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Do you have practical expertise in cross-border civil or commercial litigation:

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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?

As known, the term "parallel proceedings" may be used to determine various situations depending on the author: It is sometimes used to refer to situations where the same action and/or related actions are simultaneously pending before different courts of the same state, and/or before the courts of different states, and/or before a state court and an arbitral tribunal, and/or before two different arbitral tribunals.

As I understand from the Draft Text, "parallel proceedings" here is used to mean only "lis pendens situations", i.e. where the same action is pending before the courts of different states.

Due to the fact that the Draft Text also aims to regulate "related actions", in my view it should rather use the term "parallel proceedings" as an umbrella term to include both situations where the same action and related actions are simultanously pending before the courts of different states. In other words, parallel proceedings should include lis pendens situations and related actions. As such, parallel proceedings could be defined as "existence of simultanous proceedings arising from the same or related actions before the courts of different Contracting States". In this case, "same action" and "related actions" should also be defined.

Draft Text, when defining paralel proceedings (as any proceedings in courts of different Contracting States between the same parties on the same subject matter), it refers to "same parties" and "same subject matter". However, some contracting states may also require the "same object" (triple identity test) to accept that same action exists. Therefore inclusion of the requirement of "same object" to define the "same action" can be suggested.

Another question as regards the definition of parallel proceedings and the scope of the Draft Text is as regards situations where there exists an exclusive choice of court agreement between the parties. In such cases, the jurisdiction of one of the courts seized is based on the choice of court agreement and the jurisdiction of the other court is based on the national rules of jurisdiction. Although in such cases one can speak about existence of simulatenous actions before courts of different states, and thus in fact there are proceedings which are parallel, such situations are not technically considered as "lis pendens" situations. If the parties have concluded an exclusive choice of court agreement, this would mean the court that is designated by the parties shall have jurisdiction (positive effect of the choice of court agreement) excluding courts of other states (negative effect of the choice of court agreement). Thus, in such situations, the courts, other than the one designated by the parties shall have no jurisdiction to see the dispute. On the other hand, "lis pendens" by its definition requires simultenous adjudiction of the same dispute by courts of different states, both of which have jurisdiction under its national rules. However, where the parties have agreed on an exclusive choice of court agreement and proceedings have been instituted before that court and the court has validly assumed jurisdiction, the jurisdiction of the state court before

which the same action is subsequently brought is precluded by virtue of the negative effect of the jurisdiction agreement. Accordingly, although it is accepted in such cases that the state court seised of the latter action must dismiss the case, the basis for such dismissal is not the existence of the same action before a court of another state, but rather the absence of international jurisdiction of the latter court to adjudicate the dispute as a consequence of the negative effect of the choice of court agreement. I think such an approach is also in line with the objectives of the exclusive choice of court agreements in international litigation and the 2005 Hague Choice of Court Convention. Thus, my view is that situations where the parties have concluded exclusive choice of court agreements should be excluded from the scope of the Draft Text.

On the other hand, non-exclusive choice of court agreements may give rise to problems of parallel proceedings (as indicated in the explanatory report of the 2005 Hague Choice of Court Convention) within the meaning of the definition provided above. As such they should be considered within the scope of a possible convention on parallel proceedings.

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?

Yes.

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)?

Although family law matters are excluded from the scope of the Draft Text, it must be underlined that in fact, some family law matters, such as divorce, are the largest amount of actions which are taken simultenously before the courts of different countries which lead to problems of adjudication and later to problems on the recognition and enforcement of judgments. Therefore this exclusion may be reconsidered.

The Draft Text does not provide express rules on the exclusion of insurance contracts from its scope, although such contracts share the same characteristic as to the protection of the weaker party (the insurer) with consumer contracts and individual employment contracts. Therefore exclusion of insurance contracts under Art. 2(3) should also be considered

Parallel proceedings in arbitration (both where the same action/related actions is taken before two arbitral tribunals or before a state court and arbitral tribunal simultenously) should be considered distinctly from the parallel proceedings in international litigation. Where there is a valid arbitration agreement between the parties, then, different considerations would apply and different procedural tools may need to be adopted to prevent parallel proceedings depending on different situations. Therefore I find it appropriate to provide that "This Convention shall not apply to arbitration". In such a case the explanatory report of the convention may explain what is meant by this exclusion- including e.g. where the parties have agreed to settle the dispute by arbitration and questions as to the validity of the arbitration agreement.

1.4 What are your views on the geographical scope of the Draft Text and how it would work in practice? (See paragraph 16 for further information).

The additional requirement provided in the Draft Text as to the existence of the habitual residence of the defendant to be in another contracting state is justified in para. 16. However, there is a risk that such a requirement may limit the application of the convention, thus its effectiveness.

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.

Please see my comments above on Question 1.1.

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

I find that Art. 4 would be appropriate for the Continental European Countries where the court is usually deemed to be seized where the document instituting the proceedings or an equivalent document is lodged with the court. However it should also be considered whether it would be more approporiate if the said provision referred to the lex fori of the courts seized rather than determining the moment when a court is deemed to be seised by itself. Although it is true that providing specific rules on the time of seising of courts would enhance uniformity, there is a risk that other methods as to seising of courts may exist in some countries which are not provided in the Draft Text.

Question 4 on Article 5 obligations

What are your views on Article 5?

Suspension of the prooceedings, provided under para. 1 of Art. 5 as the first effect of considering the parallel proceeding in another state court is the appropriate solution since, at this stage, it is not certain whether the proceedings before the foreign court shall be completed with a judgment which may be subject to recognition/enforcement. However from my point of view, para. 2 of Art. 5 may be reconsidered: Rather than providing that the case shall be dismissed when the proceedings before the foreign court resulted in a judgment capable of recognition/enforcement, the dismissal of the proceedings should be based on the fact that the foreign court's judgment is in fact recognized or enforced. Such a provision shall certainly mean to extend the period of suspension which may bring questions as to the right to a fair trial. However it can be subjected to a requirement of "reasonable time".

Question 5 on priority jurisdiction / connection

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

Because of the fact that most countries accept that in actions as regards rights in rem in immovable property, international jurisdiction of their courts is exclusive, dismissal of the action by other courts (rather than suspension) should be favored under Art. 6 (last sentence).

This provision should exclude parallel proceedings which have as the [main] object tenancies of immovable property, since the particularity of Art. 6 is that it provides for exclusive jurisdiction. Nevertheless questions as to tenancies is not usually accepted as issues as to rights in rem, but rather personal rights. Registration of immovable property is usually considered as an issue related to the right in rem.

Art. 6 may itself include examples of rights in rem to be caught by that provision.

As to Art. 7, as I explained above, exclusive jurisdiction agreements do not and can not raise questions of parallel proceedings as understood in technical sense, therefore should be totally

excluded from the scope of this convention. Nevertheless, non-exclusive jurisdiction agreements can give rise to parallel proceedings that are included in the convention.

Art. 7 may be simplified.

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

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

The connection list provides the connecting factors for the establishment of international jurisdiction of courts mostly in Continental European countries.

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?
Yes.

6.3 Are there any additional factors that you believe should be included?
Place of residence of the defendant is still a connecting factor in some countries for the establishment of jurisdiction of their courts, thus it may be added to this list.

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?
Under Art. 9 the first approach resembles the approach adopted in "The Principles for Determining When the Use of the Doctrine of Forum non Conveniens and Anti-suit Injunctions is Aappropriate" (or the Bruges Resolution) by the Institut de Droit International at its Bruges Session in 2003. I find this approach which merges the first in time rule (or the priority principle) (of mostly Continental European Countries) with determining the more appropriate court approach (most through the forum non conveniens analysis in Common Law countries) very effective for an international convention since it brings two different approaches as to parallel proceedings together.

7.2 What are your views on how the two approaches may work in practice?
Finding the approapriate court might be difficult for some courts of Continental Europe, but much easier for Anglo-American countries by its nature. However, since the Draft Text guides the courts of the contracting states as to determining the appropriate court by stating the factors to be considered under Art. 10, I would not think that it shall be a very diffucult task for these courts.

7.3 Do you have a preference for either approach? If so, please explain why.
I prefer the first approach that gives the determination of the more appropriate court to the court first seised, and to each court / other courts at a subsequent stage but only in certain circumstances ,

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)?
Factors listed are suffcient.

8.2 Do you have any views on how Article 10 might work in practice?
It might be very helpful in determining the appropriate court for the courts of contracting states which are used to the other aproach of determing the court that is first seized. As Art. 10 provides a list which is not exhaustive, the courts may consider these factors, however can also add new ones depening on the dispute at hand.

Communication mechanism would be very helpful as well.

8.3 Are there additional considerations that, in your view, should be taken into account?
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Question 9 on the effectiveness of the framework for parallel proceedings

Do you have an overall view on the effectiveness of the framework developed in the Draft Text for dealing with **parallel proceedings** in an international context? Please explain any advantages and / or disadvantages of the framework, and how you think it will work in practice.
I find the preparation of an international convention on parallel proceedings by the Hague Conference very useful because of the fact that there exist different approaches for this important problem in different countries as well as there is no internationally accepted definition of parallel proceedings or a multilateral convention dealing with the problem. The issue (and mostly lis pendens situations) are subjected to bilateral conventions. Therefore, there is today lack of widely accepted international rules to deal with the problem of parallel proceedings. In lack of such rules, countries adopt their own rules of different approaches.

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.
Related actions must be regulated in an international convention providing for express rules on parallel proceedings, because of the fact that if they are excluded for any reason (such as because of the fact that in practice parallel proceedings usually include the same action), then although they bring similar negative consequences like lis pendens, problems arising from related actions shall continue to arise.

I find the approach of the Draft Text as to the related actions appropriate. The framework which is based on the determination of the more appropriate court is parallel with the framework provided for the lis pendens situation in the Draft Text. Therefore similar frameworks are found useful for two situations of parallel proceedings. In the Draft Text, the frameowork for related actions is more flexible and discreationary- this is also in line with the approach adopted by the Continental European countries in their civil procedural rules as regards related actions in purely internal situations.

One suggestion might be to regulate that the courts, other than the approporiate court dismiss their case(s), rather than suspend their cases (Art. 12(1) Draft Text).

I do not think the framework for related actions would bring important problems in practice. Although consolidation of actions in international litigation is not a common practice since it requires an international consensus by the involving countries (such as an international convention) which is lacking at the moment, it is a tool accepted in international arbiration. As known, consolidation of actions in international arbitration is clearly provided under rules of certain arbitral institutions, such as ICC (ICC Arbitration Rules, Art. 10(b)). Therefore even if it does not yet exist in law for international litigation, it is not totally unknown in settling of the disputes involving foreign elements.

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?

Although the most appropriate and effective method to deal with parallel proceedings would be direct judicial communication between courts, some countries would hesitate to adopt this method. As such indirect communication might be the preferred method in practice.

11.2 Are there particular advantages and challenges you foresee in applying these methods?
I find the direct judicial communication between courts as the most effective method since it will save more time in the settling of the issue. However some countries would prefer the indirect judicial communication since they would like to have another 'control' through the central authorities- because they would relate the issue with sovereignity.

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?

As to the public policy safeguard, it would be approporiate to include the word 'manifestly' in the text to precule the possibility of the frequent and abusive use of this safeguard. Nevertheless abusive use is still possible in practice particularly because some courts may be willing to use the ground of public policy as regards actions to which their own nationals are parties.

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Question 13 on the objectives of the Draft Instrument

13.1 Would the rules set out in the Draft Text achieve the objectives of a future instrument?

The objective of a future instrument is to enhance legal certainty, predictability and access to justice by reducing litigation costs, and to mitigate inconsistent judgments in transnational litigation in civil or commercial matters.

Yes, certainly.

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

In lack of multilateral agreements between countries providing clear rules on parallel proceedings, the Draft Text successfully proposes rules for both lis pendens and related actions, which normally are subjected to different approaches/rules by different countries. The adoption of the Draft Text as an international convention would also enhance uniformity among the judgments of courts within the same country. This is especially important for countries which do not have express rules on international parallel proceedings.

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?

There are always the risk of tactical or satellite litigation in parallel proceedings, all of which may not be addressed in a single convention. However I do not think the Draft Text increases such risks which already exist.

Question 14 - comments

What other comments, if any, do you have?

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