

## *Personal Details*

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Please indicate your profession:

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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?

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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?

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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)?

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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).

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#### **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.

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

What are your views on Article 4?

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

What are your views on Article 5?

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

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

See my response to Question 9 below.

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

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

See my response to Question 9 below.

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?

See my response to Question 9 below.

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

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### **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?

See my response to Question 9 below.

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

See my response to Question 9 below.

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

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### **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)?

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

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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 my view, the proposed draft text does not provide an effective framework for dealing with parallel proceedings in an international context. There are a number of problems, as outlined below.

(i) The draft text identifies a number of connections which are, in effect, given priority status under article 8. The underlying assumption is that if one Contracting State court has one of the listed connections and the other does not, the court which has the listed connection must be the more appropriate forum for the proceedings. In my view, that does not follow. The question of which forum is more appropriate may depend on many factors, including those identified in article 10 of the draft text as well as, for example, whether a particular court has been designated in a non-exclusive jurisdiction clause or is seised of other similar proceedings. Accordingly, the filtering mechanism at article 8 may well result in a less appropriate court taking jurisdiction.

(ii) Where proceedings are started in two Contracting State courts which both have a listed connection, the draft text provides mechanisms – the detail of which is still to be resolved – to decide which should suspend proceedings in favour of the other. Both options provide a combination of "first seised" and "forum non conveniens" approaches. The problem, however, is that this combination risks ending up with the worst of both worlds. The fact that the first seised court has an immediate advantage – either because it automatically takes priority (under option two) or because it is entitled to make the "more appropriate" determination (under option one) – means that, on both approaches, the draft text incentivises a race to court. However, that is not the end of the matter – on both approaches, the second seised court (assuming, under option one, that the first seised court has not made the "more appropriate" determination in its favour) may be

able to proceed with the action in certain circumstances, with its ability to do so subject to anything from a fairly low to a very high hurdle depending on which version of the draft text were ultimately to be adopted. Accordingly, even where the race to court is lost, another party who would prefer the case to proceed in a different Contracting State court is incentivised to begin a second set of proceedings in that court (assuming that court also has a listed connection). The draft text may therefore incentivise both a race to court and the commencement of parallel proceedings.

(iii) Although it is not clear from the draft text, it seems from the consultation paper that the intention is that whenever a court has priority under article 8 (because it is the only court with a listed connection) or article 9 (because it is first seised, under the second option, or it is the court which the first seised court determines to be more appropriate, under the first option), its jurisdiction will be mandatory. In other words, that court will be obliged to exercise jurisdiction, regardless of whether it considers that the other Contracting State court that has been seised is in fact a more appropriate (and perhaps clearly more appropriate) forum – or indeed whether there is a third state court, in which proceedings may already be underway, which it considers to be (clearly) more appropriate. (There is a potential carve-out under article 20 which would allow the court to suspend or dismiss the proceedings to prevent an abuse of process, but that is likely to be a high bar.) This seems highly undesirable for a number of reasons. First, it may result in a less appropriate court taking jurisdiction. Second, it may result in parallel proceedings that could otherwise have been avoided, if (in the absence of the Convention) that court had the power to stay its proceedings. Third, it may encourage claimants to "game the system" by starting proceedings in two Contracting State courts, one with and one without a listed connection, in order to achieve mandatory jurisdiction that would not otherwise exist.

(iv) In many cases, the proposed framework will not fulfil its aim of preventing parallel proceedings. Indeed, it seems that in some cases it will make parallel proceedings more likely. Article 9, in particular, envisages that in some cases – perhaps many cases – both Contracting State courts will be able to proceed with the action. And indeed one of those courts will be obliged to proceed, even if it would otherwise have stayed its proceedings in favour of the other court (or a third state court which it considers to be more appropriate).

(v) Article 5(3) also gives rise to concerns, since it requires a court which suspended its proceedings in accordance with the Convention to proceed with the case, on request, if the court for whose benefit it suspended its proceedings does not render a judgment on the merits at all, or is unlikely to do so, or to do so within a reasonable time (depending which version of the draft text were to be adopted). This appears to be the case whether or not the court in question considers itself to be an appropriate forum, and whether or not it has a listed connection, and indeed whether or not it would be able to exercise jurisdiction under its own conflict of laws rules. That seems undesirable.

In short, therefore, the proposed draft text is unlikely to meet its stated aim of preventing parallel proceedings in every case, and may incentivise parallel proceedings as well as introducing perverse incentives such as a race to court. At the same time, it introduces a complex framework which is likely to give rise to difficulties and differences of interpretation and application among Contracting States, leading to satellite litigation (as addressed further below).

### **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.

I do not see any advantages to the proposed framework for related actions. It does not appear to oblige any Contracting State court to do anything other than determine, for itself, whether a single court should adjudicate all or part of the related actions and, if so, which court that should be. If the determinations differ, then it seems that would be the end of the matter. It is therefore difficult to see why it should have any significant effect in reducing the number of related actions in practice.

### **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?

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

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### **Question 12 on safeguards**

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

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### **Question 13 on the objectives of the Draft Instrument**

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

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

I do not believe that these objectives would be achieved by the rules set out in the draft text. It is likely that a Convention along the lines proposed would simply add uncertainty and complexity, as different Contracting States grapple with the interpretation and application of its provisions. It may also make dealing with parallel proceedings and related actions more costly, with parties pursuing satellite litigation to seek to prevail in their preferred interpretation or application of the Convention and obtain procedural advantage – including potentially, in some cases, by delaying the progress of an action against them. These disadvantages are, in my view, unlikely to be outweighed by a reduction in inconsistent judgments, since for the reasons outlined above I consider that, in many cases, the draft text would not be effective in preventing parallel proceedings or related actions.

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

I do not consider that the proposed rules set out in the draft text would improve the status quo for the reasons outlined in my other responses.

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?

I believe there would be a significant risk of tactical or satellite litigation. For example:

- As outlined above, parties would be incentivised to engage in a race to court, particularly where there was more than one Contracting State which had a listed connection.
- Where proceedings were commenced in a Contracting State which did not have a listed connection, but which might be a perfectly appropriate forum for other reasons, the defendant could seek to commence parallel proceedings (perhaps for a negative declaration) in the court of another Contracting State which had a listed connection, to prevent the case proceeding in the first court. This could cause delay and additional expense.
- In the above scenario, or in any case where proceedings were brought in two Contracting State courts, there could be satellite litigation as to whether either or both courts in fact had a listed connection, again leading to cost and delay.
- Where each court did have a listed connection, there could be satellite litigation as to, for example (and depending on the wording ultimately adopted) whether the second court was entitled to resume proceedings under the criteria in article 9, whether the court that was given priority was likely to render a judgment on the merits or do so within a reasonable time under article 5(3), or whether any of the "safeguard" provisions under articles 19 to 21 applied.
- Claimants could seek to "game the system" by starting proceedings in two Contracting State courts, one with and one without a listed connection, in order to achieve mandatory jurisdiction that would not otherwise exist.

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

What other comments, if any, do you have?

Parallel proceedings and related actions can sometimes give rise to complex issues in practice. However, I do not consider that a Convention along the lines proposed would be likely to ameliorate these issues in most cases, and indeed such a Convention may cause additional problems leading to increased costs and delay. It therefore does not seem to me to be a worthwhile endeavour for the HCCH and its members.