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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?

We have no comment on this matter.

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?

We have no comment on this matter.

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)?

We have no comment on this matter.

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).

We have no comment on this matter.

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 definitions of “exclusive choice of court agreement” and “non-exclusive choice of court agreement” (including variants thereof, such as asymmetrical jurisdiction clauses) should be stated in the “Definitions” provision under Article 3(1). The proposed Convention provides the best opportunity for standardisation, to facilitate the adoption of consistent and autonomous interpretation across signatory parties. These definitions in particular will contribute significantly to the rationalisation and simplification of Article 7, which we think is currently structurally unwieldy. Furthermore, such a definition at the beginning of the proposed Convention is consistent with the placement of Article 3's definition of “exclusive choice of court agreement” in the 2005 Hague Choice of Court Agreements Convention. It is also necessary to distinguish the proposed Convention's definition (which the Consultation Paper at paragraph 34 states does not contain a 'form' requirement) from the 2005 Choice of Court Agreements Convention (which does contain a 'form' requirement).

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

We have no comment on this matter.

Question 4 on Article 5 obligations

What are your views on Article 5?

We have no comment on this matter.

Question 5 on priority jurisdiction / connection

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

Article 7

Article 7 is central to the Draft Text as it addresses the role of party autonomy in the management of parallel proceedings. In line with this purpose – as reflected in paragraphs 34–37 of the

Consultation Paper – certain aspects of its current structure may benefit from further clarification to ensure that the provision is comprehensive.

Although the current Article 7 is labelled as a provision on “party autonomy”, it appears to function in substance as a priority rule for resolving parallel proceedings arising from non-exclusive choice of court agreements. Clarifying this function may better assist courts in understanding how Article 7 is intended to operate in conjunction with the broader allocation of jurisdiction under Articles 8 and 9, particularly the “more appropriate court” analysis in Article 9.

Based on paragraphs 34–36 of the Consultation Paper, we understand Article 7 is intended to govern parallel proceedings arising from non-exclusive choice of court agreements that fall outside the scope of the 2005 Choice of Court Convention. If Article 7 is intended to address such situations comprehensively, two points merit further consideration.

First, the title and internal structure of Article 7 may benefit from refinement. The provision does not appear to regulate the formation, scope, or validity of party autonomy as such, but rather addresses the procedural consequences of party autonomy once exercised. A more descriptive title, such as “Parallel proceedings arising from non-exclusive choice of court agreements”, may therefore better reflect the provision’s function and assist in its interpretation. Similarly, for reasons of clarity and systemic coherence, consideration might be given to relocating the definition of “exclusive choice of court agreement” to Article 3 (“Definitions”), where other core definitions are located.

Second, Article 7(1) may not resolve all forms of parallel proceedings that can arise under non-exclusive choice of court agreements, including those referred to in paragraph 36 of the Consultation Paper (“non-exclusive agreements with purely prorogatory effect”).

To illustrate this, consider a contract providing that: (1) the courts of Utopia have non-exclusive jurisdiction over disputes between Parties A and B; and (2) Party B may also commence proceedings in the courts of Ruritania.

If Party A commences proceedings in Utopia, followed by Party B commencing proceedings in Ruritania, Article 7(1) as currently drafted does not determine how priority is to be allocated between the two courts. In particular, the condition in Article 7(1) that priority arises where “only one of the courts seised is designated under such agreement as having jurisdiction” is not satisfied in this scenario, since both the courts of Utopia and Ruritania are designated under the agreement. As a result, the direction that “that court shall proceed with adjudication of the dispute” and the corresponding obligation that “[a]ny other court shall suspend the proceedings” are not triggered. Article 7(1) therefore does not itself indicate whether the Utopian court or the Ruritanian court is required to suspend proceedings, or whether both courts may proceed concurrently.

If it is intended that such situations be addressed through recourse to the “more appropriate court” analysis under Article 9, we suggest that this relationship be made explicit within Article 7. Doing so would enhance legal certainty and assist courts in determining whether Article 7 is intended to displace or supplement Article 9.

A related point arises from the interaction between Article 7(1) and Article 7(3), particularly in cases where a defendant’s subsequent consent to jurisdiction differs from a jurisdiction designated in a prior choice of court agreement. Clarifying the intended hierarchy between these paragraphs may further enhance predictability and reduce the risk of inconsistent outcomes, consistent with the considerations noted in paragraph 37 of the Consultation Paper.

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

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

We confine our comments to Article 8(2)(d)(ii).

We acknowledge that the law applicable to the contract may be a significant factor for courts of common law jurisdictions in deciding whether to retain proceedings (see R Garnett, “Determining the Appropriate Forum by the Applicable Law” (2022) 71 ICLQ 589). However, this approach may be unfamiliar in at least some civil law jurisdictions, where questions of jurisdiction are typically decided prior to and separately from questions of applicable law, even where the underlying connecting factors may overlap.

These concerns are particularly acute where no express choice of law clause exists and the applicable law must be determined through choice of law rules, which necessarily vary from forum to forum. Conditioning jurisdiction on the outcome of that determination risks circularity, inconsistent outcomes in parallel proceedings, and premature engagement with merits-related issues at the jurisdictional stage.

The advantages of having the court of the State whose law governs the contract hear the proceeding are nonetheless considerable. To preserve these while addressing the concerns above, a possibility might be to amend the current wording of “the law applicable to the contract ...” to “the law chosen expressly by the parties to be applicable to the contract ...”. An express choice of law is relatively straightforward to determine at a preliminary stage, and would serve as a meaningful connecting factor.

Accordingly, we suggest that the use of applicable law as a jurisdiction/connection requirement in Article 8(2)(d)(ii) may merit careful reconsideration.

- 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?
Please see our comments above.
- 6.3 Are there any additional factors that you believe should be included?
We have no comment on this matter.

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?

Given Article 9’s importance to the design of the proposed Convention and the need for further work, we offer the following preliminary observations.

First, we understand Article 9(2) as providing for mandatory suspension of proceedings in favour of the court first seised. In a situation where parties have entered into a non-exclusive jurisdiction agreement, it is possible for a chosen court to mandatorily suspend proceedings if those proceedings were commenced in that chosen court second in time. This is different from the mandatory suspension provisions in Article 6 of the 2005 Hague Choice of Court Agreements Convention, which mandate that non-chosen courts suspend proceedings.

We are concerned that this mandatory provision may adversely affect the effectiveness of the communications and cooperation mechanisms designed in Chapter IV of the Draft Text. If there were to be a provision that proceedings must be suspended in favour of the court

first seised (so long as the first-seised court is of a Contracting State satisfying one or more of the requirements in Article 8(2)), it appears to us that courts may lack the incentive to communicate and cooperate with each other. This is especially so in the case of Contracting States where the judicial systems are under heavier workloads or stricter performance standards such as time to case disposal. Dispute system design analysis (see eg SI Strong, “The Role of Empirical Research and Dispute System Design in Proposing and Developing International Treaties: A Case Study of the Singapore Convention on Mediation” (2019) 20 *Cardozo J Conflict Resol* 1103) may help to improve the Article 9(2) mechanism such that it would encourage (or at least would not actively disincentivise) cooperation and communication between courts. In the interim, we suggest that the suspension mechanism be framed as non-mandatory, and that an explicit connection be made to the Chapter IV provisions in determining the appropriate court under Article 9.

Second, we think that the public policy carve-out in Article 21 should be applicable to Article 9. Whether an express reference should be made in Article 9, or whether it would suffice for Article 21 to include Article 9 within the scope of provisions over which Article 21 takes precedence, is a matter we leave to the drafters.

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

Subject to a more definitive draft on Article 9, our preliminary observations are as follows. Article 9 plays an important role by establishing the default rules for resolving parallel proceedings commenced in two chosen courts selected through a non-exclusive choice of court agreement. However, in its current form it does not fully leverage the innovative solution in the Draft Text: Chapter IV, which provides a formal avenue for courts to communicate and cooperate in resolving issues of jurisdiction in complex cross-border litigation. Courts already do, in practice, improvise by cooperating informally (see, for example, the case of a cross-border cryptoasset investment dispute involving multiple parties engaged in Hong Kong and Singapore proceedings, *Finaport Pte Ltd v Techteryx Ltd* [2025] 1 *SLR* 1236). We would suggest that Article 9 be drafted in a way that supports, or at least does not deter, cooperation and communication between courts. We echo our response to 7.1 above in suggesting that an express link be made to Chapter IV in Article 9.

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

Subject to our responses above, we reserve comment on this question pending a more definitive draft of Article 9.

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)?

With respect to Article 10(c), we echo our comment above at 6.1 and suggest that “the law applicable to the claims” be revised to “in the case of proceedings concerning a contractual obligation, the law expressly chosen by the parties to govern the contract” or removed. We also urge the Hague Conference to consider perspectives from a wide range of civil law jurisdictions, such as China, Japan and the Republic of Korea, which provide for the possibility of an otherwise seized court to not exercise jurisdiction pursuant to their international civil procedure rules.

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

We have no additional comment beyond what we have stated in our response to 8.1.

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

We have no additional comment beyond what we have stated in our response to 8.1.

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.

We have no comment on this matter at this point in time, and look forward to a more complete draft produced by the Conference.

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 have no comment on this matter.

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 find this intriguing but have no substantive comment on this matter at this point in time other than our comment below.

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

This looks to be an innovative mechanism with few clear parallels in history. We foresee difficulties in coordination between judicial systems with differences in legal traditions, case management philosophies, institutional capacity, judicial resources, etc. That said, we are of the tentative view that it is preferable for the proposed Convention to include communication mechanisms even if there may be concerns over their eventual operation. We look forward to a successful implementation of this proposed Convention that would revolutionise complex cross-border commercial litigation through this process-oriented solution based on, among other things, judicial dialogue.

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?

We are in favour of the forum necessitatis provision in Article 19, and have no comment on the other provisions, subject to our responses above.

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.

We have no comment on this matter.

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

Subject to our concerns stated above as to structure, definitions, and list of connecting factors, we are cautiously optimistic.

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?

We have no comment on this matter.

Question 14 - comments

What other comments, if any, do you have?

We have no other comments.