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Please indicate your profession:

- Practitioner
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- Others, please specify: Click or tap here to enter text.

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

- Yes
- No

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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?

It seems that the activities of a State, including government, a government agency or any person acting for a State fall within the scope of the Draft Text so long as they are private, commercial and proprietary acts, or the so-called acts *jure gestionis*. But those acts *jure imperii* or those sovereign and governmental acts are outside the scope of the Draft Text, the likes of those relating to revenue, customs or administrative matters, activities of armed forces, law enforcement activities, and sovereign debt restructuring through unilateral State measures. By excluding acts *jure imperii* from the coverage of the Draft Text reinforces Article 2(7) that the Convention shall not affect privileges and immunities of State pursuant to the basic principle of immunity of states.

It is recommended that "civil" and "commercial" matters be properly defines as defined as this may vary from country to country.

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, the scope of the Draft Text is comprehensive enough to cover matters for which rules on parallel proceedings and related actions would be beneficial. By listing those that are within the contemplation of the Convention, followed by specific list of excluded items made the coverage clear and specific. It appears, however that Article 1 has specific exclusions which were expanded under Article 2. This may require some reconciliation.

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)?

It is proper to exclude in the coverage arbitration because the wordings of the scope of the Draft Text indicate that the same applies to court or judicial proceedings. Arbitration is not a judicial proceeding. Judicial proceedings contemplate courts that are pre-existing prior to the controversy while in arbitration, tribunals are *ad hoc* bodies that are established temporarily and only intended to address the issue at hand. Jurisdiction in judicial proceedings is compulsory, while in arbitration, jurisdiction is voluntary on the part of the parties. Finally, the law applied in court proceedings is independent of the will of the parties while in arbitration, the parties may limit the law.

Further discussions may be necessary to rethink exclusions on consumer rights and contracts of employment (labor) as these may have discriminatory effect on vulnerable or marginalized groups (social exclusion).

It is suggested that status and legal capacity, condition, family law matters and succession, should be included in the scope of the Convention to cover instances of marriages or family law matters concerning parties of different nationalities.

An additional exclusion may be considered which concerns culture and traditions of minority groups.

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 geographical scope of the Draft Text is global and universal contemplating the concurrence of court proceedings in more than two Contracting States, highlighting transnational litigation, and establishing international obligations of the court seised, for the purpose of cutting litigation costs, and preventing conflicting decisions and resolutions of the same legal issues and causes of actions.

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.

The definition of parallel proceedings and related actions enhanced the scope of the Draft Text. Their strategic position which is immediately following the Scope (Article 1) and Exclusions from scope (Article 2) emphasized the specific application and coverage of the Draft Text, drawing with clarity its metes and bound.

It may be necessary to consider a scenario where there are multiple actions within the same contracting State and in another contracting State. How will the prioritization on the appropriate court apply? Will the rule on consolidation of cases have any impact/effect?

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

Article 4 specifies when a court takes cognizance of the application of the provisions of this Convention. While this article does not establish a rule on first in time, it nonetheless, with particularity, mandates when a court is deemed to be mindful of whether to proceed, suspend, or dismiss parallel proceedings. Notably, the word "seised" is not reflected in Philippine rules of procedure.

Subprovision (b) must be further discussed on how a case is deemed "seised" in relation to the Philippine rules of procedure on service of summons and other pleadings and within the context of the treaty obligations under the Service Convention. More, under Philippine law, jurisdiction is conferred by law. As such, there may be overlapping or inconsistent procedures.

Question 4 on Article 5 obligations

What are your views on Article 5?

With Article 5, there is a built-in mechanism that the provisions of the Convention will be operational and put to use, in order to reap the expected results – no multiplicity of court proceedings, and conflicting resolutions and decisions in parallel proceedings.

Communication mechanisms must be threshed out into some form of protocol communications within agencies and among Contracting States. This may entail clear diplomatic guidelines and privacy/confidentiality agreements.

There should be a timeline for the suspension the proceedings. If the "appropriate" court cannot render a decision within the indicated timeframe, the suspension should be lifted and the proceedings in other court/s should proceed. Can the lifting of the suspension be effected only upon motion of a party and not by a court? This is relevant as the proposed Convention seems to convey that the court's action (dismissal or suspension as the case may be) is mandatory. It may also be useful to identify at what stage of the proceedings can a suspension and/or dismissal in another court be effected.

What kind of dismissal is contemplated - with prejudice or without, depending on the grounds?
How would *lis pendens* apply to such cases?

Question 5 on priority jurisdiction / connection

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

Article 6 is an implement of the *lex situs* principle positing the primacy of the jurisdiction of the court of the Contracting States where the property is located. The definition of "registration" of an immovable may need clarification as its meaning may vary in different jurisdictions. Does the Draft Text contemplate registration that is akin to an annotation or a recording?

Article 7 provides parties' autonomy to agree on which courts shall have jurisdiction over the dispute, prior to the existence of the dispute, or for disputes which have arisen, or may arise in connection with a particular legal relationship, subject to the application of Article 6. This means that the exclusivity and priority of jurisdiction of the court of the State where the property is located, shall prevail over the parties' autonomy. Any "choice of court" agreements must be read in the light of the Choice of Court Convention. There must be some regulatory mechanism on the exercise of discretion due to the choice of the parties.

Is there a timeframe within which the "defendant" gives consent to the choice of court? Should this be referred/applied to the claimant's consent as well considering that choice upon agreement involves both parties. Note also that a claimant may be a defendant, and vice versa, in multiple actions in multiple courts.

Article 8 speaks of standards to determine jurisdiction/connection of a court of a Contracting State. This article is the most critical in the entire Convention as it will determine whether a court of a Contracting State will proceed with, or suspend or dismiss its proceedings. There must be an agreed timeframe within which a jurisdictional issue can be contested within the context of existing domestic rules of procedure on reglementary periods or time frames. Additionally, there must be

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 enumeration in paragraph 2 is exhaustive which renders the Covenant practical and useful in many instances of parallel proceedings.

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, these factors are appropriate. They are not only conventional but also universal that find application in most States.

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

None.

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?

Article 9 ensures that the issue on which court should adjudicate in cases of parallel proceedings which were not resolved by Articles 6-8, is settled. The approaches make it incumbent upon a party to make an application before the court first seised, to determine

whether any other seised court in a Contracting state with jurisdiction/connection under Article 8 is a more appropriate court to resolve the dispute. There must be clear protocols/guidelines on determining the “more appropriate court” as it would have implications on substantive and procedural due process requirements particularly on jurisdiction, venue, domestic remedies on the right of redress/appeal.

Is there a standard for "effective access to justice"? Does it include access to evidence? Can effective access to justice be equated or reconciled with effective judicial protection under international law?

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

With the first approach, identifying where to file the application by a party would be easier because the application is to be made to the court first seised. While the determination of the application is being conducted by the court first seised, all the other courts seised shall suspend the proceedings. The result of the determination of the application by the court first seised will give rise to the recognition of which seised court shall proceed to adjudicate the issue, while the other seised courts shall suspend the proceedings and which can only resume pursuant to Article 5(3). In the second approach, any court other than the court first seised shall suspend its proceedings in favor of the court first seised. The suspension of proceedings here does not require first the determination of the application by any of the party. Though, under this second approach, in exceptional circumstances, on an application by a party, any court other than the first seised court, resume proceedings. It shall be this other court that shall determine the propriety of it resolving the dispute to guarantee effective access to justice.

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

The second approach is preferable because as a general rule, it gives the court first seised the facility to adjudicate the dispute without delay, while other courts seised suspend proceedings, and only in exceptional circumstances, and by application by any party, that a court other than the court first seised determines the propriety of resuming the proceedings. Thus, there is scant chance of possible delay.

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)?

The factors enumerated are all favorable to litigants, and are intended to secure the proper administration of justice.

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

Article 10 may work pursuant to the legal doctrine of forum non conveniens, which allows a court of competent jurisdiction to dismiss the case, on the ground that another court in another State, is a more appropriate and convenient place to adjudicate the dispute, considering factors like parties' habitual residence, accessibility and availability of evidence and witnesses, and the interest of justice.

8.3 Are there additional considerations that, in your view, should be taken into account?

Additional considerations can be impartiality of local court, and efficiency of the domestic legal system. Do the provisions contemplate, shared burden of proof and/or shared burden

of evidence? What is the context of a shared burden of litigation - how will this be factored into the payment of fees?

What is the standard of “likelihood” in relation to timeframe of rendering a decision, enforcement? What are the remedies post decision, enforcement challenges?

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.

The framework in the Draft Text will prevent simultaneous proceedings of actions involving the same parties and the same subject matter, thus cutting costs of litigation; allowing the singular adjudication of the same cause of action involving the same issue filed from different vantage points and before several courts each has jurisdiction or connection; and ensuring that resolution or decision will be promulgated that would result to a judgment capable of recognition and, where applicable, of enforcement in that Contracting State.

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.

The framework developed in the Draft Text for dealing with related actions may work effectively since it is crafted to be flexible and discretionary such that there is no required connection/jurisdictional ground set forth in Article 8(2). It must be noted, however, that there can be multiple courts where related actions are filed, and application may be had in these multiple courts. Thus, before all these courts can determine whether there should be a single court to decide the entirety or any part of the related actions, and if so which is the more appropriate court among the several courts would that be, delay is already incurred, tremendous cost is spent. And this process does not even ensure that multiple courts determining the application will arrive at a uniform resolution.

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?

The communication methods set out in Chapter IV of the Draft Text are relevant, timely, and practical. To ensure cooperation and communication of all Contracting States, their exchange of information is encouraged. Thus, as early as the deposit of the instruments of ratification, acceptance, approval or accession or at any time thereafter, Contracting States may notify the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention, that they allow any of the enumerated methods of communication under Article 16 (2). The manner by which communication methods is employed ensures that the information sought to be transmitted by one Contracting Party is understood and received by the other Contracting Party. With effective communication, in no time, it can be determined which court seised shall proceed in adjudicating the issue in parallel proceedings; and whether a single court shall adjudicate the entirety of related actions or part of it, and which of the multiple courts would that be.

How can tracking and monitoring of a case/cases be conducted within/among courts in a certain State Party and cross-border (other State Parties) that have related actions? Does direct judicial communications contemplate real time monitoring in the light of information technology?

Further discussions may be necessary on provisions for reservation clauses, withdrawal (partial/total) clauses and their implications on joint hearings, pending proceedings, and the like.

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

The requirement that the initial communication aside from being in the official language both by the sending and the receiving Contracting State, should be in writing, serves well the reality that our courts are courts of record. Whether the same is in soft copy or hard copy, the most important thing is, there is record to prove communication and cooperation of Contracting States.

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?

The three safeguards guarantee that justice interests shall be the paramount concern, the be-all and end-all of this Covenant.

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.

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

The proposed rules set out in the Draft Text would improve the status quo. In this day and age where technology and progress can convert the community of nations into a small and intimate village, increased possibility of parallel proceedings, and related actions is inevitable. With the proposed rules, present challenges and weaknesses of the legal infrastructure may be transformed into strengths and opportunities.

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?

In any innovation there is risk. These rules are now a novelty but necessary.

Question 14 - comments

What other comments, if any, do you have?

Perhaps, the inclusion of criminal matters within the coverage of the Convention should be studied due to the proliferation of transnational crimes, e.g., trafficking in persons, terrorism, money laundering, and online sexual exploitation of children. It is highly possible that an offense or any element thereof maybe committed in various states, such that an accused may be prosecuted

before two or more States. It would prevent double jeopardy of cases across borders. If the provisions on parallel proceedings are not applied to criminal cases, an accused may be prosecuted and convicted twice or more for the same crime.

What is the implication if one is a non-Contracting State? Will there be a partial application of the proposed Convention?

What if any of these exclusions are incidental reliefs to the main action deemed as “parallel proceedings” ? What is the effect?

Are claims for reparations (sum of money or its alternative, attachment of properties) for human rights victims considered as an exclusion or will the proposed parallel proceedings apply? The definition/scope of “habitual residence” in the proposed text is different from the definition of habitual resident under Philippine laws/rule of procedure. There is a need to reconcile this seeming disconnect on interpretation/definition. Also, existing definitions of habitual residence under other international conventions must be considered to avoid conflicting/misleading definitions.

The provision on “abuse of process” must be further defined in the light of specific accountability mechanisms under international law and domestic law of the State Party concerned. Accountability mechanisms may differ from one jurisdiction to another. What about the doctrine of “judicial courtesy”? From what perspective is the “abuse of process” contemplated under the proposed text?

What is the standard of “denial of justice” – in the light of access to justice, availability of judicial remedies, procedure and substantive due process? Will the doctrine of effective judicial protection apply?

What would be the remedies in case of inconsistent or conflicting findings by court of non-contracting State?

There must be an agreed or uniform definition of "exorbitant judicial concerns".

The proposed Convention contemplates its alignment with provisions of the 2005 Choice of Court Convention, 2019 Judgments Convention, Evidence Convention, Service Convention. However, the Philippines is not as yet a State Party to the 2019 Choice of Courts Convention and the 2019 Judgments Convention. There may be implications or effects on substantive and procedural grounds due to the “disconnect”.

The proposed Convention does not provide for other grounds within which to challenge decision made by the appropriate court except for jurisdiction and notice. Is fraud under the proposed Convention covered by the provision on “abuse of process”?

How to balance a State’s compliance with treaty obligations vis-a-vis right of citizens/nationals to access to local courts and local remedies? Jurisdictional sensitivities within the context of cultural landscape should be further studied. Will this have implications on alternative dispute mechanisms, decisions of “tribal courts”, Shariah courts.

There should be clear guidelines for determining the more "appropriate court". Factors such as convenience of the parties, ease of accessing evidence and the stage of proceedings, burden of litigation, probability of enforcement in both countries must be considered.

Matters involving ease of accessing evidence should be further discussed as to scope/coverage especially in access, handling and preservation.

What if one of the courts seised decides to adjudicate the entirety of case while the other courts are taking too long to make their determinations, and the first court makes its decision. What happens to the decision of the delayed courts (which eventually determine that they are the most appropriate court) if they also make a decision on part of or all of the matters in the case?

Joint hearings may pose several challenges because of differences in terminology and legal language which may carry different meanings depending on the context.