| Survey response | |
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| Please indicate: [Name:] | Sarah Garvey/Sarah Shearman |
| Please indicate: [State:] | ENGLAND |
| Please indicate: [Region:] | UK |
| Please indicate: [Affiliation:] | Mayer Brown International LLP |
| Please indicate your profession: | Practitioner |
| Do you have practical expertise in cross-border civil or commercial litigation: | Yes |
| Press "Next" to continue | |
| 1.1 What are your views on the scope of the Draft Text? | The scope of the Convention is limited to rules relating to parallel proceedings or related actions pending in courts in Contracting States. It does not address the situation where proceedings are simply started in the 'wrong' (inappropriate) forum. Based on our experience of international commercial litigation, we make the following observations on the Draft Text: (a) the proposed rules are engaged only once there are parallel/related proceedings in another Contracting state court pending. This arrangement may have the effect of encouraging parties faced with proceedings started in one Contracting state court which they consider to be an inappropriate forum to start their own proceedings before another Contracting state court (presumably in what they consider to be the 'appropriate' forum but not necessarily) so as to engage these proposed rules. That party may not in fact want to start proceedings at all. It may just want to prevent proceedings continuing in the inappropriate forum but to be able to rely on the Convention rules it needs to be able to point to pending proceedings in a Contracting state court. Procedures vary in different legal systems but currently a party facing this dilemma may be able simply to apply to the court first seised (i.e the court it considers to be an inappropriate forum) for a stay/dismissal of the proceedings pending before it under applicable jurisdictional grounds. It would not necessarily need to incur the costs of instructing lawyers in another jurisdiction to start proceedings (and pay any applicable court fees etc,) before it has a basis for applying for a stay/dismissal in the court first seised. The proposed rules therefore risk encouraging an escalation in the litigation 'arms race', with more satellite litigation and greater complexity and legal uncertainty in international litigation. The proposed Convention would also risk increasing costs. These results appear to be contrary to the stated objectives of this initiative. (b) ) given the |

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| | structure of the Convention (see observations at (a) above), there could also be an incentive for parties to rush to start proceedings in a Contracting state court to establish a 'first mover' advantage, in circumstances where it might otherwise have sought to continue negotiations etc. This would also have the result of increasing legal costs and legal uncertainty for businesses. (c) where commercial parties involved in international disputes have often faced problems with proceedings being issued in an inappropriate forum (for example in breach of a jurisdiction clause) those proceedings have often been issued in a jurisdiction which is unlikely to sign up to the proposed Convention. As a starting point therefore, our expectation is that any proposed Convention would in practice do little to address the identified problems (parallel proceedings/abusive proceedings) and achieve the stated objectives (enhancing legal certainty/predictability/reducing legal costs). |
| 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 do not consider the Draft Text would be beneficial. See comments above and below. Although parallel proceedings and related actions can give rise to complex issues in cross border commercial litigation, we do not perceive particular difficulties sufficient to warrant the implementation of a new Convention. In our experience, courts faced with parallel/related commercial proceedings often consider issues of efficiency and the appropriateness and viability of the pending proceedings (and any parallel/related proceedings). In our experience the issue of irreconcilable judgments arises infrequently in commercial litigation and, in any event, the Hague Judgments Convention (Article 7.1,(e) and (f))and other enforcement rules in different legal systems may assist in this regard. In fact, as outlined in 1.1. above, we are concerned that the Draft Text may serve to complicate the position regarding parallel proceedings/related proceedings in Contracting State courts. There are also complications which do not appear to be fully addressed in the Draft Text. For example if there are three jurisdictions all considering their positions as to jurisdiction over a particular matter, and only two of the three were Contracting State courts, it is not clear how the Convention would help those Contracting State courts navigate this situation. |
| 1.3 What are your views on the subject matter exclusions in particular, and how they would work | The exclusions are broad. We note a significant issue for commercial parties (what happens when there is an exclusive jurisdiction clause in a commercial |

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| in practice? For example, what are your views on the formulation of the arbitration exclusion in Article 2(3)? | contract?) is left undetermined in the Draft Text. As regards the arbitration exclusion, we agree it is important that arbitral proceedings remain outside the scope of the proposed Convention. The scope of arbitration 'related proceedings' may be construed differently by Contracting State courts without further guidance. There could be greater clarity regarding which rules should apply in the event that there was disagreement between two Contracting States as to whether arbitration had been validly invoked by the relevant party. |
| 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). | The relevant article in the draft Convention provides that it would only apply where the defendant(s) to proceedings in the court of a Contracting State is/are habitually resident in another Contracting State. It is not entirely clear what is intended by "another" Contracting State. It is also not clear why the Convention would only apply where the defendant was habitually resident in a Contracting State when the parallel proceedings might be in a separate Contracting State where the defendant is not habitually resident - does this mean the Convention will not apply? If that is the intention, the motivation behind it is not clear. It is also not clear what the position would be in a situation where there is more than one defendant and those defendants are not habitually resident in the same jurisdiction. There is a risk that this provision might encourage claimants to attempt to bring actions against individuals or organisations based on their 'habitual residence', rather than whether they are genuinely the appropriate defendant(s) to the dispute, which might generate additional procedural delays and disputes. |
| 2. 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 "related actions" is not entirely clear. For example, paragraph (b)(ii) of Article 3.1 brings within scope proceedings in the courts of different Contracting States that involve facts arising from the same transaction, occurrence or series of transactions/occurence. This will not always be appropriate - for example, some finance transactions involve numerous parties, all engaged in the same large transaction with each other, but with differing contractual relationships and jurisdiction agreements between each other, so that disputes between two parties might need to be dealt with by the courts of one Contracting State, whereas disputes between two others, in respect of the same transaction, might fall to be dealt with in another jurisdiction. As drafted, the Convention would treat those separate disputes as |

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| | related actions and bring the parties into the scope of the Convention. |
| 3. What are your views on Article 4? | The rules seem reasonably clear. |
| 4. What are your views on Article 5? | Article 5.3 lacks clarity - there is scope for argument around what would be a reasonable time for rendering a judgment, and what might be a reasonable period of time for one kind of dispute might be very different to what is a reasonable period of time for another type of dispute. The time to render a judgment might be a function of different legal systems meaning cases are dealt with at different speeds. It seems that there might be scope for parties to argue that proceedings in some slow moving jurisdictions eg with long court backlogs might not render a judgment within a reasonable time. It is also not clear at what point in the proceedings a request could be successfully made by a party, for example, could the request be made after a merits trial but before the handing down of a judgment? |
| 5. What are your views on Articles 6 – 8 including how they will work in practice? | We have concerns about legal uncertainty - see comments generally. |
| 6.1 What are your views on the 'jurisdiction / connection' list in Article 8(2)? | The list is extensive and in places lacks clarity. By way of example only, 2(b) identifies a defendant a natural person who had their principal place of business in a State at the time they became party to the proceedings regarding disputes arising out of the activities of that business. What would happen where a dispute involves multiple businesses situated in different jurisdictions? Another example of where there is uncertainty relates to claims brought against parent companies in respect of disputes arising out of the activities of subsidiary companies in separate jurisdictions. Further, how is jurisdiction / connection to be established in disputes which might arguably fall within a number of the possible scenarios listed which, when considered individually, might lead to a different outcome in terms of which jurisdiction was appropriate based on these rules? It seems that in these situations Article 9 would be engaged so that the court first seised makes the decision as to which court is most appropriate to resolve the dispute, as to which please see our response to Question 7. In that situation, what happens if there is a dispute first as to whether the court first seised even validly had jurisdiction under Article 8(2)? Separately, it is not clear what is intended by the second half of the provision in (j): "unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would |

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| | not have succeeded under that law". The provision seems to start out by, understandably, providing that if a party has submitted to the jurisdiction of a court seised, that court has jurisdiction. The second part however seems to operate, as drafted, to undermine that jurisdiction in circumstances where an objection to its jurisdiction would not have succeeded, which is not understood. |
| 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 out concerns outlined above. |
| 6.3 Are there any additional factors that you believe should be included? | See our comments outlined above. The court whose law governs the dispute, and a contractually selected jurisdiction including in the context of non-exclusive or asymmetric jurisdiction agreements should be considered. |
| 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? | This Article appears to determine jurisdiction on a court first seised basis, as it is the first seised of two or more potentially legitimate courts which determines which is the most appropriate court for the dispute. This seems likely to encourage parties to engage in a race to initiate a claim in their preferred jurisdiction, especially if there are doubts as to whether that court would in fact be the most appropriate forum. Furthermore, the mechanics of this Article are unclear. The second formulation of the Article also creates uncertainty as it allows another court, not first seised, to determine that it still ought to hear the dispute and override the decision of the court first seised. This is likely to add to procedural complexity and create more confusion, rather than alleviate any perceived issues with current approaches. |
| 7.2 What are your views on how the two approaches may work in practice? | In practice, these provisions are unlikely to reduce the incidence of parallel proceedings. Nor are they like to help resolve difficulties when they do arise. Please see also response to Question 7.1. |
| 7.3 Do you have a preference for either approach? If so, please explain why. | We have concerns about both options. |
| 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)? | Inevitably there are likely to be wide variations as to how Contracting state courts assess and apply these factors. Unlike the Brussels Recast for example, where a common supervisory court (the CJEU) determines the correct interpretation and application of EU jurisdictional rules, there would be no such |

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| | court overseeing the 'correct' application of this Draft Text. There would be a real risk of legal uncertainty. Two further points. It is not clear what is meant or intended by the "burdens of litigation on the parties", or the "convenience of the parties", or habitual residence, or how those would be weighed across jurisdictions. The proposed rules appear to allow a party/court to select a jurisdiction on the basis that their laws have more favourable limitation periods. It is not clear to us that this is a fair or principled approach. It might also encourage, rather than deter, parallel proceedings in situations where limitation is a live issue. |
| 8.2 Do you have any views on how Article 10 might work in practice? | Please see response to Question 8.1. |
| 8.3 Are there additional considerations that, in your view, should be taken into account? | See comments above. |
| 9. 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. | Our overall view is that there is no detectable pressing need in the commercial context for a Convention to address the issue of parallel proceedings and related actions. Courts (and litigants) generally manage these issues, albeit within the EU/Lugano states under common rules set out in applicable an EU Regulation/treaty. See also points on lack of utility at 1.1 above. Moreover, even there was a detectable need for an interntional Convention in this area, the proposed framework does not seem to be an effective one for the various reasons given in the responses to the questions above. The Draft Text risks adding to, rather than alleviating, existing complexities and legal uncertainty meaning it is likely to increase costs for litigants (and thereby reduce access to justice, a stated objective). |
| 10. 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. | See our response to Question 9. |
| 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? | The communication mechanism seems to place much of the burden on Contracting States courts or competent authorities. This may give rise to resourcing issues and be a factor contributing to delays and uncertainty. |

| 11.2 Are there particular advantages and challenges you foresee in applying these methods? | Please see response to Question 11.1 above. |
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| 12. 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 could be used to circumvent the intended mechanism of the Convention and ultimately mean that the incidence and continuation of parallel proceedings remains unaffected in practice. |
| 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 do not consider that the rules set out in the Draft Text achieve these objectives for the reasons given in the questions above. |
| 13.2 Do you have any views on whether the proposed rules set out in the Draft Text would improve the status quo? | We do not consider that these rules would improve the status quo; we are instead concerned that they would complicate matters and lead to additional delay, uncertainty and costs for parties. |
| 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 consider that the risks of tactical and satellite litigation are increased by the mechanisms proposed Draft Text. |
| 14. What other comments, if any, do you have? | See above. As a separate matter, we would welcome the Hague Conference considering the streamlining of service in international litigation. |