

Personal Details

Name: Prof. Dr. Dr. h.c. mult Burkhard Hess

State: Austria

Region: Vienna.

Affiliation: University of Vienna

E-mail:

Please indicate your profession:

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

Article 1 (1) Draft Text (DT) makes sense as it addresses concurrent proceedings before courts of different Convention States. This is a correct description of the territorial scope.

However, Article 1 (2) DT goes too far. The mere fact that one party is domiciled in another Contracting State does not make the conflict of parallel proceedings an international one. The pendency/relatedness of the actions is domestic. when the two proceedings are pending in the same state. If one follows the DT, it might be very difficult to delineate this constellation from purely domestic cases where consolidation of proceedings is an option as the courts apply the same procedure (or there are special mechanisms between state and federal courts). The proposal would deprive parties from simpler/faster/more efficient mechanisms of domestic law. In other words: the issue to be tackled is the competition of proceedings pending in the courts of different States applying different procedures. Art. 3 (1) DT is correctly worded in this regard.

Article 1(3) also appears problematic: What counts is a final decision terminating pendency of the proceedings (maybe even not a decision on the merits) - there are also conflicts between courts of different instances (appeal, second appeal). The decisive moment is the finality of the judgment given- finality entails the obligation to recognise and enforce it in other Contracting States under the 2004 or 2019 Conventions.

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?

The limited material scope of the HCCH instruments limits their practical impact. However, consensus for a global instrument requires limitations of the subject matter. In addition, it makes sense to align the exceptions of the different conventions of the "Judgments Project" to make them coherent. This coherence also facilitates the practical application of the instrument. One has to be aware that the application of the HCCH Conventions in this field is not an every-day business of parties and courts. Coherence facilitates facilitates the application in practice.

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)?

The interfaces with arbitration are difficult as the London Steamship case (CJEU, case 700/20) demonstrates. The issue cannot be solved from one perspective only. I agree with the exception.

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).

See supra answer to Q 1.

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.

Art. 3(1)(a) DT corresponds to existing texts that work well in practice (especially Art. 27 BX 1bis Regulation). This provision is narrowly phrased as it provides a stringent solution in case of priority. However, the concept of "the same party" is much more difficult in collective redress proceedings: There are models where the plaintiff is a natural person representing the others. These may be parties when they are indicated (by name and address). In other models, only a qualified entity is a party (and the group is generally described as in opt out proceedings). In other systems, a lead plaintiff represents the group. You find much valuable information on the variations at www.cplj.org.

What about parallel collective claims? In a recent German-Italian Volkswagen case, decided by the CA Braunschweig (6 May 2022, file no 4 MK 1/20) an Italian consumer association brought a case for around 400 buyers of Volkswagen cars in the dieselgate litigation in Germany. However, it turned out that 124 represented consumers had also registered in collective proceedings in Italy. Same parties - partially same parties? Issues of collective redress should be openly addressed in the DT. They cannot be simply sorted out as more and more collective claims (comprising thousands of individual claim(ant)s) are brought via platforms with the help of AI (just consider cartel damage litigation like the ongoing Truck cartel litigation in Europe). It seems to me that all these claims go to relatedness making this alternative much more important .

There is a need that the DT openly addresses collective litigation, not only lead plaintiffs, foundations and qualified entities but also platforms run by lawyers and litigation funders/investors organizing collective claims.

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

The basic idea is good. However, what about collective litigation and the registration of group members in public registers? In the different systems of/approaches to collective litigation additional moments might be decisive.

Question 4 on Article 5 obligations

What are your views on Article 5?

Art. 5(1) and 5(2) DT appear well drafted, especially the reference of Art. 5(2) DT to recognition and enforcement.

Art. 5(3) DT will generate "satellite litigation" when the obligation to stay is linked with the obligation of the court conducting the proceedings to render a judgment "within a reasonable time". This is about the "torpedo issue". However, determining "reasonable time" in a general manner is impossible as it is case depending. This referral will trigger additional litigation - why not impose a solution under the communication mechanism in Art. 16 DT.

Question 5 on priority jurisdiction / connection

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

It makes sense to "sort out" provisions where the relationship between parallel proceedings is addressed and solved by exclusive heads of jurisdiction (in rem) and exclusive choice of court agreements. These provisions are not only applicable at the beginning of the proceedings when the

jurisdiction of the court is determined but also operate at a later stage when the concurrence of proceedings becomes an issues.

There is no need to use the term "connection" in the DT to designate the issue as these provisions are about heads of jurisdiction largely recognised around the world. The basic idea is a very valuable one: These provisions solve problems of parallel proceedings by providing for a priority rule to the court having exclusive jurisdiction. One should consider to expand Art. 6 DT to other largely accepted exclusive heads of jurisdiction like IP rights or disputes related to enforcement proceedings.

Art. 8 DT does not follow the same pattern. It mixes general and special heads of jurisdiction with pendency. A first glimpse at the text demonstrates the complications of this complex provision covering two full pages. This provision will not be helpful for parties and justices applying a Convention where no international instances will give guidance and provide for uniformity.

The mechanism entails a double-check of jurisdiction: first the court needs to apply the rules on jurisdiction of its own legal system. In a second step, it needs to determine jurisdiction again under Art. 8 (2) DT. This doubling of work will not make the DT a smooth instrument.

All in all, Art. 8 DT appears too complicated to provide straightforward guidance how to proceed in lawsuits concerning identical or parallel cases. Finally, I do not believe that Art. 8 DT is needed. The mechanism of Art. 9 and 10 should be applied immediately - but these provisions need further improvement.

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

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

Much too complicated and not helpful for the judges applying the Convention.

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?

This mechanism will not work in practice. It would make much sense to take out Art. 8 DT and to provide for a straightforward mechanism of the resolution of parallel proceedings. Article 34 of the Brussels Ibis Regulation provides a better solution. The potential recognition of the foreign judgment should be assessed on the basis of the 2004 and (better) the 2019 Conventions.

6.3 Are there any additional factors that you believe should be included?

No, take the entire article out.

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?

I understand that both approaches shall provide a compromise between priority and forum non conveniens. However, two issues should be distinguished here: One is found in Art. 10 DT regarding the criteria to determine the more appropriate court. These criteria are inspired by the forum non conveniens approach. It makes sense to complement (or enlarge) the strict priority principle by additional criteria to determine the more appropriate court - especially when the courts seized communicate.

The other issue relates to the determination of the court that applies the criteria of article 10: should it be the court seized first or every court seized later. To my opinion, the situation of parallel litigation in competing courts should be avoided. The court seized first should determine (under article 10 DT) whether it is the more appropriate court. Direct communication between the courts seized will facilitate the assessment. A parallel resolution of the proceedings as foreseen in the 1st alternative, para 5 and in the 2nd alternative para 2 should not be permitted. This situation will increase litigation costs and time and lead in the worst scenario to conflicting judgments. As a result, it goes against the objectives of the DT.

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

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

With the proposed corrections, I would prefer the 2nd alternative as the wording is less complex and, therefore, easier to handle in practice.

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)?

They are very similar to the factors applied by courts following the forum non conveniens approach. I find lit c) highly problematic (either going to the merits and the outcome of the case or favouring the lex fori by disregarding conflict of law rules). The criterium in lit f) is the most relevant. There should be a direct link to the 2004 and 2019 HCCH Conventions.

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

The open criteria will increase unpredictability and entail lengthy proceedings.

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 welcome the solution found in articles 6 and 7 DT. Art. 8 DT should be deleted. Articles 9 and 10 should be streamlined as indicated in my previous answers.

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.

For related actions, the draft proposes a more flexible and balanced approach. Except where there is an exclusive choice-of-court agreement, the coordination framework does not require establishing jurisdiction under Draft Articles 6 and 8. Especially, the complicated assessment of jurisdiction under article 8 will be avoided. This might be a solution for parallel actions, too.

Coordination under Chapter III provides three different options (Draft Article 11) : the courts may designate a single court to adjudicate the entirety of the disputes (Draft Article 12). If concentrating

common issues in one (main) court is not feasible, parts of the disputes may be decided by a single court. If such coordination is not possible, the courts shall continue with separate proceedings (Draft Article 14).

The cooperation framework differs from the Brussels' regime: it does not grant discretion to the courts to stay the related proceedings but instead provides for different solutions by emphasizing direct communication between courts. This flexible approach is welcome and might be considered in the upcoming recast of the Brussels Ibis Regulation. It should work in practice when courts are willing to communicate and cooperate.

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?

This mechanism will be very helpful and deserves full support.

11.2 Are there particular advantages and challenges you foresee in applying these methods?

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Question 12 on safeguards

What are your views on the three safeguards provided in the Draft Text (Articles 19-21), particularly as to how they will operate in practice?

These safeguards are welcome - from their perspective, it might be possible to simplify Art. 8 - 10 DT.

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.

To achieve these objectives, the text needs considerable simplification.

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

One should still assess the mechanism in Article 34 of the Brussels Ibis Regulation as an replacement of Articles 8 - 10 DT. Recognition should be assessed under the 2004 and 2019 Conventions.

13.3 Do you consider there are any risks of tactical or satellite litigation arising from any of the provisions, or the overall approach of the Draft Text? Are these risks greater or fewer than those that currently exist? Are there any ways that such risks could be addressed in the Draft Text?

Yes, there is a high risk of increased tactical and satellite litigation, see my answers to question no 7

Question 14 - comments

What other comments, if any, do you have?

What about anti-suit and anti-anti-suit injunctions? They need to be addressed.

The conceptual weakness of the Draft is its limitation to pendency and relatedness. One cannot address these issues without looking at jurisdiction (this is why the Regulation BX 1bis addresses litispendence and relatedness as part of jurisdiction). This limitation was not decided by the drafters. However, Art. 6 - 8 DT demonstrate the direct relations between jurisdiction and pendency. In this regard, the Judgments' project adopted (from a procedural perspective) the wrong starting point.

Despite these critical remarks, I strongly support the continuation of the project.