

## *Personal Details*

Name: Nadia de Araujo. Daniela Vargas. Lauro Gama. Theophilo Miguel. Lidia Spitz

State: Brazil

Region: Latin America

Affiliation: Pontifícia Universidade Católica do Rio de Janeiro - PUC-Rio

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 Your contact details will not be published.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?

While the Draft Text makes an important contribution to the discussion on the management of parallel proceedings, its current scope appears relatively narrow and raises questions as to the range of civil and commercial matters it is intended to effectively address. In particular, the breadth of the exclusions may limit its practical reach and create uncertainty as to its added value in areas where parallel proceedings are most frequent.

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?

2 We fully recognise that the exclusions set out in Article 2 of the Draft Text reflect a carefully negotiated compromise with the 2005 Choice of Court Convention and the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

3 However, from a practical standpoint, it appears that the situations in which parallel proceedings and related actions most commonly arise tend to lie outside the scope of the proposed Convention, particularly in areas such as family law, intellectual property, and arbitration. It may also be noted that, in practice, a significant proportion of commercial disputes are resolved through arbitration, with mediation playing an increasingly important complementary role.

Against this background, some uncertainty remains as to the range of civil and commercial matters in which the Convention is likely to have meaningful practical application. In view of the potentially limited number of cases that may fall within its scope, it may be appropriate to reflect on the relationship between the Convention's intended objectives and its expected practical reach.

This observation is informed by recent exchanges with highly specialised practitioners, who generally consider that the number of cases potentially covered by the proposed Convention would be relatively small. Even in fields such as maritime law - where bills of lading still frequently provide for court jurisdiction rather than arbitration - specialists have indicated that circumstances in which the Convention would apply appear to be uncommon.

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)?

This point reflects the considerations outlined above. While the exclusion of arbitration is understandable and, indeed, unavoidable in light of the 2005 Choice of Court Convention and the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, it nevertheless has the practical effect of removing a substantial number of cases from the Convention's potential scope.

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 Draft Text does not clearly explain why this additional requirement is necessary, nor how it is intended to interact with the coordination mechanisms set out in Chapters II and III. This structure differs from the approach adopted in both the 2005 Choice of Court Convention

and the 2019 Judgments Convention, where habitual residence operates as a jurisdictional or recognition factor rather than as a condition for the applicability of the instrument itself. As a result, paragraph 2 risks introducing an additional layer of restriction.

### **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.

We do not have any objection to the definitions set out in Article 3(1)(a) and (b). However, in our experience, these are highly sophisticated concepts that may prove challenging in practice for judges who do not routinely deal with international cases. More generally, it appears that the draft Convention would introduce a complex preliminary phase at the very outset of proceedings, requiring courts to engage in an additional layer of analysis before being able to move forward with the substance of the case. This additional decision-making stage may increase both the cost and the duration of proceedings for the parties, while also placing a significant burden on the judiciary, with tangible progress in the case only occurring at a later stage.

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

What are your views on Article 4?

From the perspective of Brazilian law, the definition of the moment at which a court is deemed to be seised - based on the filing or service of the initiating document - is broadly consistent with domestic procedural concepts, in which jurisdiction is generally considered to be established upon the lodging of the claim before the court. In this respect, Article 4 aligns with the internal Brazilian understanding of when judicial proceedings are instituted.

At the same time, it is important that the Draft Text expressly addresses the implications of this definition for the treatment of parallel proceedings at the international level. Under Brazilian law, there is currently no room for international *lis pendens*. When parallel proceedings concerning the same subject matter are initiated in different jurisdictions, Brazilian law adopts a “first final judgment” approach: the proceedings that reach a final decision first effectively prevail.

Accordingly, where foreign proceedings are concluded first, the resulting judgment may be recognised by the Superior Court of Justice, provided the applicable requirements are met, and the mere existence of pending proceedings in Brazil does not in itself prevent such recognition. Conversely, where the Brazilian proceedings are concluded first, any subsequent foreign judgment will be denied recognition in Brazil.

That said, Article 13 of the Brazilian Code of Civil Procedure expressly provides for the prevalence of international treaties over domestic procedural rules. From this perspective, while international *lis pendens* does not currently operate under Brazilian law, a clear and carefully drafted treaty-based regime could, in principle, be accommodated. .

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

What are your views on Article 5?

Article 5 remains subject to a high number of brackets, which may suggest that reaching consensus on this provision will be challenging. In particular, paragraph 3 gives rise to serious practical concerns. Under this approach, proceedings may be suspended, only for a party to later request that the court resume the case on the ground that the other court has not acted appropriately.

This mechanism may entail an indeterminate period of suspension, followed by the reopening of the proceedings with the introduction of new elements, the exercise of procedural rights by the parties, and the need for a fresh judicial determination. Such a sequence risks undermining

procedural economy and legal certainty, while increasing costs and complexity for both the parties and the courts.

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

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

With respect to rights in rem, it would appear preferable to adopt a clear rule of exclusive jurisdiction. Brazil has previously advocated, without success, for the exclusion of tenancy matters as an exception during the negotiations of the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Revisiting this issue in the present context would once again run counter to the exception framework agreed upon in that instrument.

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

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

- 4 The connecting factors based on the defendant’s habitual residence or place of business, the place of performance of the obligation, and the place where a non-contractual obligation occurred reflect classical jurisdictional bases and are compatible with the Brazilian system of concurrent jurisdiction under Article 21, I, of the Code of Civil Procedure.
- 5 However, connection D(ii) raises serious systemic concerns from the perspective of Brazilian law and could not be supported. The applicable law does not constitute, and cannot be elevated to, a jurisdictional connecting factor. The mere fact that a court may be required to apply foreign law in contractual or non-contractual matters is entirely unrelated to the allocation of jurisdiction and cannot justify the exercise of adjudicatory authority.

Furthermore, Article 8(2)(e) would, under Brazilian law, necessarily operate as a ground of exclusive jurisdiction. While it may appear as a connecting factor within the structure of Article 8(2), its exclusive character would exclude the operation of the exceptions provided for in Articles 9 and 10, which are designed to allow for a forum-appropriateness assessment. In matters falling within exclusive jurisdiction—particularly in rem claims—the balancing considerations contemplated in Article 10 would be inapplicable and, from a systemic perspective, incompatible with the jurisdictional framework.

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?

Not all of them are appropriate.

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

We do not have comments on this issue.

#### **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?

- 6 Both approaches set out in Article 9 are conceptually complex and may prove challenging in practice for judicial authorities that are not already familiar with transnational coordination mechanisms for parallel proceedings. The degree of procedural sophistication required to apply either model should not be underestimated, particularly in legal systems where international lis pendens and forum coordination have not traditionally played a central role.

7.2 What are your views on how the two approaches may work in practice?  
Please see answer above.

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

The second approach appears to be more consistent with fundamental principles of international law, in particular the principle of the sovereign equality of States. By avoiding any obligation for courts to follow or defer to jurisdictional determinations made by courts of another Contracting State, this approach better accommodates the diversity of procedural traditions among potential Contracting States, which are rooted in different legal traditions. In this respect, a non-hierarchical and cooperative model may offer a more realistic basis for broad acceptance of the Convention across different legal systems, particularly in light of the practical sensitivities that may arise when courts are asked to give binding effect to determinations issued by courts operating in markedly different institutional, legal, and economic contexts.

**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)?

7 The possibility of relying on additional factors to determine the most appropriate court outside the exhaustive list set out in Article 8(2) undermines the objective of predictability and renders that provision largely ineffective in practice. Rather than providing clear bases of jurisdiction, the current structure risks reintroducing discretion at the very stage where legal certainty is most needed.

8 In operational terms, a judge applying the Convention would be required to engage in a fragmented and potentially duplicative analysis. First, the court would need to determine whether it should be seised, necessarily from its own perspective, while a competing court could be called upon to conduct the same assessment in parallel. Even where a connecting factor under Article 8(2) is identified and jurisdiction is formally established, the court would then be required to apply the forum-appropriateness test under Article 10.

9 At the same time, the Convention does not make clear whether Article 10 is intended to operate only as an exception after jurisdiction has been established under Article 8(2), or whether it may be applied at an earlier stage, effectively displacing the jurisdictional criteria set out in Article 8(2). This lack of a clear hierarchy or sequencing between the two provisions creates uncertainty as to their interaction and weakens the Convention's capacity to guide judicial decision-making in a uniform manner.

10 From a systemic perspective, this structure risks encouraging parallel proceedings, inconsistent outcomes, and forum shopping, while increasing procedural complexity, cost, and delay for the parties. As such, it runs counter to the core objectives repeatedly identified in the Jurisdiction Project, namely the promotion of legal certainty, procedural economy, and the effective coordination of proceedings across Contracting States.

For these reasons, we believe Brazil would be unable to support a Convention structure that allows open-ended forum-appropriateness assessments to operate alongside, or in

competition with, the jurisdictional bases set out in Article 8(2), in the absence of a clear hierarchy and sequencing between these provisions.

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

It will not be easy.

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

No more comments here.

### **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.

As noted above, the framework as currently developed would not function effectively in practice. Rather than enhancing coordination or predictability, it would introduce significant complexity, materially increase the time and cost of proceedings, and impose an additional layer of judicial discretion and decision-making that does not exist under current procedural systems. This structure would undermine procedural efficiency and legal certainty, contrary to the core objectives of the Jurisdiction Project.

### **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 do not have a view 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 have reservations regarding the manner in which cooperation and communication are envisaged in the draft document. In particular, it may be worth considering, as an alternative to a system centred on Central Authorities, mechanisms inspired by liaison judges or comparable judicial networks. In any event, further examination of comparative law approaches would appear necessary in this area.

Additionally, it should be noted that the negotiation of detailed cooperation rules by the executive branch, intended to govern the functioning of the judiciary, may raise practical and constitutional concerns in many jurisdictions, given the independence of the judicial branch.

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

Not at this time.

### **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?

As is often the case in this field, States' reluctance to relinquish jurisdictional authority appears to have resulted in the inclusion of safeguards that may significantly weaken the carefully constructed

rules on jurisdiction. At the same time, it is fully understood that no convention of this nature can be envisaged without a public policy escape clause.

Nevertheless, concepts such as denial of justice and abuse of process are inherently open-ended and may lend themselves to restrictive or territorially oriented interpretations, should a court consider it appropriate to do so. This raises concerns as to the predictability and uniform application of the Convention.

### **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.

No, for the reasons already stated above!

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

No. At this stage, it remains difficult to identify with sufficient clarity the practical situations in which the Convention would be expected to apply.

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 do not have comments on this issue.

### **Question 14 - comments**

What other comments, if any, do you have?

No more comments.