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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?

The scope of the Draft Text appears appropriate.

You may, however, consider also excluding, in the second sentence of 1.1:

- the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*). For consistency, it also seems best to ensure all exclusions are properly reflected in article 2,

- any criminal law matters are excluded (as some criminal proceedings involve civil claims being made).

- any requests for interim relief/provisional and protective measures. This may be the purpose or intention behind the note included under article 3 Definitions. However, the scope of that point, which relates to the fact that a "related court order to compel or restrain the performance of any act is sought in a court of another Contracting State" does not seem sufficiently broad. The scope and application of interim relief usually being limited to the territory of the country in which it is sought (and the recognition of such relief abroad being limited), there seems to be no reason to subject it to the regime for parallel proceedings. Requests for interim relief should moreover be excluded regardless of the question whether they are "related" to proceedings on the merits or not. In some cases or countries, it is possible to initiate separate proceedings to obtain interim relief (e.g. in summary proceedings).

The question is also whether, more in general, expedited/summary proceedings should not be excluded from the scope of this Convention either, in order to avoid that the expedited treatment of a case would be jeopardised.

1.2 Does the subject matter scope of the Draft Text cover those matters for which rules on parallel proceedings and related actions would be beneficial?

Yes. However, please note the comment below on the definition of "parallel proceedings" and in 1.3.

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)?

See my comments above on (i) the exclusions included in article 1.1, and also on the need to clarify the exclusion of any criminal law matters, and (ii) the applicability of the Convention to requests for interim relief and summary/expedited proceedings.

Under "family law matters", you may wish to clarify that this includes questions of parental responsibility (i.e. rights of custody, guardianship, protective measures etc).

It think it merits clarification what is meant with "related proceedings" when it comes to arbitration (either in the Explanatory Note or in the definitions). Inspiration could be sought

in this respect in Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast):

"This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award."

Apart from antitrust, would anti-competitive behaviour more generally need to be excluded (e.g. state aid, anti-boycott)? The scope of this exclusion in any event requires clarification, in terms of whether it covers also unfair trade practices.

Lastly, I note that law enforcement proceedings are excluded. However, it would be appropriate to exclude enforcement proceedings more in general.

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).

See my comment below on the definitions. I believe the definition of "habitually resident" as currently drafted may give rise to issues as to the predictability of the application of the Convention.

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 current definition of "parallel proceedings" is very broad. Indeed, it only refers to the criterion of "parties" and "subject matter". I wonder whether this is sufficiently precise, and whether what is meant with subject matter should not be clarified as meaning that the proceedings must be based on the same underlying claim, demand, and/or legal issue that is being litigated. This would bring the treatment of parallel proceedings more in line with the boundaries for *res judicata*.

The current definition gives rise to the risk that, if the claims relate to a similar fact set, they arguably have the same "subject matter" and the proceedings may be considered to be "parallel" even where the claim and legal issue to be decided is in fact different. In that scenario, the proceedings should, however, rather be treated as related proceedings as their treatment as "parallel" may not be justified.

The definition in article 3.2 of where persons can be considered to be "habitually resident" seems to refer to very different criteria, which may in fact conflict. The question is whether the place where one is habitually resident should not be determined in a more objective manner, referring to the personal law applicable to the entity/person involved in the proceedings according to applicable private law rules. This would also ensure that it is predictable for that entity/person in question when it may be subject to the rules of the Convention, as this should not come as a surprise.

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

I believe the current drafting of this article may give rise to issues. The idea that proceedings may be considered lodged before they have been properly served on the other party does not seem in line with the rights of defence, and may lead to abuse (where a party rushes to lodge a document with a court when not yet properly served).

In addition, the provision does not take into account that proceedings may in certain instances be commenced with a lodging of court documents, which then have to be formally notified to the other party to be valid (without being "served" as such).

Finally, the article seems to derogate from the rules of the Hague Convention on service, which provides for multiple means to serve a document (also depending on what the contracting state has accepted). I wonder whether this provision may not give rise to issues to the extent the wording derogates from that Convention, or insufficiently captures the nuances of when a defendant will be considered to be properly served (under the Convention or otherwise). Again, there is an issue of predictability and consistency with other (broadly applicable) international instruments here and a party should in my view not be confronted with the application of this Convention to the extent that it was not properly served in accordance with the international rules applicable to it under the international law instruments applicable to the serving of documents.

Question 4 on Article 5 obligations

What are your views on Article 5?

Article 5.2 seems problematic. Firstly, the drafting seems a bit unclear as to the country in which the judgment needs to be capable of enforcement. In the country of the court that has suspended the proceedings, or in the country of the court having rendered the judgment?

In both cases, however, the question is how this will be determined. How will the court that has suspended proceedings determine that another court has rendered "a judgment capable of recognition and, where applicable, of enforcement in that Contracting State". The court having suspended would (save in the event of automatic recognition, e.g. in the EU) not be competent to deal with the question whether the judgment rendered in another contracting state is capable of recognition or enforcement in that state. This might be dependent on other proceedings and a debate may therefore arise on whether the judgment is indeed capable of recognition or enforcement (e.g. when it is appealed) . Questions may also arise on whether it is capable of recognition/enforcement in the court of the state which has suspended proceedings. As also flagged in the note, I believe this warrants further consideration, and is likely to give rise to substantial issues if not dealt with.

Should there moreover not also be a mechanism in 5.2 for the parties to request that the proceedings be terminated/case be dismissed if a judgment capable of recognition/enforcement was rendered? Otherwise, how will the court know a decision was rendered? Article 5.1 and 5.3 do not seem to cover the scenario of 5.2.

In article 5.3, the concept of "within a reasonable time" seems very delicate and hard to assess. How will a court of one country determine what is reasonable? Should it consider the duration of proceedings in its own jurisdiction, or in other jurisdictions? Will the court decide this based on party submissions/an adversarial debate or of its own motion (which seems problematic)? The possibility to take the case if the other court is "unlikely to render" within a reasonable time seems even more audacious and would require the courts to potentially make very bold statements or decisions.

Question 5 on priority jurisdiction / connection

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

As for article 6, I believe the question whether this should concern only rights "in rem" merits further reflection. As currently drafted, e.g. lease agreements would not be caught. This may give rise to issues in practice, to the extent that disputes in relation to such rights may be covered by mandatory rules on jurisdiction which one could not derogate from.

Article 7 also requires further reflection on whether it also applies where one of the parties contests the validity of the choice of court agreement. Should, in that case, the court seized in accordance with the choice of court agreement then be required to first decide on the validity of that clause and the suspension then be assessed in the light of the outcome?

Also, where non-exclusive agreements are concerned, discussion may arise on the validity of the clause and/or which court is competent in case the two courts may be caught. More detailed rules would, in my view, be required to deal with this delicate situation, in order to avoid issues of interpretation/discussion and uncertainty.

On article 8, I have difficulties understanding how this article will be applied in practice, for the following reasons:

- it is not clear to me how the court will take this decision - does it need to make the assessment as to jurisdiction/connection of its own motion/based on submissions or an adversarial debate between the parties? If the latter, this may defeat the purpose of the idea not to have parallel proceedings (e.g. in Belgium, the courts may determine whether they have jurisdiction only at the end of the proceedings). If the former, would that decision then be capable of appeal/challenge?
- the concept of reasonable timeframe must definitely be further considered and seems very delicate. How will a court of one country determine what is reasonable? Should it consider the duration of proceedings in its own jurisdiction, or in other jurisdictions? What is meant by commenced? Does this mean that discussions on the merits have started, or that the proceedings have formally started (even if they may take some time to start due to issues of, e.g. attribution, procedural discussions etc.)? Will the court decide this based on party submissions/an adversarial debate or of its own motion (which seems problematic)?
- the interaction between article 8 and 7 needs to be clarified, especially in the event of non-exclusive choice of court agreements
- article 8.2 may conflict with how other international law instruments determine jurisdiction/connection and seems problematic; more particularly, without having verified this in detail, the criteria may not be compatible with Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) or other legal instruments and may give rise to issues of interpretation/conflict and unpredictability; in this regard, I'm not sure that it is appropriate that a Convention dealing with parallel proceedings should in reality determine based on what criteria the courts of the Contracting States have jurisdiction or determine connexity? This seems to far exceed the scope of this instrument.
- if the Convention is to detail the list of criteria to determine jurisdiction/connection, it must be considered whether it is exhaustive
- as rightly indicated in the notes, significant questions of interpretation/application may arise in the event of multi-party conflicts, where the court may consider that the criteria of paragraph 2 are dealt with vis-à-vis one, but not all parties
- what happens if a party disagrees with a court's assessment/determination? Will the decision to suspend/dismiss be subject to regular appeal? Will this then not defeat the purpose of the Convention?

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 above. I have serious doubts as to how this will work and whether this list is exhaustive and will work in relation to multi-party proceedings.

- 6.2 Based on your experience, do you consider these factors appropriate for parallel proceedings i.e. for obliging courts to suspend or dismiss proceedings if they are not seised on the basis of one of these? Why or why not?

While I consider the factors to be appropriate at first sight, I think it needs to be seriously considered whether the purpose of the Convention should be to try and unify, through the back-door, existing international instruments on jurisdiction.

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

You may want to consider adding rules in relation to special jurisdiction (e.g. operations of a branch, claims for restitution, salvage of cargo or freight), claims for warranty/guarantee, and insurance contracts, in line with the provisions of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

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?

I would be of the view that it is most appropriate for the court first seised to consider whether it is the most appropriate court to deal with the question of whether it is the most appropriate court.

I think, however, the question of resuming the proceedings for courts that have suspended proceedings under 9.4 is problematic in terms of the interaction with article 5.3 (see notably my comment on how that court would determine that no judgment will be rendered within a reasonable time).

In addition, regardless of which court would be considered competent to deal with the question of the most appropriate court being seised, I believe the concept of "exceptional circumstances" would have to be defined and/or merits clarification in an Explanatory Note as it is capable of creating a number of interpretation issues, notably on when it must hear the case to ensure effective access to justice etc.

More in general, I think this mechanism requires further reflection to avoid that there is a situation of back and forth and a risk of denial of justice as a result of the fact that there are multiple rounds of discussions and determinations on which court is the appropriate court. It may be advisable to define (maximum) timeframes for the treatment of requests rather than just state the decision must be made expeditiously (as this term may be given a very different meaning in different jurisdictions).

Finally, it merits further consideration whether all the decisions contemplated by this article will be capable of appeal. If they are, this may be problematic and lead to significant additional delays, or they may be capable of abuse which is hard to counter.

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

I have difficulties understanding how the second approach would work, or how it may interact with the proceedings before the court first seized in the absence of a mechanism to deal with the suspension of proceedings before the first court. Depending on how long the determination takes, the proceedings may already be at an advanced stage. Will this not lead to a de facto suspension or discussion in the first proceedings? Should this not be dealt with? I note that, in both cases, there can be a communication between the courts but what if the courts disagree?

- 7.3 Do you have a preference for either approach? If so, please explain why.
See under 7.1.

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)?

I believe the criteria in article 10 are appropriate but complex to consider in practice (see 8.2 below).

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

I believe the criteria in article 10 are appropriate, but these may require a very complicated assessment to be made (e.g. also on applicable law, capability of enforcement). In the absence of submissions and discussions of the parties, I have serious doubts as to how the court will be able to easily make this determination and how it will have to be motivated/may be challenged. I am concerned that, given the complexity of the assessment to be made, it may delay the treatment of the claims excessively and be used as a delaying tactic.

- 8.3 Are there additional considerations that, in your view, should be taken into account?
No; see comments under 8.2.

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.

I believe there are very serious issues which need to be resolved in order to ensure that the Convention provides for an effective mechanism, which is not capable of abuse or does not carry the risk of creating undue delays and additional hurdles for international litigation.

The advantage of a clear and predictable framework is clear as it would avoid several courts considering the same case, with subsequent issues arising of conflicting and contradictory judgments.

The disadvantages of not getting it right are, however, also evident. If the framework is not clear (as I fear is currently the case), it may lead to deadlock and create an additional burden/issues for international litigation, and additional means for parties to abuse proceedings and use delaying tactics as a tool.

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 believe a mechanism for related actions in itself is appropriate and could lead to certain legal issues being dealt with by the most appropriate court.

However, I think the mechanism as currently included needs to be clarified and considered further to avoid abuse.

Firstly, it needs to be clarified how the mechanism functions in case one of the proceedings is at a much more advanced stage than the other.

Another question to be further considered is also what the value of the decision of one court not to adjudicate all or part of the dispute is? Will some additional value then be attached to the resulting court decision on the court having determined the related action? How will this work in practice? Also, it needs to be clarified whether there is any possibility for the parties to appeal the relevant determinations on adjudication as, if so, this may again delay proceedings. Absent clarification of these matters, they may give rise to significant interpretation and application issues and discussion.

Finally, the question is whether the proceedings may lead to some form of denial of justice, or courts not adjudicating cases (or not making a determination on a related action and hoping the other court will deal it) simply because they do not want to do so or want to push them onto other courts. Where the workload and backlog of some courts is high, there may be a real risk or incentive for them to consider that other courts should deal with the "related action".

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?

I believe the appropriate means are listed. You may however wish to consider also expressly refer to electronic means for communication and/or videocalls (where possible) as these may be most efficient in practice. indeed, more generally, if the courts would communicate only indirectly through competent authorities, or even only opt for indirect communication through the parties, I fear that the mechanisms will not really function properly, or there is a very significant risk of delays and proceedings becoming bogged down by inefficient communication of which ultimately the parties may be the victim.

Joint hearings are in my view a very efficient method to come to decisions but may be complicated in practice in case of mandatory requirements.

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

See above. I believe indirect communications through competent authorities or through the parties will not allow for decisions to be taken expeditiously. In addition, I fear that, in practice, in certain countries the organisation of joint hearings may be challenging (especially in terms of use of languages and mandatory laws in relation to the organisation and conduct of hearings).

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?

While these provisions are important, I believe they may not be sufficient. I believe it is imperative for the Text to clarify whether the determinations to be made are subject to appeal or not, and to

be clearer on deadlines to avoid the risk of delaying tactics. Moreover, often (at least in Belgium) determinations on abuse (but also on jurisdiction) are only made at the end of the proceedings. The question is therefore whether courts will have the adequate tools to really prevent the delays from occurring before they have actually occurred. This requires certain tools such as the possibility of bifurcation which may not exist/be mandatory. The provisions of the Draft Text seem too generic to deal with these issues.

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.

As currently drafted, I do not think so for the reasons set out above. I think there are a lot of uncertainties, and areas which need to be clarified to avoid delays and abuse.

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

I fear that, as currently drafted, the Text carries a risk of only marginally improving the status quo, and potentially even giving ammunition to parties seeking to delay tactics.

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?

Yes, I believe there is a significant risk, for the reasons set out above.

Question 14 - comments

What other comments, if any, do you have?

No other comments.