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Author	PB
Agenda Item	Item III.3
Mandate(s)	C&D Nos 12-13 of CGAP 2020
Objective	To report on the Jurisdiction Project and convey the Conclusions and Recommendations of the fifth meeting of the Experts' Group (1-5 February 2021)
Action to be Taken	For Decision ☒ For Approval ☐ For Discussion ☐ For Action / Completion ☐ For Information ☐
Annexes	Annex I: *Aide-mémoire* of the fifth meeting (online) of the Experts' Group on the Jurisdiction Project Annex II: Summary of the Responses to the Questionnaire on Parallel Proceedings and Related Actions in Court-to-Court Cases (Introduction and Executive Summary, only)
Related Documents	Prel. Doc. No 5 for CGAP 2020, "Third Meeting of the Experts' Group on Jurisdiction"

Report on the Jurisdiction Project

Introduction

1 At its 2020 meeting, the Council on General Affairs and Policy (CGAP) mandated the Permanent Bureau (PB) to make arrangements for two further meetings of the Experts' Group on the Jurisdiction Project (EG) to continue its discussions on "matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction)", "with a view to preparing an additional instrument".[1] This Preliminary Document constitutes the EG's Report to CGAP on the status of the Jurisdiction Project, following these two additional meetings.

2 The first of these two additional meetings took place from 16 to 19 November 2020, the second from 1 to 5 February 2021. Both these meetings were held via videoconference. The February 2021 meeting was the EG's fifth meeting overall; it was attended by 48 experts, representing 20 Member States from various regions, one Regional Economic Integration Organisation, and two Observers, as well as members of the PB.

3 The *aide-mémoire* of the Chair for the fifth meeting is included as Annex I and provides an overview of the deliberations of the EG, including Conclusions & Recommendations to CGAP.[2]

4 In addition, the PB, as mandated by CGAP at its 2020 meeting,[3] circulated a questionnaire on how parallel proceedings and related actions or claims are addressed in different jurisdictions, and subsequently compiled information received in the Summary of the Responses to the Questionnaire on Parallel Proceedings and Related Actions in Court-to-Court Cases (Summary of the Responses). The Introduction and the Executive Summary of the Summary of the Responses are included as Annex II.

Conclusions and Recommendations

5 The EG recommends to CGAP that:

a. a Working Group on matters related to jurisdiction in transnational civil or commercial litigation (WG) be established, following the conclusion of the work of the EG;

b. in continuation of the mandate on the basis of which the EG has worked, the WG be mandated to develop draft provisions on matters related to jurisdiction in civil or commercial matters, including rules for concurrent proceedings, to further inform policy considerations and decisions in relation to the scope and type of any new instrument;

c. the WG's work proceed in an inclusive and holistic manner, with an initial focus on developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims), and acknowledging the primary role of both jurisdictional rules and the doctrine of *forum non conveniens*, notwithstanding other possible factors, in developing such rules;

d. the WG explore how flexible mechanisms for judicial coordination and cooperation can support the operation of any future instrument on concurrent proceedings and jurisdiction in transnational civil or commercial litigation; and

e. irrespective of CGAP's decision on the establishment of a WG, or the continuation of the work of the EG, the PB be invited to convene two meetings before CGAP 2022, with intersessional work as required, so as to maintain momentum. If possible, one meeting will be held after

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1 See C&D No 12 of CGAP 2020; C&R No 5 of CGAP 2019; C&R No 5 of CGAP 2018; C&R No 7 of CGAP 2017; C&R No 13 of CGAP 2016.

2 The *aide-mémoire* of the Chair for the fourth meeting is available on the Secure Portal of the HCCH website at < www.hcch.net >, under "Working / Experts Groups", then "Experts' Group on the Jurisdiction Project".

3 See C&D No 13 of CGAP 2020.

the northern hemisphere summer 2021, and another in early 2022, with a preference, where possible, for hosting in-person meetings.

Annexes

Annex I

AIDE-MÉMOIRE OF THE FIFTH (ONLINE) MEETING OF THE EXPERTS' GROUP ON THE JURISDICTION PROJECT

Prepared by Prof. Keisuke Takeshita, Chair of the Experts' Group

Monday 1 to Friday 5 February 2021

1. At its meeting of 3 to 6 March 2020, the Council on General Affairs and Policy (CGAP) of the HCCH mandated the Permanent Bureau (PB) to convene two further meetings of the Experts' Group on the Jurisdiction Project (EG) prior to the 2021 meeting of CGAP.[4]

2. The EG, as mandated, held its fourth meeting from 16 to 19 November 2020 and its fifth meeting from 1 to 5 February 2021 via videoconference, under the chairmanship of Professor Keisuke Takeshita (Japan). This fifth meeting of the Group was attended by 48 experts, among 10 of whom were designated as alternates as the Group convened through videoconferencing. The experts represented 20 Member States from various regions, one Regional Economic Integration Organisation, and two Observers.

3. This *aide-mémoire* is intended to provide a broad overview of the main points of the discussion at this fifth EG meeting.

I. Introduction

4. It was recalled that the mandate of the Group is to discuss "matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction)", "with a view to preparing an additional instrument".[5]

5. At the fourth meeting in November 2020, the Group focused only on technical discussions leaving policy considerations on the desirability, necessity and feasibility of a future instrument on jurisdiction, including parallel proceedings, for the fifth meeting of the EG in February 2021, with the then foreseen possibility of an in-person meeting. Following this approach, the Group began its discussion at this fifth meeting on policy considerations, and, where possible and appropriate, identified technical options against each different policy consideration.

II. Discussion on the desirability and feasibility of a new instrument and possible types of instrument (*tour de table*)

Question 1: *What is your view regarding the desirability and feasibility of a new instrument on direct jurisdiction, including on parallel proceedings? What should be the objectives of such new instrument if it is desirable and feasible?*[6]

6. The Group exchanged views on the necessity, desirability and feasibility of developing an instrument on direct jurisdiction, as well as the objectives of any future instrument(s).

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4 C&D No 12 of CGAP 2020.
5 C&R No 5 of CGAP 2019; C&R No 5 of CGAP 2018; C&R No 7 of CGAP 2017; C&R No 13 of CGAP 2016.
6 The questions cited in this *aide-mémoire* are taken from the Agenda of the fifth meeting.

7. There was general agreement on the **objectives** of the future instrument: to enhance legal certainty, predictability, and access to justice, to reduce risks and costs associated with multiplicity of proceedings, and to prevent inconsistent judgments in international civil or commercial litigation.

8. Regarding the **necessity, desirability and feasibility**, most of the experts considered that there was a general necessity and desirability to develop an instrument on jurisdiction, including parallel proceedings. However, there were differing views on the relationship between jurisdiction and parallel proceedings and the emphasis to be given to the two topics. Also, experts expressed varied views on the necessity, desirability and feasibility of a binding instrument on direct jurisdiction.

9. The views on the possible **types** of future instrument(s) varied and were conveyed by reference to the three options proposed by the Chair in the Agenda:

   Question 2: *What is your view regarding the possible types of instrument(s)?*

   [Option A] Binding instrument on direct jurisdiction, including on parallel proceedings

   [Option B] Binding instrument on parallel proceedings, and a binding additional protocol on direct jurisdiction

   [Option C] Binding instrument on parallel proceedings, and a non-binding instrument (*e.g.*, model law, guiding principles, etc.) on direct jurisdiction

10. A number of experts expressed a clear and strong preference for **Option A**. They considered the matters of direct jurisdiction and parallel proceedings to be intrinsically linked or inseparable and therefore any future instrument should address them together. Some of them also expressed their scepticism concerning a soft law instrument in this regard, emphasising the need for any new instrument to add value to the existing transnational litigation framework.

11. A clear and strong preference for **Option C** was also expressed by experts, with a common consideration being that diverse legal backgrounds and jurisdictional rules from around the world would make a binding instrument on direct jurisdiction difficult to conclude and to implement. These experts also noted that Option A may not be feasible due to existing differences in opinion of experts and considering past similar attempts. In this context, they considered it more useful to develop a soft law instrument on direct jurisdiction and were open to considering the viability of different types of soft law instruments such as a model law, principles, or guidelines. Given the need to deal with parallel proceedings in practice, they expressed a preference for developing a binding instrument on parallel proceedings.

12. There were also experts who had not decided on a specific position in relation to this question. Among them, some experts expressed a certain preference for Option A, acknowledging the challenges to its feasibility.

13. While remaining open to considering all three options, two experts expressed a preference for the option of developing a soft law instrument covering both direct jurisdiction and parallel proceedings.

III. Discussion on direct jurisdiction

14. The Group proceeded to answer the three questions raised by the Chair in the Agenda regarding direct jurisdiction.

   Question 3: *What would be the possible jurisdictional grounds for "required jurisdiction"? Which of the bases of indirect jurisdiction in Article 5 of the Judgments Convention could be included as jurisdictional grounds in the new instrument?*

15. Some experts, noting the importance of being consistent with the approach taken in the 2005 Choice of Court and 2019 Judgments Conventions, supported using the indirect jurisdictional bases

laid down in Articles 5 and 6 of the 2019 Judgments Convention as a starting point for any future drafting of rules of direct jurisdiction. Several experts suggested some provisions in Article 5(1) as possible grounds for "required jurisdiction", in particular, paragraphs (a), (b), (d), (e), (g), (h), (i), (k) and (m) (and perhaps (f)). One expert further suggested that if this approach is taken, each of the bases should be considered article by article. Another expert mentioned that exercising the required jurisdiction could be supplemented by the possibility of resorting to national rules of jurisdiction, provided they are not exorbitant.

16. One expert, however, stressed that there were fundamental differences between Article 5 of the 2019 Judgments Convention and any future binding rules on direct jurisdiction. The former aims to establish eligibility for the recognition and enforcement of foreign judgments, whereas the latter deals directly with jurisdiction rules, which could require a State to amend its national laws upon joining.

17. Another expert added that any jurisdictional basis should not be obligatory. One expert also expressed doubt on the utility of providing for "required jurisdiction", as the situation of no court taking jurisdiction would be very rare.

18. Upon an explanation that the term "required jurisdiction" is perhaps inappropriate given that in certain circumstances the EG future work envisages the possibility of declining to exercise jurisdiction, the Chair suggested renaming the term.

Question 4: *Concerning the "exceptional circumstances" in which a court of a Contracting State may suspend its proceedings [and/or] decline jurisdiction, even if it has "required jurisdiction" under the instrument, is it appropriate to use Article 22 of the 2001 Interim Text as the starting point of the discussion? If so, is there anything that should be modified? If not, what are the possible alternatives?*

19. Several experts agreed that flexibility is needed, and that Article 22 of the 2001 Interim Text would be a good starting point for discussion. One expert indicated that, in particular, Article 22(2)(a), (b) and (c) should be considered. Some experts noted the need for refining the provisions in Article 22(1) and (4), and one expert raised hesitations regarding Article 22(2)(d). An expert suggested that any consideration of these bases should be carried out article by article. In addition, some experts suggested considering other exceptional circumstances; others suggested that any such rule should be designed so as to avoid situations of denied or delayed justice – the latter rule could apply differently depending on the category of jurisdiction assumed by the courts.

Question 5: *For the discussion regarding "exorbitant jurisdiction", is it appropriate to use Article 18 of the 2001 Interim Text as the starting point of the discussion? If so, is there anything that should be modified? If not, what are the possible alternatives?*

20 . A certain number of experts supported working on the basis of Article 18 of the 2001 Interim Text, drafting a general rule for exorbitant jurisdiction and a list of exorbitant grounds of jurisdiction under national law. Some of them suggested fresh consideration of certain grounds, such as "no substantial connection" under Article 18(1), "service" under Article 18(2)(f), and the possibility of allowing exorbitant grounds of jurisdiction in situations of human rights violation as listed in Article 18(3).

21. However, several experts opposed the inclusion of any "exorbitant grounds of jurisdiction" in the instrument, and two experts expressed hesitation as to the use of the category in general. One of those experts expressed the view that exorbitant grounds of jurisdiction should not be included, even in a soft law instrument, as it would cause difficulties for certain States to adhere to it, as it could be viewed as a value judgment on domestic legal traditions; this expert further suggested the alternate possibility of defining "weaker grounds of jurisdiction" instead of "exorbitant grounds of jurisdiction".

22. In answer to the three questions posed, incumbent on the type of instrument and understanding that decisions on policy still need to be made, with no prejudice to future discussions or positions of States, the Chair concluded that:

- there is broad technical support for using Article 5 of the 2019 Judgments Convention as reference point for possible grounds of "required jurisdiction";
- there is technical support for using Article 22 of the 2001 Interim Text as a starting point, subject to drafting refinements, for discussing "exceptional circumstances";
- the rules for exorbitant jurisdiction should be explored further, using Article 18 of the 2001 Interim Text as the starting point of discussion. However, the Group needs to revisit the question of whether to include such rules at a later stage.

IV. Discussion on parallel proceedings between the same parties on the same subject matter by using the basic scenario (*tour de table*)

23. The Group proceeded to exchange views on the three Options raised by the Chair in the Agenda regarding parallel proceedings, with the explanations of the three Options in the Annex of the Agenda.

Question 6: What is your view regarding the following options of rules for parallel proceedings? Please discuss not only your preference, but also share your analysis on the desirability and feasibility of each option.

[Option A] First-in-time rule + exceptional circumstances

[Option B] Better forum approach

[Option C] Better forum approach with the use of certain jurisdictional rules

24. For this question, the experts carried out an analysis of the three options, explaining their advantages, disadvantages, desirability and feasibility. In explaining Option B, several experts introduced the *Alternative text for an instrument on parallel proceedings – Non-paper submitted by the experts of Brazil, Israel, Singapore and USA, in their personal capacities*.

25. As for preference, both Options A and B had a certain strong support from experts. Some experts recognised the viability of Option C, and one expert supported the possibility of developing a new approach mixing the elements of Options A and C on the basis of indirect jurisdictional rules (inspired by those in the 2019 Judgments Convention) in the context of parallel proceedings first; one could then explore in a holistic fashion whether it is possible to go further in the direction of direct jurisdiction rules.

26. Several experts did not make express preferences but did highlight that *forum non conveniens* should be considered in any future instrument on parallel proceedings. One expert noted that any future text will require several definitions, which should be consistent with other established international standards, namely the ALI / UNIDROIT Principles of Transnational Civil Procedure.

27. During the discussion, experts highlighted several issues to be considered in discussing rules on parallel proceedings, such as (i) linkage to rules on direct jurisdiction, (ii) the necessity to address problematic tactical litigation strategies, (iii) added value to the status quo, (iv) due consideration to the sovereignty of Contracting States, and (v) issues relating to time (the point of time when the court is seised and the necessity for the prioritised court to render a judgment within a reasonable time).

28. Recognising the necessity to bridge between different approaches, the Group then discussed a tentative non paper on *lis pendens* prepared by an expert from Switzerland, which builds upon Articles 21 and 22 of the 2001 Interim Text and was intended to offer a suggestion based on a combination of Options A and B. The discussions were carried out on the basis of using the non

paper as a useful starting point without committing to any particular approach or final drafted text. Some experts raised a concern about the use of the term “exceptional” in relation to the circumstances for proceeding with the case in the court second seised, and expressed a preference for this term to be deleted or changed to "appropriate". Several experts expressed their disagreement with the absence of any link to jurisdictional rules and pointed out that the first-in-time rule cannot properly work in a jurisdictional vacuum as it should be applied between at least two *fora* that are considered appropriate in principle.

29. The experts expressed willingness to continue the discussion on a text, with a view to assessing the policy decisions to be made.

***Question 7**: Is it appropriate to focus on cases in which at least one of the proceedings is pending before a court of a Contracting State which has jurisdiction under the instrument? In other words, is it possible to exclude from the scope of the discussion cases in which proceedings are pending only before courts of Contracting States exercising jurisdiction under their national law?*

30. The Group agreed to continue the discussion with the inclusion of the scenario where parallel proceedings exist with jurisdiction based on national laws, as reflected in Scenario 4 of the Annex to the Agenda.

***Question 8**: Is it necessary to provide, as a basic requirement for suspending proceedings in a court of a Contracting State, the prognosis of recognition and enforcement of the judgment which will be rendered by a court of another Contracting State (the court first seised for option A or the better forum for option B or C)? To ensure access to justice for parties to disputes, it seems that a court of a Contracting State should exercise jurisdiction if it is apparent that the judgment which will be rendered by a court of another Contracting State will not be recognised and enforced in the Contracting State [under its national law].*

31. The Group reached consensus in including recognition and enforcement of a judgment as a relevant, but not always a determinative, factor to consider when developing rules on parallel proceedings. The Group acknowledged that the relevance of the prognosis of recognition and enforcement of the judgment would depend on the individual case, and the Chair confirmed that this aspect would also be discussed when the text relating to parallel proceedings is developed. Several experts mentioned the importance of introducing a "reasonable time" requirement, when considering recognition and enforcement of the judgment as a factor.

V. Discussion on parallel proceedings of related claims

32. The Group continued the discussion by answering two questions raised by the Chair in the Agenda.

***Question 9**: Should the instrument apply also to related claims? What should be the basic rule for parallel proceedings of related claims? One of the possible rules for parallel proceedings of related claims might be the following:*

“Even if a court of a Contracting State [other than the court first seised] has jurisdiction over a claim (original claim) under the instrument, the court should be allowed to suspend its proceedings [and decline jurisdiction] discretionally when there is a pending proceeding on a claim related to the original claim (related claim) before a court of another Contracting State.”

This issue may also be addressed through a cooperation mechanism.

***Question 10**: In case the instrument would apply to related claims, what should be the definition of related claims? Is it possible to use Article 7(1)(e) of the 2019 Judgments Convention as a reference? If so, the starting point might be the following:*

"Claims are deemed to be related where (i) they are between the same parties and (ii) the future judgments on those claims resulting from separate proceedings can be inconsistent with each other."

33. There was general support for discussing how to deal with related claims in the future instrument. However, views were divided as to whether to include the above-mentioned rule on related claims. Some experts supported the inclusion and stressed the importance of having flexibility in the rules, such as the discretion of the court in suspending proceedings. In this respect, some experts noted that the term "related" is ambiguous and that consideration should be given to the use of the "same claims", defining it in a flexible manner, so as not to restrict its application to "identical claims". Some experts expressed hesitation and suggested dealing with related claims through a mechanism for judicial coordination and cooperation or the application of the rules on parallel proceedings based on the better forum approach. Yet other experts were of the opinion that while such rules might be desirable and necessary, their feasibility in an international instrument is questionable and that, in any case, clear criteria would be needed in order for such rules to work.

34. Regarding the definition of related claims, many experts expressed reluctance to use Article 7(1)(e) of the 2019 Judgments Convention as a starting point, given the different objectives in the Convention vis-à-vis the future instrument. Other experts suggested using Articles 30 and 34 of the Brussels Ia Regulation as a starting point for a future definition. While some experts expressed a preference for a clear and narrow definition, others expressed a preference for flexibility. Some experts highlighted that the "same parties" is the requirement for *lis pendens* and should not be the requirement for related actions due to the complexity of international litigation (*e.g.*, cases involving multiple claimants or multiple defendants on the same relevant facts and / or legal issues where the parties are not identical in each forum, and cases where an insurer is a party to litigation in one forum but not the other).

35. Following this discussion, the Chair acknowledged the importance of flexibility for the rules on related claims, the difficulty in addressing related claims separately from jurisdictional considerations, and the desirability to define clearly what "related" means. The Chair also noted that the suggested definition was too narrow in that it was limited to claims between the same parties.

VI. Discussion on mechanisms for judicial coordination and cooperation

36. The Group proceeded with the discussion by answering two questions raised by the Chair in the Agenda.

Question 11: *Is it feasible, desirable or necessary to establish a mechanism for judicial coordination and cooperation among courts of Contracting States?*

Question 12: *What should be considered in establishing such a mechanism?*

37. While a few experts expressed hesitation, there was broad support for establishing a mechanism for judicial coordination and cooperation to support the operation of a future instrument on matters relating to direct jurisdiction, including parallel proceedings and related actions or claims.

38. The Group agreed that such a mechanism will depend on the form the instrument will take. Some experts emphasised the need for flexibility for States to decide what form of communication to use, including taking into account party autonomy. One expert raised the need to include provision for cases where communication fails. Other issues that were raised were respect for sovereignty, costs and resourcing, and language to be used in communication.

VII. Conclusions and Recommendations

39. The EG recommends to CGAP that:

a. a Working Group on matters related to jurisdiction in transnational civil or commercial litigation (WG) be established, following the conclusion of the work of the EG;

b. in continuation of the mandate on the basis of which the EG has worked, the WG be mandated to develop draft provisions on matters related to jurisdiction in civil or commercial matters, including rules for concurrent proceedings, to further inform policy considerations and decisions in relation to the scope and type of any new instrument;

c. the WG's work proceed in an inclusive and holistic manner, with an initial focus on developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims), and acknowledging the primary role of both jurisdictional rules and the doctrine of *forum non conveniens*, notwithstanding other possible factors, in developing such rules;

d. the WG explore how flexible mechanisms for judicial coordination and cooperation can support the operation of any future instrument on concurrent proceedings and jurisdiction in transnational civil or commercial litigation; and

e. irrespective of CGAP's decision on the establishment of a WG, or the continuation of the work of the EG, the PB be invited to convene two meetings before CGAP 2022, with intersessional work as required, so as to maintain momentum. If possible, one meeting will be held after the northern hemisphere summer 2021, and another in early 2022, with a preference, where possible, for hosting in-person meetings.

Annex II

Summary of the Responses to the Questionnaire on Parallel Proceedings and Related Actions in Court-to-Court Cases

Introduction

1. In February 2020, the Experts' Group on Jurisdiction (EG) resumed its discussions on addressing matters relating to jurisdiction with a view to preparing an additional instrument. At the end of this meeting, the EG recommended to the Council on General Affairs and Policy (CGAP) that it task the Permanent Bureau (PB) with the preparation of a questionnaire on how parallel proceedings and related actions or claims are addressed in different jurisdictions.

2. CGAP endorsed the EG's recommendation at its 2020 meeting,[1] and the PB, as mandated, prepared and circulated the Questionnaire, as approved by the Chair of the EG, to HCCH Members on 31 March 2020. Thirty-six responses from the following 33 Members were received: Argentina, Australia, Brazil, Canada, Chile, Costa Rica, the People's Republic of China, Croatia, the European Union, Finland, France, Germany, Georgia, Hungary, Italy, Israel, Japan, the Republic of Korea, Malta, Mexico, Poland, Portugal, Romania, the Russian Federation, Singapore, Slovenia, Slovakia, Sweden, Switzerland, the United Kingdom, the United States of America, Venezuela, and Viet Nam. The PB is very grateful to these Members for the time and effort they have put into preparing their responses.

3. This Summary of the responses, which follows the structure of the Questionnaire, seeks to briefly summarise the general practice on how parallel proceedings and related actions (or claims) are dealt with in each jurisdiction. The analysis is made based on available information in the responses, and where the answers to the questions are not clear, they have not been considered for the purposes of this Summary. Only responses received in the official languages of the HCCH, English and French, have been considered for the preparation of this Summary. Responses received in the Spanish language have, however, been uploaded onto the Secure Portal for reference purposes.

4. The Summary is not intended to be conclusive or comprehensive, as indicated in several responses, and States' answers do not always provide complete reviews of their laws and practices, for a variety of reasons, *e.g.*, different federal / state, federal / province (or territory), multi-territorial regimes. Moreover, in some jurisdictions, parallel proceedings are dealt with differently in domestic cases as compared to cross-border cases, such as in Brazil, Canada (civil law jurisdiction (Québec)) and Japan. Whilst every effort has been made to accurately summarise the responses received, should any contributor consider their response to have been inaccurately reflected below, their input would be welcomed.

5. This document contains an Executive Summary, followed by a Summary of Responses Received, then, in an annex, a Compilation of the Responses.

1 CGAP 2020, C&D No 13.

Executive Summary

PART I: MANAGEMENT OF PARALLEL PROCEEDINGS

1. Can your courts raise the issue of parallel proceedings on their own motion (*ex officio*), or can the issue only be raised by a party:

1.1 Under national law?

1. Allowing courts to raise the issue of parallel proceedings *ex officio* is the answer in the majority of responses, nevertheless it is mentioned that, in practice, it is parties that raise the issue of parallel proceedings.

2. In comparison, it is more common that both courts and parties can raise the issue of parallel proceedings, rather than only parties being allowed to raise the matter. Very few jurisdictions do not address the issue of parallel proceedings at all.

1.2 Under any relevant regional, bilateral or international instruments?

3. Most instruments allow courts to raise the parallel proceedings issue on their own motion. Certain bilateral treaties allow the issue to be raised either by a party or by a court on its own motion.

4. It should be noted that in a number of instruments referred to in the responses, *lis pendens* is only considered at the stage of recognition and enforcement and is applied as a ground for refusal.

2. On what basis are proceedings given priority:

a. A "first-in-time" rule

b. Priority to a court whose jurisdiction is based on exclusive grounds

c. Priority to a court whose jurisdiction is based on party agreement, whether exclusive or otherwise

d. Other considerations

2.1 Please specify whether the above rules are included in national law:

5. The vast majority of the responses stated that their jurisdiction adopts a "first-in-time" rule in parallel proceedings. Some responses added conditions for the application of the “first-in-time” rule, such as the foreign judgment which would be given in foreign proceedings, is capable of, or expected to have legal effect in the court second seised, or a reasonable time limit for conclusion of the foreign proceedings. Under certain circumstances, the “first-in-time” rule is however not applicable, such as in the case of jurisdiction based on exclusive grounds, or on parties’ agreement, or concerning certain types of contracts, such as consumer contracts, individual contracts of employment or insurance contracts.

6. Exclusive jurisdiction is referred to as a direct jurisdiction rule in most responses, and is not an independent basis of setting up priority in parallel proceedings. It does, however, affect the application of the “first-in-time” rule.

7. As mentioned in some responses, jurisdiction based on parties’ agreement is not an independent basis of setting priority in parallel proceedings. Instead, it is a direct jurisdictional ground which will normally be given priority in determining jurisdiction, in particular regarding exclusive choice of court agreements. However, it does affect the application of the “first-in-time" rule.

8. In those jurisdictions which do not apply the “first-in-time" rule in parallel proceedings, the doctrine of *forum non conveniens* is generally referred to or is taken into consideration.

2.2 Please specify whether the above rules are included in any relevant regional, bilateral or international instruments:

9. The “first-in-time" rule is included in most instruments by which the relevant jurisdictions are bound. Priority should be given to a court the jurisdiction of which is based on an exclusive choice of court agreement or on exclusive grounds, which would result in the inapplicability of the “first-in-time" rule.

3. What solutions are available to your courts to:

a. Continue proceedings without regard for the parallel proceedings pending elsewhere

b. Stay proceedings

c. Dismiss proceedings / decline jurisdiction

d. Take other measures

e. Transfer or consolidate proceedings

3.1. Please specify whether the above solutions are included in national law:

10. The majority of the responses showed that courts may dismiss proceedings and / or decline jurisdiction in their jurisdictions, followed by stay of proceedings, continuation of proceedings, taking of other measures and transfer or consolidate proceedings.

11. It should be noted that the first three solutions are often applied with conditions. In addition, in terms of granting anti-suit injunctions, it was highlighted that anti-suit injunctions are rarely used, and apply only in exceptional circumstances, for example, where the foreign proceedings interfere or tend to interfere with proceedings in the forum court, or where they amount to unconscionable conduct. It was also mentioned that in the responses stating the option of transfer or consolidate proceedings, this option is only accepted within domestic courts.

3.2 Please specify whether the above solutions are included in any relevant regional, bilateral or international instruments:

12. The solution that courts may dismiss proceedings and / or decline jurisdiction is included in most instruments. Similarly, the solution of staying proceedings is also adopted in most instruments. Only a few instruments include the solution of continuing proceedings. None of the responses provided information on other measures, or transfer or consolidation of proceedings.

4. Are any of the above solutions mandatory?

13. The majority of responses stated that at least one of the above solutions is mandatory, particularly in regional and bilateral instruments.

14. Near to one third of the responses received stated that it is mandatory for the courts of their jurisdiction to dismiss proceedings and / or decline jurisdiction in case of parallel proceedings. It should be noted that in this context, several jurisdictions have set up conditions: if the foreign court delivered a decision on the merits capable of being recognised in forum or the expectation of recognition of the foreign judgment is obvious.

5. What is the procedural position of a party opposing any of the above solutions?

15. In general, all responses stated that certain procedural rights are granted for parties to oppose decisions of the court regarding any of the above solutions. It appears that the majority give the parties the right to appeal, and relatively fewer responses referred to the right to be heard. Both rights are often mentioned together in the responses. There are also several references to other rights that the parties may have to oppose any of the above solutions, such as the right to challenge the relevant decisions or to raise an objection.

6. Can your courts order any interim or provisional, including protective, measures in support of parallel proceedings pending elsewhere:

6.1 Under national law

16. Most jurisdictions allow their courts to order interim or provisional, including protective, measures in support of parallel proceedings pending elsewhere. Some responses specified the conditions upon which a court may order such interim or provisional measures.

6.2 Under any relevant regional, bilateral or international instruments?

17. From the responses received, some instruments allow courts to order interim or provisional measures in support of parallel proceedings pending elsewhere. There are also conditions for granting such measures, for example whether the court would have granted such measures if the matter had been before it, *i.e.*, foreign courts are not treated any better in terms of provisional measures than domestic courts.

7. Please provide a brief description of any noteworthy judgments from your jurisdiction, and any other critical issues faced by your courts in relation to the above.

18. See annex of this summary.

PART II: MANAGEMENT OF RELATED ACTIONS OR CLAIMS

8. Can your courts raise the issue of related actions (or claims) on their own motion (ex officio), or can the issue only be raised by a party:

8.1. Under national law?

19. Over a third of the responses stated that their jurisdiction allows a party to raise the issue of related actions (or claims). This is followed by jurisdictions allowing either courts or a party to do so, and then by jurisdictions allowing courts to raise the issue *ex officio*. Very few jurisdictions do not deal with the issue of related actions at all. It should be noted that several responses mentioned that in their jurisdiction, there is no special rule for cases with an international element, or that they are not considered as a separate category.

20. In terms of raising the issue by courts on their own motion (*ex officio*), several jurisdictions highlighted that, in practice, it is the parties that raise the issue of related actions.

8.2 Under any relevant regional, bilateral or international instruments?

21. Responses showed that the rules are different under these instruments. Under some instruments, the court will act upon application by one of the parties. Under others, either courts (*ex officio*) or a party is allowed to raise the issue of related actions (or claims).

9. If applicable, on what basis are related actions (claims) given priority:

a. A "first-in-time" rule

b. Other considerations

9.1 Please specify whether the above rules are included in national law?

22. More than one third of the responses received stated that related actions are given priority based on a "first-in-time" rule in their jurisdiction. The "first-in-time" rule is applied with conditions. Some responses stated circumstances where the "first-in-time" rule is not applicable, such as exclusive jurisdiction of the court (of the State), or parties' agreement, or if the claims are dependent on one another.

23. In terms of other considerations, it is noted that priority is given to a court, the jurisdiction of which is based on exclusive grounds or on parties' agreement. In the jurisdictions where the doctrine of *forum non conveniens* is applied to deal with related actions (or claims), they often provide criteria for the assessment of *forum non conveniens*. There are also other considerations mentioned in the responses, either in the context of consolidation of proceedings or of staying of proceedings.

9.2 Please specify whether the above rules are included in any relevant regional, bilateral or international instruments?

24. From the responses received, it appears that most instruments by which the relevant jurisdictions are bound include the "first-in-time" rule. As stated, in certain instruments, the "first-in-time" rule is not applicable under certain circumstances, such as exclusive jurisdiction, or parties' agreement, or matters related to certain types of contracts, such as consumer contracts, individual contracts of employment, insurance contracts.

10. What solutions are available to your courts:

a. Continue proceedings without regard for the related proceedings elsewhere

b. Stay proceedings

c. Dismiss proceedings or decline jurisdiction

d. Take other measures

e. Transfer or consolidate proceedings

10.1 Please specify whether the above solutions are included in national law?

25. The majority of the responses stated that courts in their jurisdiction may stay proceedings. A similar number of jurisdictions provide the options of "dismiss[ing] proceedings or declin[ing] jurisdiction" or "continu[ing] proceedings without regard for the related proceedings elsewhere". It should be noted that these options are often applied with conditions.

26. Anti-suit injunctions are relatively often mentioned as one type of other measure, although they will only be granted in exceptional circumstances. Such circumstances occur, for example, where the foreign proceedings interfere or tend to interfere with proceedings in the forum court or where they amount to unconscionable conduct.

27. As specified in some responses, courts in their jurisdiction are only able to transfer and consolidate domestic or intra-national proceedings.

10.2 Please specify whether the above solutions are included in any relevant regional, bilateral or international instruments?

28. Responses showed that the solution allowing courts to dismiss proceedings and / or decline jurisdiction is included in most instruments. A few instruments include the solution of staying proceedings. Only the Brussels Ia Regulation includes the solution that courts may continue proceedings. But these solutions are applied with conditions.

11. Are any of the above solutions mandatory?

29. A slight majority of the responses stated that some of the above solutions are discretionary to their courts. Among those responding with mandatory solutions, it should be noted that close to one third stated that it is mandatory for their courts to dismiss proceedings and / or decline jurisdiction. One response stated a condition for termination of proceedings (dismissal), *i.e.*, if the foreign court delivered a decision on the merits, capable of being recognised in the forum court.

12. What is the procedural position of a party opposing any of the above solutions?

30. In general, the vast majority of responses stated that certain procedural rights are granted for parties to oppose decisions of the court regarding any of the above solutions. It appears that the majority gives the parties the right to appeal, and a minority of responses refer to the right to be heard. There are also several references to other rights that the parties may have to oppose any of the above solutions, such as a right to challenge the relevant decisions, or to request to stay the proceedings, or to make a request for rehearing.

13. Can your courts order any interim or provisional, including protective, measures in support of related actions (or claims) pending elsewhere:

13.1 Under national law

31. The responses showed that most jurisdictions allow their courts to order interim or provisional, including protective, measures in support of related actions (or claims) pending elsewhere. Some responses specified the conditions upon which a court may order such interim or provisional measures, such as whether the court would have ordered such measures if the matter had come before it, and for the enforcement of foreign judgments.

13.2 Under any relevant regional or international instruments?

32. Responses showed that only a few instruments allow courts to order interim or provisional measures in support of related actions (or claims) pending elsewhere. Certain instruments state the conditions, such as concerning the court jurisdiction.

14. Please provide a brief description of any noteworthy judgments from your jurisdiction, and any other critical issues faced by your courts.

33. See annex of this summary.

PART III: DEFINING PARALLEL PROCEEDINGS AND RELATED ACTIONS (OR CLAIMS)

15. Do you have a private international law act / statute?

34. See annex of this summary.

16. Do you have rules governing parallel proceedings?

16.1 Under national law

35. Responses showed that the vast majority of jurisdictions have rules governing parallel proceedings, whether they are codified under national law, or are applied as a general principle of court procedure, or are found in case law. In some jurisdictions, parallel proceedings are dealt with through the doctrine of *forum non conveniens,* for which the existence of parallel proceedings is one factor to be taken into account when determining the appropriate or natural forum.

16.1.1 If yes, how do such rules define parallel proceedings?

16.1.2 What are the necessary conditions?

36. Irrespective of whether "parallel proceedings" is defined or is given an explanation under national law / or in case law, or is encompassed in the *lis pendens* exception, it is clear from the responses that it requires two proceedings: one in the domestic court which is seised and another pending proceedings in a (foreign) court, which was initiated first. In addition, there are several other common requirements for parallel proceedings.

37. In general, all these responses require the involvement of the "same parties". In addition, the "same subject matter" and the "same cause of action" are two other most commonly used

conditions in their respective categories. Some jurisdictions listed extra conditions regarding "parallel proceedings".

38. As mentioned in certain responses, when applying *forum non conveniens* to parallel proceedings, the court would apply different conditions. For example, the domestic court must have jurisdiction and must have been properly seised; the domestic court will require *prima facie* evidence that authorities of that State would have jurisdiction under their conflict of law rules; the domestic court will consider the best interests and convenience of the parties, and whether justice is best served by proceedings in the forum or abroad.

16.2 In any regional, bilateral or multilateral instrument to which you are a Party?

16.2.1 If yes, how do such rules define parallel proceedings?

16.2.2 What are the specific necessary conditions?

39. As shown in the responses, not all instruments that contain rules on parallel proceedings provide a definition, but they often provide conditions for "parallel proceedings". The conditions for "parallel proceedings" set forth in the instruments are quite similar to those mentioned in national law. First, requiring the existence of two proceedings: one in the domestic court and another already pending dispute in the other Contracting Party.

40. In addition, the responses showed three general requirements: the "same parties", which is used in almost all instruments; the "same cause of action" (more often used); and the "same subject matter", which is used in most instruments.

17. Do you consider the solutions currently available for dealing with parallel proceedings to be effective?

41. Most responses considered the solutions currently available for dealing with parallel proceedings to be effective. Some of the points raised for consideration, or as reasons presented on why the current solutions were considered not entirely effective or needing more improvements, are, for example, that they may be too rigid in concrete situations; a more structured guidance for courts on how to exercise their discretion in dealing with parallel proceedings would be desirable; existing domestic regulations do not cover all aspects of parallel proceedings; regulations provided by international legal instruments are not uniform; difficulty for courts to obtain information regarding foreign proceedings; the rules regarding the obligation of the court second seised are likely to be misused by the parties; the 2007 Lugano Convention does not effectively prioritise exclusive choice of court agreements; the current solutions do not emphasise the need to protect the interests of the parties and the needs of international mobility.

18. Do you have rules governing related actions (or claims) arising in foreign jurisdictions?

18.1 In national law?

42. In half of the jurisdictions that answered this question affirmatively, the rules are either specifically for related actions (claims) or are those governing parallel litigation. It should be noted that, in some jurisdictions, the rules for parallel proceedings apply to related actions (or claims) depending on the facts of the particular case. In addition, some jurisdictions deal with the issue through the doctrine of *forum non conveniens*.

18.1.1 If yes, how do such rules define related actions (or claims)?

18.1.2 What are the necessary conditions? (e.g. the same factual or legal relationship, related parties)

43. As shown in the responses, "related actions (or claims)" are generally considered as concerning two (or more) actions that are "connected". There are, however, different criteria to demonstrate that "connectedness": the "same (or connected) cause of action" is a relatively common criterium. If there is a different "cause of action", some responses note that their jurisdiction lays down other

conditions or provides a certain description in demonstrating the "connectedness" of the actions (or claims). In addition, some responses mention jurisdictional requirements.

44. As mentioned in several responses, "related actions (or claims)" are assessed on a case-by-case basis.

18.2 In any regional, bilateral or multilateral instrument to which you are a Party?

45. Responses stated that some instruments contain rules governing related actions, and others regulate this issue at the stage of recognition and enforcement of foreign judgments.

18.2.1 If yes, how do such rules define related actions (or claims)?

18.2.2 What are the necessary conditions? (*e.g.*, the same factual or legal relationship, related parties)

46. As mentioned in some responses, the 2007 Lugano Convention and the Brussels Ia Regulation define related actions as closely connected actions that should be heard together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. In addition, there are different conditions depending on the methods of dealing with related actions, either the staying of proceedings or declining jurisdiction.

19. Do you consider the solutions currently available for dealing with related actions (or claims) to be effective?

47. Most jurisdictions consider the solutions currently available for dealing with related actions to be effective. Some raised points for consideration or gave reasons why the current solutions were considered not entirely effective or needing more improvements. They include, for example, not explicitly or sufficiently regulating the matter under both law and international agreements; do not emphasise the need to protect the interests of the parties and the needs of international mobility.

PART IV: NECESSITY, DESIRABILITY AND FEASIBILITY OF A NEW INTERNATIONAL INSTRUMENT

20. How would you assess the (i) necessity, (ii) desirability and (iii) feasibility of a new international instrument harmonising, or coordinating, the legal framework dealing with parallel proceedings and related actions (or claims) in court-to-court cases?

48. Most jurisdictions would welcome a new international instrument harmonising, or coordinating, the legal framework dealing with parallel proceedings and related actions (or claims) in court-to-court cases. Certain jurisdictions would keep an open mind to such a new international instrument, with their final position being dependent on the content of a possible instrument and the need for further consultation.

49. Various reasons for supporting the development of such a new international instrument were mentioned, including the similarity of criteria in different jurisdictions; the facilitation of cross-border commercial arrangements and trade; providing greater certainty, predictability and efficiency in cross-border dispute resolution for individuals and businesses; discouraging forum shopping; reducing risks and costs.

50. There were also particular issues or comments raised as regards the questions of necessity, desirability and feasibility, such as challenges resulting from policy issues related to judicial sovereignty and economic interests; the existence of national law rules which do not require a binding international instrument; an international instrument only working in practice if it contains rules on direct jurisdiction; additional difficulties in providing criteria for related actions compared to parallel proceedings; the need for the new instrument to be built on the 2005 and 2019 Conventions; the preference for national courts to have some discretion when deciding whether to

obtain or decline jurisdiction or staying proceedings; the relevance of provisions ensuring expedited recognition and enforcement of judgments issued by the better forum. Some responses also provided suggestions regarding jurisdictional rules, such as that they should be compatible with national law; the relationship with the rules on recognition and enforcement; and the desirability of including some elements based on the *forum non conveniens* doctrine.

21. How would you describe the (i) necessity, (ii) desirability and (iii) feasibility of a new international legal framework for cooperation between courts dealing with parallel proceedings and related actions (or claims) in civil or commercial matters?

51. Most jurisdictions would welcome a new international legal framework for cooperation between courts dealing with parallel proceedings and related actions (or claims) in civil or commercial matters. Certain jurisdictions would keep an open mind to such a new international instrument, with their final position being dependent on the content of a possible instrument and the need for further consultation.

52. Various reasons for welcoming such a new international legal framework for cooperation were mentioned, including to facilitate legal certainty in transnational justice. There were also particular issues or comments raised as regards the questions of necessity, desirability and feasibility, such as the interdependence between the draft rules on parallel proceedings and on related actions; the attention due to various views on independence of courts as well as to different rules of litigation and various languages of courts; the relevance of courts exchanging information and the possible need for rules on professional secrecy / confidentiality. It was also stated that such a new framework is not needed, and that such a cooperation regime could require courts to engage in communications which are considered unlawful or immoral in certain jurisdictions.

21.1 Please comment on the desirable aspects of such a potential framework for cooperation between courts, including, for instance, information-sharing among courts, coordination, transfer of jurisdiction (for all or part of a proceeding, including for a matter to which foreign law is applicable).

53. Responses listed a number of aspects which would be desirable for a potential framework for legal cooperation between courts, such as information-sharing, including the use of requests for information on foreign law as under various international agreements; rules for staying proceedings; a system of direct communication between courts; and a non-mandatory system of transfer of jurisdiction, including views on the possibility to restore access to justice in the original jurisdiction.

54. On the particular aspect of information-sharing, various suggestions were submitted that could be included in a possible new instrument, such as the appointment or establishment of a central body in charge of channelling information between courts; the inclusion in the shared information of the time the litigation was brought before a court in a particular case, and the sharing of information with the court which stayed the proceedings, that the proceedings with regard to the same case are concluded with a valid and final decision; the drafting of guidelines for more effective means of cooperation, including rules governing information-sharing, not only with regard to the case at hand but also regarding important current case law developments, the court where the case is being heard, the identity of the judge for the case, the practical way in which the courts / judges are able to communicate.

21.2 What elements of a direct court-to-court communication system would be considered to be crucial (cf. UNCITRAL Model Law on Cross-border Insolvency)?

55. Responses mentioned several elements that would be crucial including, the participation of Central Authorities, or the appointment of a person or a body to act at the direction of the court, for cooperation. As regards courts, responses noted that one should consider whether courts are authorised under their respective national law to directly communicate; whether it is convenient for

various courts to communicate; the mode of court-to-court communication, coordination and information transmission. In addition, depending on the form and content of the future instrument, either a system of (direct) communication between courts or a system of (indirect) communication could be envisaged. Other elements that were mentioned include considering using a standard form to communicate crucial information on proceedings (including on procedure, norms and jurisprudence of the applicable law); language of communication; the issue of confidentiality; time frames for responses; the formal and unified channel to communicate; as well as communication in writing. Lastly, some responses noted that it would be desirable to address the issue of access of the parties, and of other necessary participants in the proceedings, when located in different jurisdictions.

22. Are there any other issues, concerns or successes you would like to submit for the consideration of the Group?

56. Many responses did not specifically answer this question; of those that did, several supported the drafting of a binding instrument dealing with direct jurisdiction, including rules on avoiding parallel litigation; several preferred to focus on parallel proceedings, or only mentioned this issue, rather than related actions. It was also highlighted that in practice it is up to the parties to decide to what extent proceedings should be coordinated or whether information from one proceeding should be included in the other.