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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?

To the extent that the scope is limited to parallel actions, this is acceptable, even though the stated objective – enhance legal certainty, predictability and access to justice (Executive Summary, p. 4) – is very unlikely to be furthered by the draft. To the contrary, the draft is likely to facilitate guerrilla litigation tactics by forcing courts and parties to engage into time-consuming and costly coordination proceedings.

Conversely, related actions should not be covered in any case. They raise too many complex questions. It is not by chance that the respective articles in the Brussels Ibis Regulation and the Lugano Convention are mostly dead letter.

Of course, avoiding parallel proceedings is desirable in principle, but is of no use if the resulting judgment is not recognizable and, if applicable, enforceable in the other jurisdiction. The scope should be limited to situations where recognition is at least possible in principle under applicable law and likely.

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 Convention should apply in particular to disputes of an economic nature, excluding anything relating to family matters, personal status, bankruptcy, etc. So yes, from a material point of view, the scope of the Convention seems correct.

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 list of exclusions is too long. Every single exclusion creates demarcation issues. Article 2 would create numerous demarcation problems and there is no single court instance to clarify, unlike the European Court of Justice for the Brussels Ia Regulation. Who is a consumer? What is a defamation? What about exception 1(p) on certain anti-trust matters? There can be satellite litigation merely on the issue of subject-matter scope. If such a long list of exclusions is necessary, maybe the whole project is questionable.

We note the absence of a provision on conflicts with other international instruments, such as, e.g., the Lugano Convention, but we understand that such a provision will likely be added later.

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).

No comment.

#### **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 is standard.

With regard to related actions, the definition lacks clarity or is too broad. International disputes may involve numerous proceedings with some common facts, which may involve many different jurisdictions. If proceedings must be blocked every time some of the facts are similar or some of the parties are the same, this risks creating more complications than solutions and does not prevent parallel proceedings. Coordinating a plethora of proceedings by attempting to bring them all before the same court seems illusory to us.

The provisions concerning related proceedings create more legal uncertainty against little if any potential benefit to anybody.

### **Question 3 on when a court is deemed to be seised**

What are your views on Article 4?

In some jurisdictions, civil proceedings are not initiated in court, but, e.g. in a conciliation procedure, such as in Switzerland. Under the Lugano Convention, there had been decades-long discussions whether initiation of a conciliation was sufficient for pendency (until the ECJ declared that it is, in the Schlömp case, C 467/16, 20 December 2017). It would make sense to clarify this in the wording of Article 4.

### **Question 4 on Article 5 obligations**

What are your views on Article 5?

The wording of this provision includes several options, some of which make sense, others less so.

- The first brackets in para. 1 are probably erroneous, as a verb would be missing without the bracketed text. The words "as soon as it is informed" seem to ignore the right to be heard of the other party/ies to the proceedings. It would be better to write something like: "A court that must suspend proceedings in accordance with this Chapter shall do so on application of a party or if informed of the proceedings in the other court through the communication ...".
- The second bracketed text in para. 1 should be deleted. We do not see a basis to allow third parties ("other relevant person") to be involved in civil proceedings.
- Suspension should be kept, since dismissal could lead to loss of claims due to statutes of limitations if the other court does not render a judgment on the merits.
- Para. 3: There is a risk of "torpedo" actions. We therefore suggest to opt for "unlikely to render a judgment on the merits within a reasonable time".

### **Question 5 on priority jurisdiction / connection**

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

Articles 6 to 8 follow a fairly logical sequence, namely exclusive jurisdictions, which cannot be derogated from and mainly concern immovable property (Article 6); then the choice of the parties (Article 7); and finally other connecting factors (Article 8), where the parties could typically choose between the courts of the defendant's domicile and other jurisdictions, e.g. based on the place where an unlawful act was committed, etc. This sequence does not pose a problem in itself.

Article 7(1): It is advisable to require an agreement by text as in Article 3.c) of the 2005 Choice of Court Convention for the benefit of legal certainty and predictability.

Article 7(2) is unclear with regard to asymmetric exclusive choice of court agreements, which are standard e.g. in the finance industry. They should be explicitly covered by 7(2) in order to avoid the misguided discussion about whether or not such agreements are excluded from the 2005 Choice of Court Convention (from a practitioner's point of view, they should definitely not, but are often said to 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)?

No comments.

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?

The fact that a court must decline jurisdiction when its jurisdiction is not based on a pre-established standard criterion seems quite standard to us.

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

It depends on the scope of the convention itself.

### **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?

In our opinion, the cascade reasoning should be as follows: first, exclusive jurisdiction (in particular for real estate): only the court of the place where the property is located has jurisdiction (Article 6). For jurisdictions that may then be alternative, the parties' wishes take precedence (Article 7).

In the absence of a choice by the parties, where there are alternative jurisdictions within the meaning of Article 8, the court first seised should have jurisdiction. We therefore have a clear preference for the temporal factor. Decisions on jurisdiction should not be left to the discretion of the judge. This creates legal uncertainty and unpredictability and tends to encourage parallel proceedings rather than anything else. It also likely encourages common law courts to allow pre-trial discovery, a notoriously cumbersome, costly and inefficient process that users abhor (one reason for the popularity of arbitration in common law jurisdictions).

If we had to choose, we would prefer the second version set out in Article 9 of the Draft Convention.

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

The first alternative, which leaves it up to the judge first seised to determine whether he or she is the appropriate judge, leaves the second judge dependent on the choice of the first. The second judge will probably not accept this if he or she considers that the first judge's assessment is incorrect, because he or she is the most appropriate court. Instead of avoiding parallel proceedings, this method risks creating more parallel proceedings.

Any method other than that of temporal priority (subject to Articles 6 and 7) seems to us doomed to failure in practice and likely to create more parallel proceedings in addition to causing extensive satellite litigation to the detriment of, in particular, the claimant in the first proceedings.

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

Cf. the answers to questions 7.1 and 7.2.

### **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)?

Article 10 is framed on the common-law concept of forum (non) conveniens, a concept that has been rightly refuted in civil law jurisdiction due to its utter inefficiency. The concept is wonderful for lawyers on an open-fee arrangement but a nightmare for parties. If this is the price to pay for avoiding parallel proceedings, it is too high a price.

Only a straightforward, easy to apply concept should be adopted, namely the priority of the court first seized, under the condition that a judgment on the merits by the court first seized is likely to be recognized and, where applicable, enforced in the other court. This is, in essence, the approach of the Brussels Ia Regulation and the Lugano Convention and it has worked reasonably well.

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

Such vague criteria risk creating significant delays, and the judge will not know how to decide, which suggests that he or she will fall back on what he or she knows, namely his or her own jurisdiction and his or her own procedural law.

For example, if a Swiss court has to determine whether a court in India is better placed to decide the dispute, it will have to decide on the likelihood that the Indian courts will render a decision within a certain period of time, how they will proceed with the administration of evidence, what law they will apply, whether or not the judgment will be recognized, how the parties will be able to participate in the proceedings in India, etc. The parties will have to take position on this, with one party arguing that India is more appropriate and the other that the Swiss courts are more appropriate. Again: wonderful for the lawyers and for a party that wants to obstruct justice on the merits.

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.

In our opinion, the draft convention is not capable of efficiently preventing parallel proceedings.

It is largely based on the inefficient principle of forum non conveniens and thus invites obstructing tactics, including parallel proceedings initiated solely for the purpose of harassing a claimant and postponing a decision on the merits. The draft therefore risks leading to more parallel proceedings than is currently the case.

If we want to avoid parallel proceedings, we need choose a system based on strict criteria, i.e. that provides for: 1) exclusive jurisdiction, particularly for immovable property; alternative jurisdiction available to the parties, in which case jurisdiction is determined primarily according to 2) the choice of the parties and, failing that, 3) according to the principle of temporal priority.

Otherwise, a party sued at their residence (the famous "juge naturel") could throw a spanner in the works of justice by initiating a counteraction (e.g. for negative declaratory relief) in another

jurisdiction, thus unleashing a potentially years-long process of coordination between the two courts on the basis of vague criteria and potentially extensive evidence taking, including appeals to one or two instances. This is a no-go at least in most civil-law jurisdictions and would seal the fate of such a convention.

### **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.

We reiterate here our concerns regarding related actions. This chapter should be deleted. It would create more problems than solutions.

International disputes may involve a large number of different actions, which may be more or less related to each other. In such cases, the two (or more!) courts with potential jurisdiction will have to determine whether they are best placed to rule on the case, again based on opportunity and vague criteria and will hear from several parties with different interests.

Attempting to bring together different disputes simply because they have some elements or parties in common is notoriously complicated in practice. Even more so than for parallel actions, such a regulation could affect many disputes and parties at the same time, with the delays and complications that this entails.

### **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?

We think this is wishful thinking. The purpose of regulating parallel proceedings is, in particular, to avoid lengthy and costly proceedings. If courts around the world, with very different procedural regimes and traditions, have to start exchanging information with each other, it will take a considerable amount of time, and there is no guarantee that the courts will reach a conclusion.

The effectiveness of such a cooperation and communication mechanism also depends on the level of development and effectiveness of the local judicial system. Being confronted with potentially ineffective judicial systems would only create additional complications and could waste a lot of time for the parties.

There is a high risk that a party tempted to engage in delaying tactics could use the convention as a “torpedo” by bringing an action before the court of a particularly slow or inefficient state. Instead of avoiding parallel proceedings, this would in fact create a third proceeding between the courts themselves, which will in the end result to nothing. The communication and cooperation mechanism does not seem appropriate to me..

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

The cooperation and communication mechanism should not be formulated as an obligation. Otherwise, what happens if one court does not communicate with the other court seised, or does not follow through with the procedure because of a lack of results? Could the parties argue that the decision of the court retaining its own jurisdiction is flawed because it did not communicate with the other court? Would this open up endless avenues of appeal?

The idea to hold joint hearings (Article 17) is unlikely to work in practice. The procedural rules are so different that a joint hearing creates more problems than solutions, including likely appeals based on a perceived violation of some procedural rule. Procedural rules are often mandatory and not within the discretion of the courts, let alone the parties, e.g. admissibility of evidence, language of the proceedings, scope of witness testimony, confidentiality of proceedings (an issue in related actions). Courts are unlikely to venture on such uncharted terrain.

### **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 safeguards are fine on the face of them and essentially a matter of course. In practice, they allow a court to ignore the Convention in their discretion. A striking example is the insistence of the European Court of Justice that any case involving the (very generously defined) public policy principles of the EU be decided by a EU court with potential recourse to the European Court of Justice.

### **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.

No. Leaving it up to judges to decide which court has jurisdiction does not create legal certainty, especially since the criteria on which they must base their decisions are extremely vague. The communication mechanism will make the decision excessively complicated.

In our opinion, the solution envisaged by the convention does more harm than good in terms of avoiding parallel proceedings, as it creates legal uncertainty, which is not conducive to easier access to justice or lower costs, since the steps and positions taken by the parties will be multiplied.

These problems are even more obvious in case of related actions. It is not by chance that the respective articles in the Brussels Ia Regulation and the Lugano Convention are essentially dead letter. In practice, the coordination of merely related actions between different jurisdictions is a nightmare for everybody involved except the party that wants to avoid a reckoning on the merits.

If we want to achieve these objectives, we must apply straightforward, easy-to-apply criteria, such as temporal priority, or abort the project.

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

In our opinion, the draft agreement would not improve the status quo but would only unnecessarily complicate the current situation without providing any real solution.

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?

It seems to us and based on decades-long experience in international litigation, that the draft convention carries a significant risk of satellite disputes. Such a convention likely leads to an increase of parallel proceedings. A party wishing to obstruct proceedings could bring cases before (all) possible alternative courts, forcing judges to make decisions based on vague criteria and leading to endless exchanges between the parties over which court is most appropriate.

In addition, the courts would have to communicate with each other, which would further delay the proceedings, incur costs, and in no way guarantee a satisfactory outcome. To complicate matters, courts in civil law jurisdiction do not have a tradition of coordination proceedings through direct contacts nor do civil procedural codes typically provide for the necessary procedures.

In other words, the draft convention is ideal for parties who wish not to avoid but to cause additional parallel proceedings!

#### **Question 14 - comments**

What other comments, if any, do you have?

1. The Consultation paper shows the basic problem with this draft: it does not explain why the draft is necessary at all. Yes, there are sometimes parallel actions (in our experience not very often), but why exactly this is a problem that needs to be addressed and why the draft would be helpful remains unexplained. Section I.A. on the purpose of the instrument is tellingly short and vague. If it is not necessary to make a law it is necessary not to make a law. This adage also applies to international conventions.

2. The drafters seem to have had common-law jurisdictions on their minds. There, courts have some experience with handling the relevant issues, namely, communicating with other courts and addressing complex assessments such as required by Articles 9, 10 and 11 of the draft. Civil courts do neither have the necessary experience nor even the necessary procedural rules. The draft is highly unlikely to be acceptable to the judiciary and governments in civil law jurisdictions. It is also highly unlikely to be welcomed by business people for whom the draft should be prepared. They prefer arbitration in international disputes amongst others exactly to avoid such cumbersome preliminary issues related to forum (non) conveniens and related jurisdictional discovery.

3. In sum, the project should be discontinued. We are surprised and frankly dismayed that such notoriously inefficient common-law concepts should be adopted for a global convention. The Hague Conference should know better./