Personal Details

Name: Rt. Hon. Lord Hamblen of Kersey.

State: United Kingdom.

Region: London.

Affiliation: Justice of the UK Supreme Court.

E-mail:

Please indicate your profession:

- ☐ Practitioner
- ☒ Judge
- ☐ Company/business lawyer
- ☐ Government official
- ☐ Legal professional in international organisation
- ☐ Academia
- ☐ Others, please specify: Click or tap here to enter text.

Do you have practical expertise in cross-border civil or commercial litigation:

- ☒ Yes
- ☐ No

The HCCH will publish your response to this public consultation (both in its original form and in a compiled document, together with other responses) to its Members on the Secure Portal of the HCCH. The Secure Portal is accessible by HCCH Members only. You can choose whether you would prefer to have your personal information (name and affiliation) published or to remain anonymous when your response is published. For transparency, the State, region, and the type of respondent (*e.g.* "profession", "area of practice") will be published. Your contact details will not be published.

Please indicate whether your personal information can be published on the HCCH Secure Portal webpage (accessible by HCCH Members only) and in HCCH's relevant documents. Please tick one box:

- ☒ Yes, I consent to the publication of my name and affiliation

☐ Yes, I consent to the publication of my affiliation only

☐ No, I do not provide consent to the publication of my name and affiliation

Please indicate where you have acquired information about this consultation (for HCCH's internal use):

☐ HCCH website

☐ HCCH social media

☐ News from blogs

☐ News from associations or organisations

☒ Others

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 focus on "parallel proceedings" in "Contracting States" is problematical.

First, it does not provide any solution to the common problem that a party ("D") may be faced with proceedings instigated by a claimant ("C"), often tactically, in an inappropriate forum ("State A"). D is then faced with a choice of: (i) relying on the national laws of State A to dismiss the claim on forum non conveniens grounds or similar (the likelihood of which having already been considered by C before initiating the claim); or (ii) instigating 'protective proceedings' in the natural forum ("State B") (or, if State B is not a Contracting State - discussed below - a more "appropriate forum" i.e. "State C") quickly to gain potential protection under the Draft Text (under Articles 8 and 9). D may not want to initiate proceedings anywhere and by having a scope focused on parallel proceedings, the convention could be said to promote the instances of such proceedings occuring.

Second, the "Contracting States" restriction in Article 1 (and in the definition of "parallel proceedings") is understandable but it means that parallel proceedings which are located in a Contracting State and a Third State would fall outside the convention's scope.

So, for example, in the scenario identified above where D has to bring proceedings in a Contracting State which is slightly more appropriate under the Article 10 factors (State C) than the first seised court (State A) to gain the convention's protection but, importantly, is not the most natural forum for the dispute (which is State B), such a reliance on the convention may inhibit, through issue estoppel or submission to jurisdiction arguments, D from later arguing for proceedings to occur in the most appropriate forum, in State B.

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?

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 subject matter exclusions are acceptable but the arbitration exclusion should clarify the extent of "[arbitration] related proceedings". Questions concerning the validity, applicability and enforceability of arbitration agreements should be captured by the exclusion (in line with the Kompetenz-Kompetenz principle in arbitration).

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 additional limitation on scope set out in the optional Article 1(2) (excluding parallel proceedings where no defendant is habitually resident in a Contracting State) may be undesirable, especially bearing in mind that Article 6, Article 7 (frequently, non resident

parties will choose a jurisdiction for proceedings that they are not resident in), and Article 8 are not conditioned on this factor.

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.

Whilst definitions of "parallel proceedings" and "related actions" are needed, "subject matter" is a wide term and is likely to lead to parties disputing its application to their specific dispute. This is all the more important where the width given to "subject matter" will influence what is captured by "related actions" (which cannot be "parallel proceedings").

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

The proposed structure appears to be workable.

Question 4 on Article 5 obligations

What are your views on Article 5?

Article 5(3) requires a suspended court to resume proceedings if it is of the view that the other Contracting State's court will not render "a judgment within a reasonable time". This places pressures on the latter court, at all stages of its proceedings, to deliver judgment within a "reasonable" timeframe or risk the parallel court re-commencing proceedings. Not only does this pressure sit uneasily with the fact that, in most cases, the time-pressured court is considered to be the 'more appropriate' court to hear the dispute under the terms of the convention itself (under Articles 7 or 8 and 9), but it has the potential for parties and the suspending court to argue that inherent delays in certain jurisdictions when compared to their own procedural timeframes mean that this is nearly always satisfied.

Question 5 on priority jurisdiction / connection

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

The structure of Articles 6 - 8 is clear.

Regarding Article 7, it is unclear how it is planned to deal with 'asymmetric jurisdiction clauses' (which provide differing rights to the parties in the available venues for hearing the dispute which by their nature are not exclusive) where, for example, one party (X) is required to bring litigation concerning all aspects of the agreement in one or more Contracting States, however, the other party (Y) is given a limited right to bring a specific sub-set of those claims in a differing Contracting State. Such clauses expressly envision the potential for parallel proceedings (in seised Contracting States) between X and Y but appear to fall outside of Article 7(1) and (2).

Regarding Article 7(3), it is unclear why higher formality requirements are imposed just because the litigation has already been commenced. What Article 7(3) seems to be dealing with is voluntary submission to that court's jurisiction which is, in many systems, an uncontroversial justification for the court to assume jurisdiction. Indeed, this is implicitly recognised in Article 8(2)(j). If the focus is on party autonomy / voluntary submission in prioritising Article 7 over 8, the Article 7(3) prescriptive requirements, are most likely unnecessary.

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

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

The list of jurisdiction / connection factors in Article 8(2) may be said to be too narrow to cover all cases where it is appropriate that the court should have jurisdiction.

In particular, the list omits the appropriate and necessary ability in complicated multi-party disputes to join co-defendants that do not satisfy any of the Article 8(2) gateways but are necessary to resolve the dispute cost-effectively and expeditiously.

The place that a contract was made and its governing law are also omitted. This means, for example, that in a case involving a contract governed entirely by the law of a specific Contracting State ("State Z") (with no residence in State Z being involved) but being partially performed in another Contracting State ("State Y"), the courts in State Y, who may be unfamilar with State Z's laws and their specific principles applicable to the dispute, are mandated by the convention to continue the proceedings and State Z, who has no current Article 8 jurisdictional factors, is required to suspend/dismiss it. There may be circumstances where this is appropriate, but this will often not be so (especially in the complex, high-value, and commerically significant disputes).

As the convention prioritises a 'first court seised' approach in respect of: (a) requiring a later Contracting State court to suspend/dismiss the proceedings if not instituted within a "reasonable timeframe" after the first court proceedings were instituted (Article 8(1)(b)); and (b) being prioritised to determine which of the Contracting State courts is more appropriate to hear the dispute (Article 9(1)), this will inevitably increase the pressure on parties to rush to the courts to litigate and will likely increase the costs in doing so.

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 restricted list of factors (i) ignores the situation where a Third State court is the appropriate forum; and (ii) is exhaustive, meaning that relevant and significant factors, rendering a Contracting State appropriate may be inapplicable. Such a circumstance would force those courts to have to rely on the safeguards in Articles 19 - 21 to maintain such parallel proceedings, but a broad application of those safeguards risks undermining the uniformity of the convention regime.

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

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?

Article 9(1) uses the 'first seised court' prioritisation for the determination of which forum is most appropriate for parallel proceedings. However, the fact that a party was able to initiate proceedings quicker in one Contracting State has no bearing on whether that State's court is best able to determine whether a differing Contracting State is more appropriate. Further, the requirement for the second court to suspend its proceedings whilst awaiting the first court's determination is another incentive for litigation stalling tactics (i.e. initiating a claim first in a Contracting State with suffers from major delays), unless Article 20 applies, which may be difficult to prove.

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

In practice, the parties are likely to be making two comparable arguments in two separate courts: (1) that the court first seised is / is not the most appropriate forum; and (2) that the second court is / is not the most appropriate forum instead. This effectively leads to both courts applying forum (non) conveniens principles but without such courts having the benefit of precedent in their application. This may have the unintended consequence of decreasing the predictability of forum conveniens outcomes for parties. The result could be that both courts ultimately conclude that, in accordance with the convention, they are the most appropriate forum and therefore refuse to suspend/dismiss their respective proceedings.

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

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)?

The factors are generally well suited, however, it would be preferable: (i) that they should not be exhaustive and rather be examples of potentially relevant considerations in determining the overarching criterion; and (ii) that the criterion, which court is "more appropriate", should incorporate the optional factor in the Draft Text of "justice" being achieved.

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

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

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.

Whilst the stated objectives of the convention in increasing legal certainty and predictability and reducing legal costs and instances of inconsistent judgments concerning parallel proceedings are all desirable, I doubt that the convention will significantly advance them.

First, the convention does not deal with a potential major source of issues arising in the parallel proceedings context: those between Contracting States and Third States. In such circumstances, the frequency of which will be affected by the uptake of the convention, the national laws in each respective court applies with the result that the convention will not have added anything.

Second, in some respects the convention can be said to encourage parallel proceedings. A party which instigates a claim in an unsuitable Contracting State effectively forces the other party to instigate a 'protective claim' in a more suitable Contracting State (which may not be the natural forum but more connected than the first court seised) to gain the benefit of the convention when they may not want to commence any proceedings at all. Furthermore, in such a scenario, the determination that is made between these two courts under the convention's rules may later prevent / be used against the defendant in bringing a claim in the Third State which is, objectively, the natural forum albeit not a party to the convention.

Third, the convention aims to take a hybrid approach incorporating forum conveniens and 'first in time' rules. Whilst understandable, such regimes are distinct and such a combination is likely to result in parties rushing to the court and increased uncertainty in the application of potentially unfamilar forum conveniens principles without the benefit of precedent.

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.

As mentioned above, a significant aspect of how the related actions regime will function in practice will depend on the interpretation given to "same subject matter" in parallel proceedings (a narrower definition, will promote greater reliance on Chapter III, for instance).

It is currently unclear whether an application would need to be made under Article 11 in each court subject to the related action to bring it into the Article 12 / 13 regime (as it is only after "two or more courts seised... determine that").

Whilst the intended related actions framework is understood, it suffers with the same issues identified above. It does nothing to resolve the issue of ensuring related actions are resolved in the most appropriate forum (which may be a Third State) and can require a party to instigate protective "related actions" to gain the benefit of the convention.

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?

The use of a formal means of communication between courts seised in commercial disputes is a novel suggestion. Whilst it may have some practical advantages, it also raises potential issues. For example: (i) Not all courts will have specific procedures that envision such means of correspondence. Creating dedicated channels may be both time consuming and an additional expense. (ii) There will be a question as to how outstanding communication requests (where a court is waiting for a response from another court) are to be accounted for in the interpretation of the convention which imposes certain time limits on the parties/the courts.

There are too many uncertainties concerning the envisioned joint hearing procedure in Article 17. Potentially such a process would increase complexity, length, and the legal costs involved in proceedings.

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

.

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 listed safeguards in Articles 19 - 21 appear appropriate and consistent with the objective of encouraging Contracting States to participate in the convention. However, a restrictive interpretation is necessary to avoid the convention regime being undermined.

Furthermore, there is a question as to whether an individual safeguard could be relied upon on a freestanding basis by a national court to justify ignoring an agreement on jurisdiction entirely (effectively ignoring Article 7), undermining party autonomy and certainty in the process.

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 think it unlikely that the convention as drafted will achieve its objectives. Rather, it may (i) result in further uncertainty as courts would have to grapple with the new convention's text and novel regimes; (ii) reduce predictability in the application of forum conveniens analysis, (iii) increase litigation costs by forcing parties to rush to courts in Contracting States to take the benefit of first in time rules and to bring their dispute within the scope of the convention, and (iv) could lead to inconsistent judgments with a greater claim to legitimacy as each court can justify them as being made in compliance with the convention's explicit framework (rather than being based on national laws of jurisdiction as was previously the case).

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

Regrettably I am of the view that the convention would not improve the status quo and potentially be to its detriment.

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?

As already mentioned, by including a first seised priority in certain respects, there is no doubt an increased incentive for parties to instigate tactical litigation more quickly where the dispute could be connected to two Contracting States. This may be more so where the party does not wish to commence any proceedings whatsoever but, due to the instigating claim, has to commence defensive proceedings in order to gain the benefits of the convention.

Question 14 - comments

What other comments, if any, do you have?

My principal comments are set out above.