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 aims of the draft Convention are undoubtedly laudable and it is clear that a great deal of thinking has gone into them. It is also, of course, understood that there are pratical limits to what is achieveable in a Convention.

The draft text is concerned soleley with parallel proceedings and related actions between Contracting States. Inevitably, that restricts its practical utillity for litigants, given that complex litigation may well have connections with multiple jurisdictions, including non-Contracting States (and that the appropriate forum may well be in the courts of a non-Contracting State), as well as involving multiple parties.

Furthermore, one of the greatest practical problems is the abusive, unjustified or tactical seising of courts, even where there may be no parallel or related proceedings elsewhere. The Convention does not seek to address this important question; and, potentially, may even enourage the commencement of pre-emptive or declaratory proceedings in order to trigger certain of its protections.

This, along with the complexity of the existing draft text on the matters that are addressed, demonstrates a real challenge in producing an instrument that: (a) sufficiently solves the practical problems that litigants face; and (b) is not so complex that it creates more problems than it solves.

Subject to these points, Article 2(1) appears broadly satisfactory in terms of subject-matter/

Article 2(2) may not be entirely straightforward to spply as an excluded issue may be a preliminary one in one set of proceedings but a central one in another set of proceedings.

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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?

See answer to question 1.1.

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)?

Given the issues to which the ambit of the arbitration exclusion e.g. in Regulation(EU) 1215/2012 and its predecessors have given rise, and the the language of Article 2(2), it would be helpful to clarify that, notwithstanding Article 2(2), all issues as to the validity and interpretation of an arbitration agreement arising, whether as a preliminary issue or otherwise, are outside the ambit of the Convention.

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).

As to Article 1(1), see above.

Article 1(2) currently has many square brackets. It is not entirely clear what the rationale for this restriction is; and uncertainty may arise if "habitual residence" for indvividuals is not defined. If there is a problem of parallel proceeedings or related actions between Contracting States, it does not seem desirable to limit the response to that problem to cases where a defendant is habitually resident in another Contracting State.

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.

It is not quite clear what the words "on the same subject matter" mean in Article 3(1)(a). The definition of "related actions" seems satisfactory but may be difficult to apply in practice (with courts of different Contracting States disagreeing as to whether the actions are sufficiently related).

The absence of a definition of habitual residence of individuals may create uncertainty, when a purpose of the Convention is to increase commercial certainty.

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

This seems fine and workable in practice.

Question 4 on Article 5 obligations

What are your views on Article 5?

It is not clear that Article 5 will be effective in practice if there are also proceedings in the courts of a non-Contracting State (which may, on the facts, be the most appropriate forum). Article 5(3) may give rise to disputes as to whether the other court is likely to act "within a reasonable time." Moreover, the language suggests that the court has no discretion but to lift its suspension. The effect may be to give rise to further litiagtion as to what constitutes a "reasonable time."

Question 5 on priority jurisdiction / connection

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

Whilst the hierarchy is intelligible, the complexity of these provisions, especially Article 8, creates a real risk that the Convention will generate more problems in practice in its application than it seeks to solve. It will introduce many terms whose meaning will need to be clarified (and in respect of which it may be difficult to expect uniform application in Contracting States).

In particular, the introduction of a concept of "Jurisdiction" in Article 8, distinct frome established concepts of jurisdiction under which a court is seised in the first place, introduces an additional, and potentially complex further step in proceedings which is likely to generate diffculties and uncertainties in application, increase costs and seems liable to create more problems that those that the Convention seeks to ameliorate.

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

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

It is difficult to imagine Article 8(2) operating effectively in practice unless it addresses the difficulties created by multi-party litigation and of potential fragmentation of proceedings involving different parties.

Beyond this, the grounds of jurisdiction may be unduly restrictive as to the circumstances in which a court seised may apropriately have jurisdiction; as well as likely to create difficulty in their interpretation and application (and increaed cost for litigants). Some may prove particularly complex to interpret and apply (e.g. Article 8(2)(g)).

More generally, these provisions will introduce a further layer of complexity by imposing an additional "jurisdiction" test for parallel proceedings. Whilst, of course, the drafting of detailed provisions can be refined, it seems quite unlikely that it will be possible to produce an instrument that improves the net position for litigants compared to the status quo.

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?

I have some concerns. First, the Convention does not currently sufficiently address the practical realities of muli-party litigation. Second, the appropriate forum may not be in either of the Contracting States seised and may lie in a third State . Third, it is important not to create an instrument that encourages a party to seek pre-emptive redress. Fourth, it is essential that any Convention does not create more complexity, unpredictability and cost such that this outweighs the mischief that it seeks to redress.

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

Plesse see above.

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?

The fact that a court first seised has jurisdiction within the meaning of Article 8(2) is not, in my view, a sound basis for it to determine which is the more appropriate forum where there are parallel proceedings. It may also creare a tactical incentive to commence limigation. The alternative version of Article 9(2)(b) should be included, using Option 2 or 3, although this should not be limited to "exceptional circumstances.".

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

See answer to question 7.1.

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

See answer to question 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)?

Subject to the above answers, the list in Article 10 itself seems broadly appropriate, provided that it is clear that this list is non-exhaustive. Wording such as "amongs others" may be preferable to "in particular". The reference to the overarching requirements of the proper administration of justice in square brackets is helpful.

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

The application of such factors is familiar in many jurisdictions. I

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

No.

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 think there are currently some systemtic problems with the proposed Convention. I also think the draft text demonstrates the real difficulty of seeking to produce a Convention that is clear, predictable and cost effective to operate and which would be a net improvement for litigants.

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.
The possibility of applications in courts of two Contracting States (in which the claimant and defendant may very well not be the same) may not be very expedient.

Subject to this, the more flexible approach to related actions in Article 11 is broadly to be welcomed; albeit that it may be of limited effectiveness where the courts of different Contracting States disgaree as to how related proceedings should be addressed. Moreover, its practical value may be limited given that it does not address the problem of related actions in a third State, which may be the most appropriate forum.

It should be made clear that the list of factors in Article 11(2) is not exhaustive.

Whilst Articles 12-14 are well-intentioned, one wonders if, in practice, mechanisms of this nature referring to decisions of two or more courts seised may risk creating more, rather than less streamlining of the litigation process compared to the status quo of a court using its own powers, case management tools and discretion to determine how best to address the existence of related actions.

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?
This is a well-intentioned proposal that may prove helpful. However, it is somewhat novel (particularly insofar as it may provide for direct communication between courts); and it is necessary to ensure that the parties are kept informed about the process. Again, it is questionable whether this provision will ultimately improve matters for litigants or may result in more delay (particularly if it is necessary to go through a central authority).

11.2 Are there particular advantages and challenges you foresee in applying these methods?
See answer to question 11.1

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?

These seem broadly sensible. Query whether starting proceedings for tactical reasons in a foreign court so as obtain benefits from the application of the Convention rules could itself be regarded as an abuse of process (or otherwise fit within one of the other safeguards). It is important that the Convention does not incentivise parties to seise a court for tactical reasons..

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 is quite unlikely that they will do so for the reasons set out above. I am concerned, in particular, that the rules of the Convention will introduce substantial complexity (including rules of jurisdiction for the purposes of, in particular, Article 8(2)), in addition to provisions on the more appropriate cour)t. Whilst the Convention may prevent some instances of wasteful duplicative litigation, it also risks introducing more complexity, argument, cost and delay in proceedings in the courts of a Contracting State.

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

For the reasons set out above, I am doubtful that the rules will improve the status quo and consider that there there is a risk of making the situation worse,

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, there are risks of tactical or satellite litgation; whist simultaneoulsy limiting the power of courts to address such matters..

Question 14 - comments

What other comments, if any, do you have?

I commend the work that has gone into this Project and its aspiration. The draft text illustrates, however, how complex any future instrument is likely to be. I think it is quite likely that the Convention would introduce more problems than it solves.