30 Article 5 of the Draft regulates the rights and obligations of courts, which, by virtue of the provisions of Chapter II of the Draft, must suspend and dismiss the case in favor of the proceedings in other courts.

31 The mechanism proposed in Article 5(1) of the Draft provides a court shall suspend proceedings as soon as it is informed of the proceedings in the other court by a party, [other relevant person,] or through the communication mechanism established pursuant to Article 16 of the Draft.

32 In our opinion, it is desirable to establish when (at what stage of the process) such a notification shall be considered appropriate, i.e. to establish a deadline for such notification. For example, if such a notification is made when the court is already ready to decide on the case? Should it also suspend the case? Or will it have other options in such a case?

33 Regarding the list of persons entitled (obliged) to notify the court of the existence of parallel proceedings in another court. Are these the parties to the case (plaintiff and defendant), or any other participant in the case (for example, a third party) or witnesses or other participants

in the case? In our opinion, the term "shall be informed" should be interpreted as informing the court of the fact of the existence of other proceedings with the provision by the party (other person) of relevant evidence and justification that such other proceedings (i) have the characteristics of parallel proceedings and (ii) fall within the scope of the convention. It would, perhaps, be advisable to clarify this in the text of the Draft. It would also be advisable to regulate the court's right to refuse to suspend proceedings and indicate the conditions under which it is possible.

34 The court may also be notified through a communication mechanism (Article 16 of the Draft), i.e. by another court. If this means that it must be informed by the court of another contracting state in which parallel proceedings have been initiated, then it must also have been notified by someone about the case being considered in the courts of another state: it resembles a vicious circle. In order to notify this court, it is necessary to know about the foreign court proceedings and have an idea of the case in order to conclude that it has features of parallel proceedings. This means that it must be informed about these foreign proceedings and the nature of the case by a certain person participating in the case in the foreign court. Considering that the exchange of information between courts, as provided for by the Draft, may be carried out, for example, through competent authorities, and this takes a rather long time, we propose to leave the notification mechanism by a party or any other participant in the legal proceedings as the only mechanism, and such notification shall be made no later than the moment of transition to the stage of consideration of the case on the merits.

35 The mechanism proposed by Article 5(2) of the Draft is that court that suspended its proceedings shall dismiss the case if the proceedings in the court for the benefit of which proceedings were suspended resulted in a judgment capable of recognition and, where applicable, of enforcement in that Contracting State (the State where a court suspended the proceedings).

36 1. Question: How can/shall a court find out that the court for the benefit of which proceedings were suspended rendered a judgment on the merits of the case?

37 2. Since in order to make a decision on dismissal of the case, the court must assess the chances of recognition and enforcement of a foreign court judgment in its state, it must check such judgment for possible grounds for refusal of enforcement provided for by its national law or international treaty, and for this purpose, it may hear the parties, assess the evidence, etc.

38 3. Proposal: (a) to supplement Art. 5 (2) of the Draft with a provision on the procedure for informing that the court for the benefit of which proceedings were suspended rendered a judgment on the merits of the case; (b) to clarify with regard to the judgment that it has entered into force in the state of its origin; (c) to add a provision that, in the event that the court determines that a judgment of a foreign court cannot be recognized and enforced in the territory of its state, the court must resume consideration of the case.

39 Elements of the mechanism proposed in Article 5 (3) of the Draft:

40 1. A court that suspended its proceedings in accordance with this Chapter shall, on request of a party, proceed with the case if the court for the benefit of which proceedings were suspended [is unlikely to render] [has not rendered] a judgment on the merits [within a reasonable time].

41 2. Question: how should we understand the term "within a reasonable time"? Should we understand it as the term that is "normal", usual for the consideration and resolution of the case (i) under the procedural law of the court for the benefit of which proceedings were suspended, or (ii) under the law of the state where a court suspended such proceedings, or (iii) in the opinion of the court, taking into account the merits of the case without reference to the law of a particular state?

3. Proposal: (a) to leave in the text of Article 5 (3) a sole wording, namely, “the court for the benefit of which proceedings were suspended has not rendered a judgment on the merits within a reasonable time”.

Question 5 on priority jurisdiction / connection

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

42 If Art. 5 of the Draft concerns the possible actions of a court that, under the rules established Chapter II of the Draft, must suspend proceedings for the benefit of another (foreign) court, then Art. 6-8 of the Draft establish the criteria under which one of two or more courts where parallel proceedings have been initiated will have priority over the other courts and for the benefit of which the other courts must suspend proceedings.

43 Regarding the grounds provided for in Article 6 of the Draft [Exclusive][Priority] jurisdiction/connection

44 The provisions of Article 6 of the Draft are quite logical and justified, given that under the law of many states, international treaties and EU acts, jurisdiction over cases concerning real estate falls under the exclusive jurisdiction of the courts of the state in which territory the real estate is located. Enshrining in the Draft the priority of the courts of the state in which territory the real estate is situated is correct.

45 It is quite logical that in cases of parallel proceedings, where the object of the dispute is real rights to real property, priority should be given not to the court seised first, but to the court of the state on which territory such property is situated.

46 Proposal:

47 (a) to present the title of the article in the following edition: “Exclusive” jurisdiction/connection”.

48 (b) the sentence in brackets, namely [, tenancies of immovable property, or the registration of immovable property] that is debatable, we propose to include in the text of Art. 6 of the Draft due to the fact that the indicated legal relations are closely related to the law of the state on which territory the real estate is situated. The first sentence should be worded as follows: “Where parallel proceedings which have as their main object rights in rem in immovable property, tenancies of immovable property, or the registration of immovable property…”.

49 (c) in the last sentence, replace the words “on application by a party” to the words “as soon as it is informed by a party”.

50 (d) to amend the last sentence to read as follows: “Any other court as soon as it is informed by a party shall dismiss the proceedings”. If we leave the term “suspend proceedings” in this sentence, this will mean granting the court the right to resume such proceedings under the general rules of Article 5 of the Draft and the right to render a judgement in the case, which will have no chance of being recognized and enforced in the territory of the state where the real estate is situated.

51 Regarding the grounds provided for in Article 7 of the Party Autonomy

52 Elements of the mechanism proposed in Article 7 (1) of the Draft:

53 The provisions of Art. 7 (1) of the Draft establish the priority of the court of one of the contracting states over the courts of other contracting states, if there is an agreement of the parties on the jurisdiction of the dispute to several courts of different Contracting States. Since paragraph 2 of the same article indicates that the provisions of paragraph 1 do not apply to exclusive agreements on the choice of court, it should be understood that the agreements referred to in paragraph 1 of this article concern non-exclusive agreements on the choice of court.

54 Elements of the mechanism proposed in Article 7 (2) of the Draft:

55 Article 7 (2) of the Draft provides a definition of the concept of "exclusive choice of court agreement", which reproduces the definition of such agreements provided by the 2005 Choice of Court Agreements Convention. We consider it useful (appropriate) to provide the same definition of choice of court agreements referred to in Article 7 (1) of the Draft, as the existing wording is not sufficiently clear and unambiguous, which could create difficulties in its understanding, interpretation and application by the courts of the Contracting States.

56 Elements of the mechanism proposed by Art. 7 (3) of the Draft:

57 Art. 7 (3) regulates cases where, in the same legal proceedings initiated in two or more courts of different Contracting States, the defendant consented to the jurisdiction of one of those courts, then that court shall proceed with adjudication of the dispute and all other courts (any other court) shall suspend or dismiss adjudication of the dispute.

58 It should be taken into account here that the very fact of the initiation of proceedings in the courts of two or more Contracting States indicates that those courts have jurisdiction over those cases. Their jurisdiction is determined either by national law or by an applicable international treaty. Otherwise, the courts would refuse to open proceedings.

59 The defendant in parallel proceedings has the right: (a) to object to the jurisdiction of all courts that initiated proceedings; (b) to consent to (not to object to) the jurisdiction of any of these courts; (c) to expressly consent to the jurisdiction of one of these courts, but not to the jurisdiction of another courts. The question arises: why in the case of item (c) does this court have priority over other courts to consider the case? Only because the defendant has consented to its jurisdiction? And if so, the consequence of applying this rule will be that it is the defendant who will determine the court that will have priority in consideration of the case. It is the defendant who will choose the court that is more acceptable to him, from among those in which parallel proceedings have been initiated. To what extent does this correspond to the spirit and letter of the future convention? To what extent do the above provisions not contradict other criteria for determining the court that will have priority?

60 Regarding Article 8 of the Jurisdiction/Relationship

61 Firstly, the mere idea of including in the Draft rules governing the jurisdiction of cases with a foreign element, which apply not as general provisions on jurisdiction applicable by the courts of the Contracting States, but only in cases where there are parallel proceedings in the courts of several Contracting State, deserves approval.

62 Secondly, application of the criterion of jurisdiction/connection to determine the court that will have priority over other courts in parallel proceedings is a new, promising idea. It legitimizes the jurisdiction of the court that will have priority in considering a case in respect

of which there are parallel proceedings. The specified rules of jurisdiction will have precedence over the rules of national law, which will facilitate enforcement of judgements of the specified courts, since their jurisdiction will be based on the rules of an international treaty that have precedence over the rules of national law.

63 Thirdly, most of the rules contained in Articles 6, 7 and 8 (2) of the Draft are known to the law of many states and are enshrined in international treaties on jurisdiction in civil and commercial matters with a foreign element, which will facilitate the accession of many states to the convention.

64 The general rule established by Article 8(1)

65 "... where parallel proceedings are pending before the courts of Contracting States, a court of a Contracting State shall suspend or dismiss the proceedings [at the request of a party this the proceedings] if –

66 (a) it does not have jurisdiction / connection following this paragraph 2 of this Article and one or more of the other courts has or have such jurisdiction/connection; or

67 [(b) proceedings in that court were not started within a reasonable time timeframe after proceedings were commenced in the court first seised having jurisdiction / connection following this paragraph 2 of this Article.]"

68 The prerequisite for the application of Article 8 of the Draft is that each of the mentioned courts of the Contracting States has jurisdiction over such a dispute on the basis of its own national law, proceedings in the courts of the Contracting States have been initiated and this is a confirmation that each of these courts has jurisdiction over such a dispute on the basis of its own national law (otherwise the courts would have refused to initiate proceedings).

69 The subject of proceedings at the request of a party to the proceedings, according to Art. 8 (1) of the Draft, is the objection by one of the parties to the right of one of the courts in which parallel proceedings have been initiated, that this particular court does not have jurisdiction according to the provisions of Art. 8 (2). The phrase "at the request of a party this the proceedings" must be included in the wording of this paragraph, because it establishes the rule that such proceedings can only be initiated by the parties, the court itself by virtue of the principle of ex officio has no right to do this.

70 In the light of the content of Article 8(1)(a), the party raising the issue must prove not only that (a) the court does not have jurisdiction under Article 8(2), but also that (b) another court(s) has jurisdiction. In its decision, the court must decide not only the question of its own jurisdiction but also the question of the jurisdiction of other courts under Article 8(2).

71 Thus, the following questions, consequently, arise: (i) to what extent is such judgement of a court of one Contracting State binding on the courts of another Contracting States, (ii) what consequences will, for example, be if this court decides that neither it, nor other courts have jurisdiction under Article 8(2), (iii) to what extent does the current wording of Article 8(1)(a) covers all possible options in the process of its application, or is it designed to regulate only one option, namely the option that is expressly provided for therein? According to the Working Group, the provisions of Article 8(1)(a) apply only to the case where the specified court accepts that it does not have jurisdiction and other courts do have such jurisdiction under Article 8(2).

72 With regard to the provisions of Article 8 (1) [(b) proceedings in that court were not started within a reasonable time timeframe after proceedings were commenced in the court first seised having jurisdiction / connection following this paragraph 2 of this Article.]

73 The wording of the provision of Art. 8 (1)(b) raises many questions of both interpretation and practical application. Which court is meant: “in that court” within the meaning of Art. 8 (1)? The question of the definition of a reasonable time also remains open, especially since it is linked to “after proceedings were commenced in the court first seised” and should be determined by the court, which allegedly missed such deadline, as another party claims? What should be understood by the term “proceedings ... were not started”: consideration of case on merits or any other stage?

74 If the Working Group intended, by means of the provision of Article 8(1)(b), to regulate the situation where (a) one of the parties to the proceedings may apply to a court which opened proceedings but was not seised first; (b) that court has jurisdiction under the provisions of Article 8(2) but (c) has not commenced consideration on merits within a reasonable time after the court first seised has commenced consideration of the case. The party is entitled to request that court to suspend/dismiss the proceedings.

Despite possible difficulties in interpreting and applying the specified provision of the Draft, we believe that it, possibly after revision, should be included in the Draft because it provides one of the possible ways to resolve the problem of parallel proceedings in favor of one court (which is the main goal of the future instrument).

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

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

75 Regarding the criteria set out in Article 8 (2) of the Draft.

76 The criteria listed in Article 8(2) constitute the rules determining jurisdiction in civil and commercial disputes involving a foreign element. Most of these rules are known in the law of many States, and they can be divided into several groups.

77 The first group includes those that apply the criterion of the location of the defendant in the case (paragraphs (a)-(c) of Article 8 (2) of the Draft): (a) the defendant was habitually resident in that State at the time that person became party this the proceedings.

78 Regarding the plurality of defendants that should be clarified. The wording of clause (a) could be as follows: “one of the defendants was habitually resident in that State at the time that person became party this the proceedings”.

79 (b) the defendant is a natural person who had their principal place of business in that State at the time that person became party this the proceedings as regards a claim arising out of the activities of that business;

80 (c) the defendant maintained a branch, agency, or other establishment without separate legal personality in that State [, or registered this do business in that State,] at the time that person became party this the proceedings in that State, and the claim arose out of the activities of that branch, agency, or establishment [or the matters covered in that registration];

81 Including an additional criterion “or registered to do business in that State” and “or the matters covered in that registration” is considered inappropriate due to the fact that the specified issues are of a different nature, than the activities of a branch, agency, etc.

82 The second group includes those rules that relate contractual and non-contractual relations, namely:

83 (d) [the proceedings have as their object] [the claim concerns] [the action concerns] a contractual obligation and the performance of that obligation took place, or should have taken place, in that State, in according to with –

84 (i) the agreement of the parties, or

85 (ii) the law applicable this the contract, in the absence of an agreed place of performance, unless the activities of the defendant in relationship this the transaction clearly did not constitute a purposeful and substantial connection this that State;

86 In the wording of Article 8 (2) (d) it is advisable to leave a sole phrase “the proceedings have as their object” as it is more consistent with the subject of regulation.

87 (e) the claim [is brought on] [concerns] a lease of immovable property (tenancy) [or the registration of immovable property] and the property is situated in that State;

88 The specified point overlaps with the provisions of Art. 6 of the Draft. If Art. 6 is worded as follows: “Where parallel proceedings which have as their main object rights in rem in immovable property, tenancies of immovable property, or the registration of immovable property are pending before courts of Contracting States …”, which we suggested above, then the clause (e) is generally unnecessary. Otherwise, the wording of Art. 6 should be without any reference to “tenancies of immovable property, or the registration of immovable property” and the clause (e) should be worded as follows: “(e) the claim concerns a lease of immovable property (tenancy) or the registration of immovable property and the property is situated in that State”.

89 (f) the claim concerns a contractual obligation secured by a right in rem in immovable property located in the State, if the contractual claim is brought together with a claim against the same defendant relating to that right in rem;

90 In clause (f), the Working Group proposes to link the rule not to the law of the place of performance of the contractual obligation, but to the law of the place where real estate (collateral) is located, provided that one claim is filed and the defendant under both the contractual obligation and collateral is the same person. This provision would be quite acceptable.

91 (g) a claim concerns a non-contractual obligation arising from death, physical injury, damage to or loss or loss of value of tangible or intangible property [, or unjust enrichment] and –

92 (i) the act or omission directly causing such harm [or enrichment] occurred in that State, irrespective of where that harm [or enrichment] occurred; [or

93 (ii) the harm was suffered in that State as the result of conduct specifically directed toward that State; or

94 (iii) the claim arises out of goods, services, or other activities placed into or directed at the market of that State, where the defendant purposefully engaged with that market and the claim arises out of or relates to those activities;]

95 Proposals: to remove the phrase [, or unjust enrichment] from the text, and out of three options proposed by the Draft, we consider appropriate to leave a clause (i) in the wording without the phrase [, or enrichment] and a clause (iii) in the wording proposed by the Draft.

96 The third group includes the rules relating to trusts, namely:

97 (h) the claim concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –

98 (i) at the time the proceedings are instituted, the State was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or

99 (ii) at the time the proceedings are instituted, the State is expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

100 This sub-paragraph only applies to proceedings regarding internal aspects of a trust between persons who are or were within the trust relationship;

101 The provisions regarding the jurisdiction of claims relating to trusts are quite acceptable.

102 The fourth group includes the rules relating to counterclaims and others, namely:

103 (i) a counterclaim arises out of the same transaction or occurrence as the original claim, if the court of the State has [priority] [jurisdiction] [connection] for the original claim under this Article and the original claim is pending in that court;

104 The provisions proposed by the Draft regarding the jurisdiction of a counterclaim (Article 8 (2)(i)) are quite acceptable. Out of the three options proposed by the Draft, [priority] [jurisdiction], [connection], we consider it appropriate to retain the term jurisdiction, namely "... has jurisdiction for the original claim jurisdiction...".

105 (j) the defendant argued on the merits without contesting jurisdiction within the timeframe provided in the law of the State of the court, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

106 Observation: This paragraph partly overlaps with the provisions of Art. 7 (3) of the Draft. The difference is that in Art. 7 (3) the defendant expressly consented to the jurisdiction of the court, and in Art. 8 (2) (j) the defendant did not contest the jurisdiction of the court within the time limits provided by the law of the forum and became involved in the case on the merits. The second part of the sentence, namely, "unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law" is drafted a little bit vague and, as a result, it could raise many questions from both the courts and the parties in the process of its application.

107 [(k) the proceedings [are in rem and concern] [have as their object] ownership or possession of rights in [tangible] movable property located in that State [at the time the court was seised];]

This rule is relatively new and may cause some kind of rejection. Nevertheless, in our opinion, it is quite acceptable and should remain in the Draft in the following wording: "(k) the proceedings have as their object ownership or possession of rights in movable property located in that State at the time the court was seised".

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?

All listed in Art. 6,7, 8 (2) are quite acceptable and should be remained in the Draft. The approach itself, as indicated above, is logical: to establish the criteria by which the court that

will have priority over other courts in parallel proceedings will be determined. The mere fact of existence of parallel proceedings in different Contracting States indicates that these courts have jurisdiction under national law of the Contracting States and this is the main reason for the emergence of parallel proceedings in cases with a foreign element. In order to eliminate this main reason for the emergence of parallel proceedings, it is necessary to introduce at the level of the international instrument "additional" jurisdictional rules, with the application of which it will be possible to determine the court that will have priority (or vice versa, to determine the courts that will not have the right to consider cases and should dismiss the proceedings).

6.3 Are there any additional factors that you believe should be included?
No. We consider the criteria provided for in Articles 6, 7 and 8 (2) of the Draft to be sufficient.

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?

108 Since the Working Group proposed two approaches to regulating the procedures for determining "the more appropriate court" in parallel proceedings, we will consider them sequentially.

109 The first approach is set out in Article 9, paragraphs 1-6 of the Draft.

110 Elements of the mechanism proposed in Article 9 (1) of the Draft are, as follows:

111 This approach is based on the fact that (a) if there are parallel proceedings in the courts of two or more Contracting States; (b) provided that all those courts have jurisdiction under the provisions of Article 8(2) of the Draft, (c) the "court first seised" must, upon application by a party, decide the following question: whether any other court, among those engaged in the parallel proceedings and having jurisdiction under Article 8(2), is "a more appropriate court to have jurisdiction over the dispute".

112 Accordingly, the obligation to decide which of the courts that initiated the parallel proceedings is the more appropriate court to resolve the dispute is assigned to the court which (a) has jurisdiction under Article 8(2) and (b) was first seised. While deciding this question, the said court shall apply the criteria set out in Article 10 of the Draft. The said court may recognise as such (a) any court in which parallel proceedings are pending or (b) recognise itself as more appropriate court to resolve the dispute.

113 In such mechanism of regulation, a phrase "[the court first seised shall determine, on an application by a party [made no later than the first defence on the merits]" must be included in the text of the future instrument.

114 The term "on an application by a party" needs interpretation. This term should be understood as a request by a party to the court that first seised to consider and determine whether there are grounds to believe that among other courts in which parallel proceedings are pending there is a court that is a more appropriate forum for the consideration of the case than the court first seised. On the other hand, an application by a party may be a request by a party

to recognize a specific court as a more appropriate forum for consideration of the case, taking into account the criteria provided for in Article 10 of the Draft. The nature of the process, the subject of consideration and court's actions depend on the answer to this question:

115 - if an application by a party is a request by a party to the court to consider and determine whether there are grounds to believe that among other courts in which parallel proceedings are pending, more appropriate court to resolve the dispute, the subject matter of consideration by a court would be a determination of the court that most closely meets the criteria set out in Article 10;

116 - if an application by a party is a request for recognition of a specific court as a more appropriate forum for the consideration of the case, then the subject matter of consideration would be a decision as to whether such court is or is not an appropriate forum, and the burden of proof of existence of grounds for considering this specific court as a more appropriate forum will be borne by that party.

117 Elements of the mechanism proposed in Article 9 (2) of the Draft are, as follows:

118 The wording of Article 9(2) should be as follows: Any court other than the court first seised shall, on an application by a party, suspend its proceedings in favor of the court first seised pending the determination of the application under paragraph 1.

119 Thus, an application by a party is mandatory, the obligation of each such court to suspend the proceedings must be unconditional, and reference to Article 9 (1) indicates the reason for such a decision of each of the courts and establishes the period of such suspension.

120 Paragraphs 3-5 of Art. 9 of the Draft are presented in brackets, which means that there is no unity in the Working Group thereon. Since these provisions are a logical continuation of paragraphs 1-2 of Art. 9 and determine the consequences of different decisions of the court that first initiated the proceedings in relation to the court that is more appropriate, they should be envisaged in the text of the Draft.

121 With regard to the provisions of Article 9 (3), it would be appropriate, in our opinion, to indicate that in such a case a court that is determined to be more appropriate is obliged to resume the proceedings it has suspended, consider the case and render a judgement on the merits of the case.

122 The provisions of Article 9(4) are entirely acceptable, taking into account the proposal to remove a reference to Article 5 (see below).

123 With regard to the regulatory mechanism presented in Article 9 (5) of the Draft and referred to in Article 9 (4), the following should be noted.

124 Firstly, a potential possibility of resuming parallel proceedings after their removal by a decision of a court first seised remains, based on the provisions of Art. 9 (1) and Art. 9 (4). How appropriate is that?

125 Secondly, terms used in Art. 9 (5), such as “in exceptional circumstances” and “as appropriate” are sufficiently vague to give a court a significant and unjustified margin of discretion in resolving this issue.

126 Thirdly, provisions under which a court may resume proceedings that it had previously suspended, would result in a full resumption of parallel proceedings.

127 Fourthly, if the provisions of Article 9(5) are to be left in the text of the Draft, it is necessary to define more specifically: (a) under what circumstances such a question may be brought before the court (what should be understood by the terms “in exceptional circumstances” and “as appropriate ”) (it is desirable to specify these circumstances to make them unified for further uniform application); (b) in such circumstances what should a court first seised do: suspend the consideration of a case or, in spite of that, continue the consideration thereof?) and (c) what consequences will have a decision of such court to resume the proceedings for the court first seised?

128 The second approach proposed by the Draft (Art. 9, paragraphs 1-3). This approach is based on the fact that (a) there are parallel proceedings in the courts of the Contracting States; (b) all these courts have jurisdiction in accordance with the provisions of Art. 8 (2); (c) any court other than the “court first seised” must suspend the proceedings for the benefit of the court first seised. This legal construction is a classic embodiment of the legal doctrine lis alibi pendens.

129 The Draft further provides that all courts (other than the one first seised) may: (a) at the request of a party; (b) in exceptional circumstances or when necessary; (c) reopen the proceedings under the following conditions (Article 9(2) of the Draft). Thus, unlike the first approach, at the request of a party, one of the courts, in addition to being first seised, has the right to decide whether it is a more convenient forum for consideration of a case, provided that it (a) has jurisdiction under Article 8(2) of the Draft; (b) received an application by a party to consider a case; and (c) there are factors set out in Article 10 of the Draft that give a court the right to consider the case. If that court finds that there are grounds for doing so, it may (i.e. it’s its discretion) reopen the proceedings, which means continuing consideration of the case and rendering a judgement.

Question: It is not clear how the court that first initiated the consideration of the case should act in such circumstances? Does this court have an obligation to suspend the consideration of the case it initiated or should it continue its consideration?

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

130 Application by courts of the first approach to determine the court that is the more appropriate court, in our opinion, will not have serious problems. In the presence of two or more parallel proceedings in the courts of different Contracting States, the court first seised, upon the application of any party, decides which court is the more appropriate court to adjudicate this case. If it recognizes that it is not such a court, it suspends the proceedings “in favor of the court that it recognized as the more appropriate court”. Accordingly, this court upon notification thereon will continue the consideration of the case and will render a judgement on the merits. If the court first seised recognizes that it is the more appropriate court, then all other courts will suspend proceedings for the benefit thereof. Such suspension will be

maintained until the court renders a judgement on the merits of the case, except for the cases provided for by the Draft for the possible resumption of proceedings.

131 Thus, we do not see any obvious procedural difficulties in applying the first approach.

132 When applying the second approach in practice, difficulties may arise due to (a) the emergence of multiple proceedings in determining the more appropriate court and (b) the use of terms such as "in exceptional circumstances", "as appropriate" and "guarantee effective access to justice". In this approach all courts other than the first seised must suspend their proceedings for the benefit of that court. And only at the request of the party applying to one of these courts (in exceptional circumstances), that court may recognize itself as the more appropriate court on the grounds of Article 10 or to guarantee access to justice, recognize itself as the more appropriate court and proceed with adjudication on the dispute. What should the court fist seised do in such a case? Can the other party apply to another court with a request to recognize it as the more appropriate court? Nothing in this approach prohibits this. In this case, we will have two or more competing proceedings on the issue of which court is the more appropriate court, and we may receive two or more contrary decisions on this issue.

In our opinion, the provisions of the Draft do not provide safeguards against the emergence of such situations in practice, which is quite dangerous.

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

133 Out of two approaches to regulating the mechanism for establishing the more appropriate court in parallel proceedings proposed by the Working Group, in our opinion, the first one has the advantage.

134 Regarding the first option, the following should be noted.

135 The question which court is the more appropriate court to resolve a dispute can be brought before one court, namely, the court first seised. Logically, in a situation where all other courts have suspended the proceedings, the court first seised, before continuing the consideration of the case, has the right to decide the question of the most appropriate forum (the more appropriate court). All other courts that have suspended proceedings can only resume such proceedings in accordance with Art. 5 (3), which is quite logical. All other possibilities for reopening proceedings should be removed, as they create a potential threat of reopening parallel proceedings, which is contrary to the very purpose of this instrument. There is some apprehension that the parties, and perhaps the courts, could abuse the possibilities granted to them by Art. 9 (5).

136 Suggestions:

137 1. Leave the sentence of the Draft [the court first seised shall determine, on an application by a party [made no later than the first defense on the merits]

138 2. to supplement the text of the Draft with a provision that would oblige the court recognized by the court first seised as the most appropriate court to reopen the proceedings and consider the case on the merits.

139 3. Remove the reference in Article 9(4) to paragraph 5.

140 4. Remove Article 9 (5).

141 Regarding the second option, the following should be noted.

142 This option is based on the right of the parties to prove that a particular court, among those that have initiated parallel proceedings and have jurisdiction under the provisions of Article 8(2) (other than the court first seised), is more appropriate to consider the case. A party must apply to such a court thereon, and it must decide on the grounds provided for in Article 10 of the Draft. The burden of proof on the existence of these grounds rests on the applying party. The other party may object.

143 In practice, two parallel proceedings may arise regarding the issue what court is more appropriate. Thus, one party may apply to one of the courts, and the other party to another court with requests to claim such a court as the more appropriate. The Draft does not provide for what should happen in such cases.

144 The provisions of the second option apply "in exceptional circumstance"" or "when necessary", which are not defined in the Draft and always create difficulties in their interpretation and application.

The Draft also does not provide for what should a court first seised do in circumstances where proceedings have been initiated in other courts to claim them as more appropriate to consider the dispute. The most logical thing would be to attribute to this court the obligation to suspend proceedings until the other courts resolve the issue.

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)?

145 Based on the proposed wording of the first sentence of Article 10 "in making a determination under Article 9, the court shall [have regard to the proper administration of justice, taking] [take] into account the following factors in particular" it should be concluded that:

146 1. The use in Article 10 of the sentence "the court shall [have regard to the proper administration of justice" indicates that the courts, when establishing "the more appropriate court" under Article 9 shall, primarily, take into account the proper administration of justice and, in particular, the factors listed in paragraphs (a)-(f).

147 2. Since the meaning of the concept of "due administration of justice" may differ from state to state, it would be appropriate to recommend courts to apply this concept taking into account either international nature thereof or ALI / UNIDROIT Principles of Transnational Civil Procedure to assure its uniform application.

148 3. Factors listed in paragraphs (a)-(f) of Article 10 which may be taken into account by courts in determining the more appropriate court, is not exhaustive, which creates the opportunity for courts to apply other factors, which will not contribute to the uniform application of this instrument in the future.

149 Assessment of factors provided for in Article 10 of the Draft:

150 (a) "[The burdens of litigation on the parties] [the convenience of the parties], including in view of their habitual residence" is a factor that can be significant and important only in a fairly limited range of cases. In the rest of cases, it cannot have an objectively significant meaning. It is quite subjective in nature, giving the court considerable room for discretion.

151 (b) "The [relative] ease of accessing evidence or preserving evidence" is a more or less specifically defined and objective factor for application. In certain cases, this factor can play a significant, and sometimes decisive, role.

152 (c) "[the law applicable to the claims]" is a relatively important factor that has a certain significance for the effective resolution of a dispute. In our opinion, this factor would be more appropriate to define as "the law applicable this the case (dispute)".

153 (d) "the stage of the proceedings before each court seised [and any applicable limitation or prescription periods] [and the possibility of significant delay in one or more courts]" is an important and objective factor. If one court is close to resolving a case and rendering a judgement, while another court has not yet begun considering the merits of the case, it can be decisive.

154 (e) "[the likelihood that one court may provide a complete or significantly more complete resolution of the dispute as a whole;]" is a quite subjective factor.

155 (f) "the likelihood of recognition and, where applicable, enforcement of any resulting judgment given in the Contracting State of any other seised court" is an important and largely objective factor that may be based on the law of the relevant state, existing international treaties and judicial practice. This factor is also important due to its nature, namely non-recognition and non-enforcement of a judgement in another state nullifies all efforts of the parties to consider the dispute.

156 The assessment provided shows that the application of each of the factors listed in Article 10 depends, first of all, on the nature of the cases.

157 Proposal: In view of this, it might be advisable to add provisions to the text of Article 10 of the Draft that would oblige courts to apply certain factors taking into account the nature of the case, through the prism of resolving a specific dispute.

158 Regarding the provisions of the last sentence of Article 10 "The courts may exchange information through the communication mechanism established pursuant to Article 16". To our mind, the simple mention in Article 10 of the possibility for courts to exchange information has no practical significance.

Proposal: use the following wording "for the purpose of establishing the presence of certain factors set out in Article 10, the courts shall exchange information through the communication mechanism established pursuant to Article 16."

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

159 Courts in establishing the more appropriate court in accordance with Art. 9 will apply the provisions of Art. 10 of the Draft in the wording presented by the Working Group, with a bias towards the understanding of "due justice" as is adopted in their legal system or legal family.

The factors listed in Art. 10 will be applied optionally, sometimes, in order to be able to refer purely formally to the application of Art. 10 of the Convention.

In our opinion, it would be desirable to make the character of Article 10 more mandatory, in terms of applying precisely those factors that it contains.

8.3 Are there additional considerations that, in your view, should be taken into account?
No.

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.

160 The basis of the mechanism for regulating parallel proceedings established by the Draft are the procedures for determining the court that should consider the case and establishing the criteria by which such a court should be determined. An element of this mechanism is the obligation of other courts to suspend/dismiss proceedings for the benefit of proceedings in the court that has priority. Two levels (filters) are provided for determining the court that has priority.

161 The first level is the establishment of a connection (jurisdiction) of the subject of the dispute or the parties with one of the Contracting States according to the criteria provided for in Articles 6-8 of the Draft.

162 The second level is the determination of the more appropriate court under Art. 9. This level applies where all courts in which parallel proceedings are pending have jurisdiction under Art. 8.

163 There are also reservations for cases where the courts with priority do not consider a case. There is a possibility of resuming proceedings in the court that suspended proceedings for the benefit of the court with priority.

164 The regulatory mechanism implemented in the Draft is quite viable and will be effective for regulating parallel proceedings in an international context.

165 The criteria for evaluating the effectiveness of the abovementioned system are:

166 - clarity, uniformity and simplicity of the definition in the text of the Draft of the criteria determining a court having priority;

167 - absence or minimization of cases where double interpretations of the same legal situation may arise;

168 - a clear definition of terms used in the text of the Draft for uniform understanding, interpretation and application by the courts of different states and parties to a dispute.

Given these criteria, the system of regulation of parallel proceedings in the international context envisaged by the Draft can be assessed as potentially effective. Further work on the text should be aimed at eliminating those provisions that do not meet the aforementioned criteria.

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.

169 The mechanism proposed in Chapter III is as follows: where related actions arise in the courts of two or more Contracting States, any party to such proceedings may apply to any court (or all such courts) to determine whether one court should adjudicate the related actions in entirety or in part. If the court decides that it should, it must determine which court (among those adjudicating related actions) is the more appropriate court for resolution of the entirety or any part of the related actions.

170 The content of Article 11 (1) and the note leave no doubt that this is exactly the model.

171 Criteria (factors) by which courts should determine which court is the more appropriate court for adjudication of related claims, are defined in Art. 11(2) of the Draft and almost entirely (with some exceptions) repeat those that should apply to parallel proceedings under Art. 10.

172 Article 12 regulates situations where the courts of different Contracting States, upon application of a party in accordance with Article 11, determine that one court should adjudicate the entirety of the related actions, and determine the court which will be the more appropriate court for resolution of the entirety of the related actions, then this court shall consider the actions and the other courts shall suspend the proceedings.

173 A similar mechanism is provided for in Art. 13 in relation to cases where the courts have decided that one court may adjudicate part of the related actions.

174 In all other cases, all courts seised of related actions have the right to adjudicate the cases independently (Article 12 (2) and Article 13 (2) and (3)).

175 Just for the purposes of comparison: the purpose of the mechanism provided for in the Draft Convention for regulating parallel proceedings is to avoid such proceedings and to determine the court that should consider and adjudicate the case. All other courts should suspend their proceedings and eventually dismiss them.

176 The purpose of the mechanism proposed by the Draft for regulating related claims is to create an opportunity (giving the parties the right to apply and the courts to decide) to reach an “agreement” on consideration of related cases by a single court and to designate such a court. Such an “agreement” is achieved through courts’ decisions, by which each of them recognizes the possibility of consideration of related cases by a single court and designates this court. Only if such an “agreement” is reached should other courts suspend or dismiss their proceedings. In all other cases, each court continues to consider its case and renders a judgement. Thus, the mechanism is entirely built on the potential equal attitude of the parties and all courts regarding the possibility of consideration of related actions by a sole court. In the absence of such a unified attitude by all courts, each of them continues to consider “its” case and renders a judgement.

The effectiveness of this mechanism should be considered exclusively through the prism of the proper formulation of the provisions of the articles of Chapter III and the proper regulation of the relevant procedures, which are provided for in Articles 11-14 of the Draft. The achievement of the Draft is that for the first time a real mechanism for resolving related cases by one court has been

proposed, the procedure for determining such a court and the obligations of other courts have been determined. Whether to apply such a mechanism or not depends on the will of the parties to related cases and the attitude of courts seised of related actions.

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?

177 The idea of regulating cooperation and exchange of information between courts within the framework of a convention on parallel proceedings is very useful and promising. The idea itself naturally arises from the nature of the relations covered by the Draft. The fact is that the exchange of information between courts of different states, though it contradicts the nature of state sovereignty, independence and autonomy of judicial systems, will contribute to the resolution of many procedural issues that arise in cases where matters with a foreign element are being considered and parallel proceedings arise.

178 Each judicial system is autonomous and the courts, when deciding the issue of jurisdiction over a particular dispute with a foreign element, are not bound by the position of the courts of another state and the law of that state. At the same time, cooperation, exchange of information, joint consideration of cases, etc. are forms of interaction between the judicial systems of different states, that is extremely necessary in the modern world.

179 The draft distinguishes between “cooperation” and “information exchange” between courts.

180 Article 15 is of a general nature. It is desirable to clarify the wording used in this article, in particular, [undertake] [are encouraged] [shall endeavor]. The modality and spirit of such cooperation strongly depend on which term will finally be used in the Draft, and this is very important. The article neither defines the meaning of the term “cooperation” and the concept of “information exchange”, nor provides the “volume” of information for exchange. This uncertainty will not contribute to the active use of this mechanism by the courts of the Contracting States.

181 Communication mechanism (Art. 16)

182 The Draft proposes: (a) that States themselves shall determine the means of communication they will allow between their own courts and the courts of other Contracting States; (b) to notify the depositary of the Convention of their position on this matter and (c) to use in such determination three possible options provided for in Article 16(2), namely:

183 (a) direct judicial communication between courts that depends on respective provisions of their law allowing communication outside the presence of the parties or their representatives (ex parte communication).

184 From the point of view of efficiency and effectiveness of communication, this is the most desirable method of communication (the language, method of communication, whether oral or written, recording of such communication, etc. remain in question), the possibility of determining various procedural issues outside the influence of the parties and/or their representatives, i.e. purely “working communication” between two or more courts of the Contracting States regarding the clarification of certain circumstances that will affect the resolution of many aspects related to the application of the Convention.

185 (b) indirect judicial communication through a competent authority [central authority];

186 This method is more understandable, first of all, for states and their authorities, since it is used in such forms of judicial cooperation as the service of judicial documents and the taking of evidence abroad, which are regulated by the Hague Conventions of 1965 and 1970, the relevant EU Regulations, and bilateral treaties on legal assistance. The Contracting States of the above conventions got used to this method of communication, they do not cause difficulties in their application, in each state these mechanisms have been worked out over many years of application.

187 However, this method of communication between the courts of the Contracting States in parallel proceedings has significant drawbacks: first of all, the slowness of communication, which is of fundamental importance for resolving issues of parallel proceedings; excessive regulation of the methods of transmitting applications, several intermediaries between the courts of different states involved, etc.

188 [(c) a combination of (a) and (b) with each Contracting State using its preferred method] Such combination, in our opinion, could cause even greater uncertainty and only complicate the interaction between the relevant authorities of the Contracting States. Each of the methods provided for in paragraphs (a) and (b) represents a certain homogeneous system with the subjects of interaction at the same level, namely court to court and central authority to central authority. The simultaneous (combined) application of these heterogeneous and multi-level systems would complicate communication, that could lead to a decrease in its application, and, therefore, to the loss of its role in the general mechanism of regulating parallel proceedings.

189 Proposal: In our opinion, it would be appropriate to propose in the Draft:

190 (i) only one mode of communication, namely between courts;

191 (ii) to regulate it in more detail, defining issues of language, form, channels of interaction, etc.;

192 (iii) to give States the right to make reservations regarding its application or the conditions of such application, instead of giving States the right to choose one of the three methods.

193 The provisions of Article 16(4) concerning regulation of certain procedural issues are important and should be part of the future instrument.

194 Joint hearings (Art. 17)

195 As indicated in the Working Group's explanation of the Draft Text, joint hearing is provided as an additional way of cooperation and coordination between courts.

196 This is a very interesting, even revolutionary idea regarding parallel proceedings and related claims.

197 The article is structured as follows:

198 (a) Authorization of each State for its courts to conduct joint hearings (Article 17 (1) of the Draft). The State may notify the depositary of this authorization when acceding to the Convention, etc. The word “may” means that each State may grant such authorization and then notify, or may not grant it and, accordingly, no notification is required.

199 (b) if both Contracting States which courts seised of parallel proceedings or related actions cases allow joint hearings (see (a) above), then such courts may conduct a joint hearing.

200 The question of whether to conduct joint hearings, provided that there is a general permission, must be decided by agreement between courts. It is possible that one court is in favor of holding a joint hearing, and the other is against it. In such a case it is unclear whether a joint hearing would be conducted. So, the question is, whether, in the opinion of the Working Group, this issue should be left for the court’s discretion?

201 (c) the courts participating in a joint hearing shall agree on the scope, process, format, and other aspects related to the joint hearing, which may be based on a proposal by the parties. Since “each court participating in a joint hearing shall retain power and independence over the conduct of its own proceeding, consistent with applicable national laws, then the question arises regarding the purpose of conducting a joint hearing, the subject matter of such hearing, the obligation of the courts participating in a joint hearing, the evidence to be presented, etc.

It should also be taken into account that such an institution as a joint hearing of two or more courts of different States is unknown to the national procedural law of many States. Therefore, the proposal is of a revolutionary nature. If this instrument is adopted with provisions on joint hearings in cases by the courts of the Contracting States, this will require the adaptation of the national law of the Contracting States.

11.2 Are there particular advantages and challenges you foresee in applying these methods?
Please see comments above for 11.1.

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?

202 A question arises out of the relationship between the mentioned guarantees and the provisions of the future document. The guarantees mentioned should be interpreted restrictively, their application by courts is permissible only in cases where compliance with the provisions of the Convention would indisputably and inevitably lead to a denial of access to justice (Article 19), and application of the relevant procedures provided by the Convention would lead to abuse of procedural rights by a party with the aim of delaying the consideration of the case or avoiding such consideration, etc. (Article 20). It is necessary to separately consider situations where (a) the proceedings may concern the sovereignty or security interests of the forum state and (b) the suspension or dismissal of a case would be clearly incompatible with public policy or fundamental principles of the forum state (Article 21).

203 It is entirely logical and legitimate to enshrine such guarantees in the text of the Convention in order to give the courts of the Contracting States the option not to apply its provisions in the listed cases. On the other hand, the wording of the said guarantees in the text of the future instrument should be clear and, if possible, unambiguous, so as to not to leave gaps

that would allow unscrupulous party (parties) to avoid applying the provisions of the Convention.

In practice, courts of some Contracting States may be inclined in certain cases to use the guarantees provided for in Articles 19 and 20 (interpret them broadly or at their discretion) in order to "prevent" the consideration of a case by a court of a foreign state, especially if it is a court/courts of a state with respect to the judicial system of which there are certain objections regarding compliance with the principles of fair trial, etc.

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.
In our opinion, yes. The rules provided for in the Draft should achieve the goals of the future instrument.

13.2 Do you have any views on whether the proposed rules set out in the Draft Text would improve the status quo?
All questions and suggestions regarding changes and amendments to the terms, wordings, and provisions of the Draft have been outlined above in the answers to the previous questions.

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?
Apart from the risks outlined in the answers to the previous questions, we do not see any additional risks.

Question 14 - comments

What other comments, if any, do you have?
No.