WORKING GROUP ON
PARALLEL PROCEEDINGS

EAPIL
The European Association
of Private International Law

POSITION PAPER

In response to the public consultation on

THE HCCH DRAFT TEXT OF A POSSIBLE CONVENTION ON PARALLEL PROCEEDINGS AND RELATED ACTIONS

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The European Association of Private International Law (EAPIL) is an independent and non-partisan organisation established in 2019 as a non-profit association under the law of Luxembourg with the aim of promoting the study and development of private international law. It does so by fostering the cooperation of academics and practitioners in European countries and the exchange of information on the sources of the discipline, its scholarship and practice. EAPIL has currently more than 600 members, mostly academics and practitioners, based in more than 60 countries.

For the purpose of taking part in the discussion launched by the Hague Conference's public consultation on its draft convention on parallel proceedings and related actions, EAPIL has established a Working Group chaired by Gilles Cuniberti to issue this position paper.

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A. Introduction

1. The purpose of this Position Paper is to comment on the HCCH Draft text of a future convention on parallel proceedings and related actions published in November 2025 (hereafter 'the Draft Convention' or 'the Convention').

B. General Remarks

2. Parallel proceedings are undesirable in international commercial litigation due to various reasons, including that they bring uncertainties to litigation, increase cost and cause delays in dispute resolution by courts, and give rise to potential issues relating to enforcement of judgments. A widely adopted HCCH convention to coordinate parallel proceedings (and related actions) globally could be a useful tool to address some of these challenges in litigation. Therefore, we are in principle supportive of a HCCH convention on this matter. We also welcome the approach of the HCCH Working Group to combine priority- and jurisdiction-based approaches with the forum non conveniens doctrine. From our point of view this is the only sensible way to agree on a convention that as many countries as possible are willing to accede to.

3. We, however, think that there are certain issues which require further consideration or clarification and we expand on them in the following sections of our response.

C. Issues Requiring Additional Express Provisions

4. The following issues in our view are either unaddressed, or not clearly addressed, by the Draft Convention.

1) Provisional Measures

5. The HCCH Working Group raises the issue of provisional measures in several places, including the Note under Article 3,[1] which seems to refer to provisional measures of protection ordered by a court that does not decide on the merits of the case. Obviously, at present, no decision has been taken on how this matter should be addressed. There is a shared view within the EAPIL Working Group that it would be both useful and appropriate to expressly exclude provisional measures from the scope of application in the normative part of the Convention. Accordingly, we propose either to exclude such measures in the provisions defining the substantive scope of application; or to address the matter under Article 3 (Definitions) by clarifying that such measures do not qualify as 'parallel proceedings'. Equally the Convention should not apply to the proceedings stemming from (i) the losses caused by provisional measures that were later annulled or (ii) the breach of the party to comply with the provisional measures, e.g. actions to recover damages, to enforce cross-undertaking provided by the applicant or undo unauthorized transfers of assets.

6. Imagine a scenario where proceedings on the merits were initiated in the court of one contracting state and provisional measures were sought in the court of another. This situation would typically not fall within the definition of 'parallel proceedings' under Article 3, because the subject matter of most provisional measures of protection (e.g. freezing order, or appointment of a judicial expert for the purpose of gathering evidence) would be different from that of the proceedings on the merits.[2] One exception, however, is anticipatory measures, whereby the same remedy (e.g. payment of an invoice) is sought provisionally in one court (*référé provision* in France, *kort geding* in the Netherlands) and on the merits in another.[3] A number of issues could then arise, in particular, whether seizure of the court for the purpose of obtaining a provisional order for payment should be taken into account to determine 1) the date of seizure of that court (if for instance it is later seized on the merits), 2) proceedings subsequently started on the merits in that court were within a reasonable timeframe under Article 8(1) and 3) whether a foreign court having a connection under Article 8 is seized, triggering rules under Article 8(1)(a) or Article 9.

7. Another case scenario is that of parallel proceedings all seeking provisional measures. The HCCH Working Group may consider clarifying in the Explanatory Report that the exclusion covers proceedings for the granting of provisional measures pending in multiple States.

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[1] That Note reads: "There is a need to consider the inclusion of text in the Draft Text, or referring to this in the Explanatory Note, to clarify that, where a proceeding is pending in a court of a Contracting State, 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, if the act is confined to the territory of that other State, does not give rise to parallel proceedings, and may not give rise to related actions within the scope of the Draft Text."

[2] See, e.g., on whether the appointment of a judicial expert for the purpose of gathering evidence is meaningful to trigger the lis pendens rule under the Brussels I bis Regulation, CJEU C-29/16 *HanseYachts*,.

[3] The CJEU has suggested that in such a case scenario, the date of the application for the provisional measure could be the date of seizure for the purpose of *lis pendens*: see e.g. Case C-296/10 *Purrucker II.*

2) Influence of Existence of a Judgment

8. The current Draft Convention does not clearly address the influence of the existence of judgments deciding some or all of the relevant claims on its operation. The only provision which touches upon the topic is Article 1(3), which provides that "Chapter III shall apply only where none of the courts seised of related actions has issued a decision on the merits", and which suggests that a decision on the merits has no influence on the application of other chapters of the Draft Convention. The basis for this distinction is unclear.
9. The issue arises whether a priority for rules on recognition and enforcement of foreign judgments should be established over rules on parallel proceedings. It is submitted that the objectives of legal certainty, reduction of litigation costs and avoidance of contradictory judgments should indeed result in such a priority. Any court seized of parallel proceedings should simply recognize the judgment originating from the other Contracting State where the parallel proceedings would have resulted in a judgment. It is further submitted that this should be made clear by an express provision of the Draft Convention.
10. An express provision could usefully clarify the scope of the exclusion. It should provide that the Draft Convention would only apply to cases where none of the parallel proceedings would have resulted in a judgment on the merits, with two qualifications. The first qualification should be that the rule should only apply where the foreign judgment would actually be recognized in the other Contracting State under applicable rules (whether an international convention – e.g. the 2019 Hague Judgments Convention or the national law of foreign judgments of the relevant state). The second qualification should be that the rule should only exclude the operation of the Draft Convention for those claims decided by the foreign court.
11. Given that the basis for the recognition of the foreign judgment could be either an international convention or the relevant state's national law of foreign judgments of, this issue should be addressed as an issue of scope, and not as an issue of relation with other international instruments.
12. Where a judgment has only partially decided the dispute, the recognition of the judgment should exclude the application of the Draft Convention for the claims decided by the foreign court. However, it could be argued that the existence of the judgment could be a factor to be considered in the determination of the most appropriate court under Article 10 in respect of the remaining claims.

3) Anti-suit injunctions

13. The current Draft is silent on anti-suit injunctions. This is unfortunate, as anti-suit injunctions are a major tool, in particular in common law jurisdictions, for coordinating parallel proceedings. The lack of an express provision in the 2005 Choice of Court Convention has given rise to significant issues of interpretation based on unclear legal

history.[4] As anti-suit injunctions are often granted as interim relief, it was argued that their availability was indirectly addressed by the exclusion of interim measures from the scope of the 2005 Convention, which left open the issue of the availability of permanent anti-suit injunctions. This shows that the lack of an express provision is generating legal uncertainty and that this should be remedied in the present convention.

14. Due to the absence of express treatment of the issue in the 2005 Convention, scholars have debated the extent to which the treaty obligations under the 2005 Convention prevent the courts of contracting states from issuing anti-suit injunctions. It is submitted that the Draft Convention should clarify which of the obligations it establishes excludes the use of anti-suit injunctions.

15. A first view (the broad view) could be that anti-suit injunctions can be seen as mechanisms aimed at resolving certain types of parallel proceedings which therefore should be excluded from the Draft Convention to the extent that it establishes a mechanism for resolving parallel proceedings binding on the relevant courts. A provision could then simply exclude the use of anti-suit injunctions within the scope of the Draft Convention, for parallel proceedings pending in courts of contracting states.[5]

16. A second view (the narrow view) could be that anti-suit injunctions should be unavailable where they would contradict specific treaty obligations. For instance, in the context of Chapter II (parallel proceedings), when the forum (by definition a contracting state) would be under an obligation to suspend or dismiss proceedings under Article 8(1) or under Article 9(2), it should not have the power to issue an anti-suit injunction to restrain proceedings respectively in a court having connection under Article 8 or in a court having such connection, seized first, and making a determination of whether it is an appropriate court. In contrast, where the forum would be the only one having a connection under Article 8, or would be seized first and have ruled that it is the appropriate forum, it could arguably restrain proceedings in a court of another contracting state ignoring its treaty obligation under Article 8(1) or under Article 9(2), unless that other court would have exercised its power to resume or continue proceedings under another provision of the Draft Convention, e.g. Article 9(5) (or Article 9(2) in the second approach), Articles 19 through 21.

17. In the context of Chapter III, the need for an express treatment of anti-suit injunctions is much higher, as the current text allows related actions to continue separately before different courts. It seems, however, that issuing an anti-suit injunction restraining the court of another contracting state to continue a related action would necessarily be in breach of

[4] Mukarrum Ahmed & Paul Beaumont, 'Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast, especially anti-suit injunctions, concurrent proceedings and the implications of Brexit' (2017) 13 J Priv Int L 386; Johannes Landbrecht, 'Anti-Suit Injunctions and the Hague Choice of Court Convention – Turner v Grovit turning Global?' (2019) Zeitschrift für Zivilprozess International 159; Gilles Cuniberti in G. Cuniberti, B. Marshall & L.E. Teitz, *The Hague Choice of Court Convention – A Commentary* (Elgar 2025) para 7.18.

[5] This last requirement would only be useful if the scope of the Draft Convention is not directly or indirectly limited to proceedings pending in the courts of contracting states.

the treaty obligations of the court issuing the injunction. This is because Article 14 recognises that any of the courts seized with a related action is ultimately free to make the determination that it should continue the relation action before it. It could be convincingly argued that Article 14 entails an implicit obligation for the courts of all contracting states not to interfere in the judicial process of courts deciding to continue to entertain a related action.

D. Answers to Individual Questions included in the HCCH Consultation Paper

Question 1 on the scope of the Draft Text

1.1 What are your (general) views on the scope of the Draft Text?

18. It is crucial for the field of application to be clearly defined since it appears that the judiciary frequently encounters difficulties when deciding whether to apply international conventions, bilateral or regional (such as EU) legislation.

19. Regarding the geographical scope, the majority of this Working Group expressed the view that habitual residence should be abandoned as the criterion defining the scope of application. It is sufficient that the parallel proceedings are pending before the courts of the contracting States.[6]

20. It has been argued above that the existence of a decision on the merits should generally exclude the application of the Draft Convention. Article 1(3) should be redrafted accordingly.

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?

21. Ideally a convention on parallel proceedings and related actions would be beneficial for *all* matters of international litigation, however it is understandable that such a consensus could be difficult to achieve in an international convention and therefore exclusions would be necessary. This sub-question in our view is best answered by the specific focus on a number exclusions, which we engage with below.

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)?

<u>Overall remarks, including on a questionable need for assimilation with other Hague Conventions</u>

22. It is evident that the Draft Convention's approach to scope and exclusions broadly mirrors that of the 2005 Hague Choice of Court Convention ("HCCCA") and the 2019 Hague Judgments Convention ("HJC"). At first glance, this continuity may appear both prudent

[6] *Infra*, para 36.

and institutionally coherent. It reinforces the HCCH's established drafting practice and it facilitates familiarity among Contracting States. However, the resemblance here in our view serves a formal rather than functional purpose. The justification for exclusions in the HCCCA and HJC should in our view not be transferred immediately to a convention with procedural coordination as its primary object. Indeed, the current Draft Convention aims at coordinating parallel/related proceedings. It does not aim at achieving jurisdictional allocation or judgment circulation (these are what the HCCCA and HJC do). Moreover, both the HCCCA and HJC operate in a context of 'competition' with other international conventions. By contrast, not many other treaties deal with parallel proceedings and, therefore, the Convention is unlikely to interfere with the operation of such treaties. Finally, judgments issued on the basis of jurisdictional rules outside the HCCCA and HJC, may nevertheless obtain recognition on the basis of the residual rules in the contracting states. It would be a missed opportunity not to include these in a convention on parallel proceedings. In summary, therefore, when determining the scope of the future Convention, a different logic than other Hague Conventions in our view should be employed.

23. Overall, while acknowledging continuity with existing Hague Conventions is institutionally valuable, a more context-sensitive approach could be engaged. Such an approach might include narrower exclusions. Indeed, the Draft Convention also sets some enhanced reliance on safety valves in Articles 19-21, e.g., public policy, denial of justice, abuse of process, as well as declaration option under Article 22 to accommodate State sensitivities. These in our view are a better means to ensuring as wide a scope of application as possible, and we propose the exceptions be revisited and narrowed down.

24. In principle, what would most certainly seem unattractive, is the exclusion of subject-matter which even in the HJC is not excluded. One example is consumers and employment contracts, but the Working Group was divided on this issue (see below para. 29).

25. With respect to all 'excluded matters', a definition of their meaning either in the text of the convention or the explanatory report, or, failing either of those, an identification of the law that determines qualification, would be warranted. CJEU authorities illustrate that difficulties with characterisation are encountered even when an international legal instrument is in place (e.g. viz the European Insolvency Regulation). In the current state of the draft, it is unclear to which matters 'uniform aka autonomous HCCH interpretation' applies, and which are left to national laws – and in the latter case which national law is the governing law for the qualification.

Individual exclusions

26. The 'family' related list of exclusions (which follows the list in Art. 2 of the 2019 Judgment Convention) in our view would be better structured if the exclusions under (a) and (c) and potentially (b) and (d) too, were not separated. For instance by redrafting as "a) the status and legal capacity of natural persons, family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; b) maintenance obligations; c) …"

27. The insolvency exceptions in par. 1(e) of Article 2 is one of those areas where the aforementioned comment on a need for autonomous interpretation is acute. As it stands, the exclusion is not very well formulated. For instance is 'financial institutions' a denoter for all 3 categories: 'insolvency, composition and resolution', meaning 'insolvency' etc is only excluded to the extent it applies to financial institutions?

28. The inclusion in the scope of the convention of 'related' claims where they are brought under civil law claims adjudicated within the framework of the insolvency case, is to be welcomed. The status under the Convention of collective restructuring proceedings such as schemes of arrangement is however unclear and should be clarified either in the text of the Convention itself, or in the explanatory report.

29. As already noted, the EAPIL Working Group was divided on the need to exclude consumer and employment contracts. Some members expressed the view that they should be included, because they are included within the scope of the 2019 HJC. Their inclusion in the current Convention, of course, would require some changes, e.g., the inclusion in for instance Art. 7(3) that the court seised must have informed the weaker party of the effects of submission. Moreover, from current wording it appears that only 'contractual' disputes in consumer and employment disputes are excluded. Convention or report should in our view clarify how one should distinguish (non)contractual consumer and employee claims, in the case of the former for instance in product liability cases. Convention or report should also clarify how assigned claims and those initiated as class actions are to be understood.

30. Other members thought that the exclusion should be maintained. They noted that the HCCH Working Group discussed this question[7] and think that the reason for the exclusion (protection of weaker parties in litigation) is convincing. In the 2019 Hague Judgments Convention, Art. 5(2) limits the bases for recognition and enforcement. The Explanatory Report clarifies: „In practice, these exceptions are likely to restrict the circulation of judgments against a consumer or employee to those given in the State of that person's habitual residence, absent express consent to the jurisdiction of another court by the consumer or employee directed at that court".[8] If consumer matters were to be included in the Draft, comparable protection would have to be provided with regard to Articles 8-10. However, it should be noted that parallel proceedings in consumer matters can be based on very different grounds that do not generally lead to a particular need for protection. For example, a consumer may bring two actions against a professional because the proceedings before the court first seised take so long. In this case, the interests are essentially comparable to those in normal parallel proceedings. The situation is different when consumers and professionals sue in different countries. In this case, there would be a greater need for consumer protection. This would require special rules in Art. 8-10, which would make political compromise difficult.

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[7] Report of 2025, https://assets.hcch.net/docs/007c2a52-2611-4470-b1dc-4d041c77f7c4.pdf, para. 10

[8] https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf, para. 221.

31. In this context, the continuity of maritime exclusions broadly (Art. 1(f) and (g)) might be particularly difficult to justify. While maritime matters are excluded from both the HCCCA and HJC, the reasons are context-specific: in the HJC, concerns centre on limitation regimes, public international law dimensions, and specialised international instruments; in the HCCCA, the focus lies on preserving mandatory jurisdictional rules and established maritime procedural mechanisms. None of these concerns directly apply to procedural coordination of parallel proceedings. The Draft Convention does not interfere with arrest of ships, limitation funds, or specialised maritime conventions. Instead, it could operate alongside them and mitigating duplicative litigation.

32. With respect to paragraphs 6 and 7,[9] in our view there is no need for such an express exclusion, considering that the issues listed are closely related to the determination of the substantive scope of application in Article 1(1) – civil and commercial matters with exclusion of revenue, customs or administrative matters. It would in our view suffice to merely add in Article 1(1) a reference to the disputes involving States which are considered '*acta iure imperii*'.

The arbitration exclusion

33. Various views were expressed in our Working Group on the arbitration exclusion. Some members argued that its scope should be narrowed, but no elaborate alternate proposal was made.

34. If the exclusion of arbitration is kept on the ground that it should not be for the Draft Convention to resolve issues of parallel litigation related to arbitration, it should avoid and indeed cure the flaw of the suggestion made by the Explanatory Report to the Choice of Court Convention[10] that the arbitration exception is triggered by the mere allegation of the existence of an arbitration agreement. The issue arises as a result of the structure of Art 2, which suggests that the exclusion of arbitration applies both when raised as object of the proceedings, or by way of defence (art. 2(2) seems to apply only to exclusions in art 2(1)). As a consequence, if the application of an arbitration agreement is raised in one of the parallel proceedings, it will exclude the application of the Draft Convention, irrespective of whether the argument is rejected, and including if the argument was fanciful. This result is highly relevant from a policy perspective as it offers obvious incentives for strategic behaviour. The problem should be remedied either by clarifying that Article 2(2) also applies to arbitration. This could be done either by changing the structure of Article 2 and moving the arbitration exclusion before Article 2(2), or by adding text providing, for instance, that 'the arbitration exception is not triggered by an objection to jurisdiction by

[9] '6. Proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party to the proceedings. 7. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.'

[10] Hartley/Dogauchi Report*,* para 84.

invoking the invalidity of an arbitration agreement, if the subject-matter of the dispute falls within the Convention's 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).

35. The limitation of the geographical scope of the future Convention to parallel proceedings pending in Contracting States only (Art. 1(1)) is logical. It establishes an incentive for third States to join the Convention in order to benefit from its rules.

36. By contrast, the rationale for an additional requirement that one of the defendants (at least) be habitually resident in another Contracting State (Art. 1(2)) is unclear and is not explained by the consultation paper. The majority view of the 'EAPIL group' is that the geographical scope should be differently defined so as to refer to litigations pending in the contracting States, regardless of the habitual residence of the parties. In many international disputes, none of the parties may be resident of any of the Contracting State. It would be undesirable if such non-resident parties could not avail themselves of the provisions of the Convention.

37. If the residence requirement were to be kept, its rationale should be clarified. Is it to establish an internationality requirement by requiring that at least a defendant be foreign based in one of the proceedings? If so, it is hard to understand why internationality could only be established by the foreign residence of defendants, and not by the foreign residence of claimants. That parallel proceedings are pending in two different States should in our view suffice to establish the internationality of the situation (just as, under the Hague 2005 and 2019 Conventions (respectively Art. 1(3) and 1(2)), the fact that recognition or enforcement of a foreign judgment is sought in the forum suffices to establish the internationality of the situation irrespective of the internationality of the case litigated in the court of origin). Further, a requirement for residence could easily be engineered by parties, and contracting states who find the requirement so essential, may perhaps be offered to do so by exercising a reservation option.

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.

38. The uniform application of the Convention depends to a large extent on the definition of parallel proceedings and related actions. It determines whether the concise procedure of Chapter II or the very flexible one of Chapter III applies. Therefore, the definitions should be as clear as possible.

39. As is generally known, this so called "identity" of the subject matter or cause of action is controversial in many jurisdictions. A good illustration is the standard practical example[11] of "parallel" proceedings: actions for performance versus actions for a negative declaration. (Alleged) debtors can attempt to pre-empt or follow-up an action for performance with an action for a negative declaration.

40. In Germany, by way of example, it is assumed that these proceedings do not have the same subject matter. The CJEU, by contrast, has held that such proceedings do have the same subject matter as long as the "central" or "essential" issue is the same.[12]

41. It would seem that the HCCH Working Group decided early on to give the expression "the same subject matter" the same meaning as in the Convention of 30 June 2005 on Choice of Court Agreements.[13] However, the term is not defined in more detail there, either. According to the Explanatory Report, it is sufficient if the "central or essential issue" is the same.[14] This suggests that actions for performance and actions for a negative declaration have the same subject matter, as they do in CJEU case law.[15]

42. Since the conflict between actions for performance and actions for a negative declaration occurs most frequently in practice, we believe that for the avoidance of all doubt, this should be specifically clarified in Article 3 of the Convention. In our opinion, such an important issue should not be dealt with in an Explanatory Report only, which may not be taken into account by courts.

43. Further, the requirement of identity of parties raises particular challenges in commercial contexts involving parent companies and subsidiaries or joint ventures. Absent express guidance, courts are likely to fall back on domestic doctrines: common law courts may adopt a stricter view of party identity and civil law courts may be more willing to look at economic reality or procedural representation. This divergence risks uneven application and reduced predictability across Contracting States.

44. Another practical difficulty concerns timing. Proceedings may evolve by amendments to pleadings and /or claim forms, by joinder of parties and by changes in relief sought. Therefore, a dispute that is initially non-parallel may later become parallel or related. The

[11] See e.g. with different examples from Japan *Haga*, Das internationale Parallelverfahren in Japan – aus der Sicht der gerichtlichen Praxis, ZZPInt 18 (2013), 339 ff.

[12] CJEU Case 144/86 *Gubisch Maschinenfabrik/Palumbo*; CJEU Case C-406/92 *Tatry*, [43]; CJEU Case C-116/02 *Gasser*.

[13] HCCH Working Group on Jurisdiction, Report of 2022 (https://tinyurl.com/bdemzej9), para. 9.

[14] *Garcimartín/Saumier*, Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2020 (https://tinyurl.com/54j72fns), para. 272.

[15] See also *Garcimartín/Saumier*, Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2020 (https://tinyurl.com/54j72fns), para. 275.

Draft Text does not specify whether courts must reassess classification of the proceedings dynamically. Without guidance, courts may diverge.

45. In contrast to the concise wording for parallel proceedings, Article 3 para 1(b) is very extensive in its definition of 'related actions'. The wording in our view is too vague and unnecessarily complicated. We would suggest it would be much more appropriate to follow the expression used in the Brussels Ibis Regulation: expedience in resolving proceedings and avoidance of irreconcilable judgments. A detailed, yet unclear approach is likely to raise numerous questions of interpretation. Under (b)(i) only the parties are mentioned, however it is unclear what is meant by 'substantially the same or connected'. No subject-matter or 'causes of action' are mentioned under (b)(i). Instead, (b)(ii) refers to the 'same transaction' or 'series of transactions'. It would be more appropriate simply to require that the claims are so closely related that expedience and avoidance of irreconcilable judgments justify deciding over both claims in one proceeding.

46. The term "the courts of different Contracting States" should in our view include such regional courts as the Unified Patent Court. The Convention could add a provision similar to par. 4 of Article 26 of the Judgments Convention.

<u>Residence</u>

47. As we have suggested above that the applicability of the Convention should not be conditional upon residence, we do not think it is necessary to define the concept. It would only be useful for establishing priority rules with other instruments: we propose that the relevant instruments define residence for this purpose (e.g. residence of all parties within the EU within the meaning of the Brussels I bis Regulation would trigger the applicability of the Brussels I bis Regulation).

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

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.*

48. The current version of Article 4, entitled "Court seised", provides that "[f]or the purpose of [Chapter II], a court shall be deemed to be seised – (a) when the document instituting the proceedings or an equivalent document is lodged with the court; or (b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant".

49. A note specifies that the inclusion of Article 4 in the body of the Convention would "not mean the adoption of certain types of rules [on first in time] for the suspension of proceedings". There is a difference in meaning between the French and English (as well as

Spanish) versions, the latter two being more precise in clearly referring to the "first in time" principle.

50. While offering a uniform definition that could prove useful to all Contracting States and promote harmonisation, a more comprehensive wording could explain in greater detail the meaning of a document "lodged with the court" or "received by the authority responsible for services". Practice may indeed differ in countries wishing to become contracting parties, so a more comprehensive definition would be welcome in order to avoid, despite the wording of the current Article 23 (Uniform Interpretation), possible misunderstandings, discrepancies, and unnecessary delays in resolving the issue of parallel proceedings.

51. Within the EAPIL working group, concerns have been raised, particularly with regard to the member countries of the Commonwealth of Independent States (CIS). In these countries, court proceedings are usually deemed to commence when the court issues a procedural order on acceptance of the claim and commencement of the proceedings. Therefore, it would be helpful to address this scenario in the description of the moment when the court is deemed to be seised.

Question 4 on Article 5 obligations

What are your views on Article 5?

52. Article 5(1) – From the wording of Article 5(1) it follows that '[a] court that must suspend proceedings in accordance with this Chapter' is: a) Any court which does not have exclusive jurisdiction in a dispute involving rights *in rem* over immovables, within the meaning of Art. 6; b) Any court which is not designated in a non-exclusive choice of court agreement within the meaning of Art. 7, c) a court second seised having connection under Art. 8.

53. Giving the party the possibility to inform the court of the existence of proceedings pending with another court is a good solution, particularly where communication between the contracting states is slow or ineffective. It could be considered a step toward ensuring the fulfilment of the Convention's objective of preventing parallel litigation and promoting judicial cooperation.

54. According to Art. 5(1), a court that must suspend proceedings shall do so not only upon a request of a party, but also on a request of '[other relevant person,] or through the communication mechanism established pursuant to Article 16'. A number of remarks have been put forward in our Working Group. Firstly, it is unclear what the wording '[other relevant person]' refers to. Furthermore, with the exception of Art. 6, it is questioned how '[other relevant person,] or through the communication mechanism established pursuant to Article 16', fits the notion of 'party autonomy' and 'tacit prorogation', within the meaning of Art. 7 and Art. 8(2)(j) respectively. In other words, it should be specified that the wording '[other relevant person,] or through the communication mechanism

established pursuant to Article 16' may relate only to Art. 6, whereas the suspension in other circumstances should be requested by a party to the proceedings.

55. In a similar vein, an objection is raised that it is not clear from the wording of Art. 5(1) whether after having become aware of the foreign parallel proceedings the court is required to give the parties an opportunity to comment on potential suspension of the proceedings before ruling on this issue. Alternatively, the court may in theory suspend the proceedings automatically allowing the parties to seek an alteration or a discharge of the suspension order. This is an important due process requirement that must be addressed by the Convention. This consideration appears even more important if the court decides to dismiss the proceedings as suggested in the first note[16] to this provision.

56. Paragraph 2 of Article 5 in conjunction with the second note[17] raises a number of questions, primarily those that concern recognition and enforcement. Firstly, the wording in the Note suggests that recognition and enforcement will be dealt with within this Convention. However, such approach is not reconcilable with the general idea that the current Draft Convention is intended to complement 2005 and 2019 Conventions.[18] Accordingly, one would expect that the matters regulated in the two Conventions will be outside the scope of the current Draft Convention, since an overlap in the matters regulated should be avoided. Instead, this is the matter left to other international instruments and/or national law. Within this context, the Convention's role and purposes, as well as the relationship with other legal instruments, should be clearly and carefully drafted.

57. Further, the wording in paragraph 2 appears inadequate to resolve a conflict between actions for performance and actions for a negative declaration. The following example illustrates its potential negative consequences: A borrower had filed an action to declare its loan agreement invalid with the court in one contracting state. Subsequently, the lender filed a collection action with the court of the second state, which action was suspended. The borrower's claim was denied, and the relevant decision may be recognised in the second state. Why should the court in the second state dismiss the lender's claim in this scenario? It would seem obvious that these proceedings have to be continued. Therefore, the scope of Article 5(2) should be reconsidered, and the expression 'dismiss' considered inappropriate at this point. The word 'suspend' or 'stay' may be used instead, as it clearly reflects the temporary nature of the intervention in the proceedings.

58. The wording in paragraph 3 may be adjusted so as to reflect a later moment than the moment when the suspension was granted (e.g., 'is unlikely' may be replaced by 'appears unlikely').

[16] [Note: For the situation provided in paragraph 1, the possibility of dismissal instead of suspension should be further considered.]

[17] [Note: Further consideration of the recognition and enforcement of foreign judgments and on the detailed rules is required.]

[18] Consultation on the draft text of a possible convention on parallel proceedings and related actions, p.7, B.2 e33df29b-8686-4f80-87c4-0d46d3e4b2f1.pdf

Question 5 on priority jurisdiction / connection

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

The mechanism (Art. 6-8) in general

59. In our Working Group, there were discussions as to whether the rules on jurisdiction should be omitted and an appropriate forum test should be applied instead. On the one hand, doubts were raised as to whether States would be able to agree on jurisdiction rules. On the other hand, it was argued that defendants could challenge the jurisdiction of the court first seised not only under national law but also under the Convention after initiating parallel proceedings. This would create an "additional backdoor option".

60. A considerable majority of our Working Group, however, welcomed the approach taken in the Draft. We believe that it would be a great benefit to international cooperation if there were uniform, predictable, and fair rules worldwide on how to deal with international parallel proceedings. For various reasons, it is convincing to focus primarily on the question of jurisdiction to reach this goal.

61. In general terms, anything else would amount to a far-reaching adoption of the *forum non conveniens* doctrine. This would arguably find little support outside common law jurisdictions. It seems inconceivable that such a general, discretionary rule alone could be turned into a mechanism that enables cooperation between courts of different countries and ensures legal certainty. Rather, there would be a risk of costly competition between the courts. Particularly when the parties wish to achieve conflicting objectives with their claims, courts should be required to assess their jurisdiction on the basis of specific criteria.

62. We note that some lawyers (especially those in the United States) are very critical of jurisdiction rules. In particular, they criticise the fact that some provisions of the Brussels I*bis* Regulation are vague and have led to many proceedings at the CJEU.[19] However, difficulties in interpretation are normal in international conventions and regulations. In fact, such problems arise even more when it comes to determining the "more appropriate" court.

63. That being so, the most important step in our view will be to agree on a list of internationally accepted jurisdiction requirements. Firstly, this could help curb national rules providing for exorbitant jurisdiction. Secondly, it would prevent national rules of jurisdiction from being elevated to the status of the gold standard. The latter can be observed in EU law and in some national legal systems. There, consideration of parallel proceedings already heavily depends on an assessment of the international jurisdiction of the foreign court.[20] For example, under German law, it is required that the proceedings

[19] *Herrup/Brand* 63 Harvard International Law Journal Online (2022) 1, 3 et seq.

[20] For EU law, see Art. 33(1) of the Brussels I*bis* Regulation.

abroad can be based on a German rule of jurisdiction.[21] This is an unconvincing solution that is not suitable for an international Convention anyway.

64. We are aware that it is difficult to agree on a list of internationally accepted jurisdiction rules (see on Art. 8(2) of the Draft Convention later). However, Art. 5 of the 2019 Judgments Convention shows that it is possible. We believe this is also the case here, because it is not a matter of directly harmonising jurisdiction. It is merely a question of which of several courts seised should decide a case. States should therefore be made aware that this Convention does not directly change their national rules on jurisdiction.

65. Due to the importance of jurisdiction, we suggest not to require the request of a party in Art. 8(1). Where parties do not know that a court can stay or suspend proceedings on the basis of the Convention, courts should still be able to prevent irreconcilable judgments (*ex officio*).

Art. 6 – Exclusive jurisdiction

66. The current version of Art. 6, entitled "[Exclusive][Priority] jurisdiction/connection", provides that "[w]here parallel proceedings which have as their [main] object rights in rem in immovable property [, tenancies of immovable property, or the registration of immovable property] are pending before courts of Contracting States and the property is situated in one of those Contracting States, the court of the Contracting State in which the property is situated shall proceed with adjudication on the dispute. Any other court shall [, on the application by a party,] suspend [or dismiss] the proceedings".

67. A note specifies that "[a]pplication of this rule to parallel proceedings which have as the [main] object tenancies of immovable property or the registration of immovable property should be discussed further". The note adds that "[f]urther consideration is necessary as to whether registration includes recordation and whether this term can be added to the text as well. Further discussion is needed to address whether the rule on tenancies should include an exception for cases where the tenant is habitually resident in a different State. Further consideration is needed as to how the above provision aligns with Art. 5(3) of the 2019 Judgments Convention".

68. At first glance, it may be observed that the current version of Art. 6 is presented as a "qualified" jurisdiction rule, whereas the subject matter of the Convention should rather be rules of procedure/parallel proceedings. The heading of Art. 6 can therefore be called into question.

69. In any event, the wording of the current version of Art. 6 is unsatisfactory. Despite drafters not yet having made a choice, the usefulness of the adjective "main" in brackets must be reconsidered. How should the meaning of the term "main" be assessed? What would/should be the determining criterion for such an assessment? It seems that, if Art. 6

[21] See Section 328(1) no. 1 of the Code of Civil Procedure, which has relevance when it comes to the likelihood of recognition.

were to remain in the body of the future Convention, this adjective should be deleted or a clearer provision should be drafted.

70. With regard to the note, it is clear from the outset that this draft provision is incomplete. It is obvious that consideration must be given to whether or not it should be aligned with Art. 5(3) of the Judgments Convention of 2019. This raises a more general question, namely whether this draft Convention is intended to be a supplementary (or complementary?) instrument to the Judgments Convention. If so, then alignment with the current provision in Art. 5(3) of that Convention would be logical.

71. However, the main issue seems to be whether presumed exclusive jurisdiction in the field of rights in rem in immovable property still makes sense. CJEU case-law in this area has shown that the former basis of sovereignty is giving way to that of proximity (of the dispute with the competent court). Consequently, should a provision such as the current version of Art. 6 be included in the future body of the convention?

72. In any event, if consistency between this draft Convention and the 2019 Judgments Convention is considered essential, one might wonder why there is no alignment with the wording of Art. 5(3) of the Judgments Convention. This would imply adding tenancy (residential lease of immovable property) or registration of immovable property to the scope of the current version of Art. 6.

73. Furthermore, if the provision is extended to tenancies, it should only concern residential lease in order to preserve parallelism with the Judgment Convention (Art. 5[3]). And it would make sense to extend the scope of Art. 6 to residential lease and registration of immovable property, since all these matters are treated as exclusive jurisdiction in the Judgment Convention. Hence, it is not obvious why they should not be treated equally in Art. 6.

74. Also with regard to the scope of the current provision, it was suggested among the members of our Working Group that an Explanatory Report should address the case of other types of leases (e.g., commercial) and indicate whether such types fall within the scope of the provision, at least when they are considered as such by the law of the place of the immovable (see p. 111 of the Explanatory Report to the Judgment Convention for an illustration of both model and clarification).

75. Still with regard to the scope of the current version of Art. 6, one may also question whether this provision could only be applied if the property is situated in a Contracting State (and more specifically in one of the two Contracting States where parallel proceedings are pending). The logic of such a condition is debatable. If the relevant criterion is immovable property and if the draft Convention considers that a right in rem in immovable property confers exclusive jurisdiction on the court where the immovable property is situated, why consider only the location of a Contracting State? If such a criterion is important, the draft Convention should in any case address it, otherwise it would prove, on the contrary, that the criterion is weak and cannot justify exclusive jurisdiction.

76. One might also ask why Art. 6 does not allow *lis pendens* (i.e. the application of rules such as Art. 8 and 9) in disputes concerning rights in rem in immovable property, especially if tenancy is included in the scope of this article. Even though some members of the Working Group questioned the very necessity of such a provision, if it were to be retained in the body of the Convention, the exclusion of any possibility of *lis pendens* seems questionable. Depending on the final scope of the current version of Art. 6, there could be room for at least one specific case of *lis pendens* in this area.

77. Regarding the discussion of a possible exclusion that can be found in the note, why should there be an exception when a tenant is habitually resident in a different state? Does this mean that the court of the Member State of a tenant's habitual residence should have jurisdiction? It is not clear why this factor attributing jurisdiction should "prevail" over forum rei sitae. It seems reasonable to discuss an exception only if both a tenant and a landlord would have common habitual residence in a different state. Also, it is then necessary to discuss further whether there would be a general exclusion or only regarding the short-term tenancies (like under the Recast Brussels I Regulation in the EU).

78. Finally, the relationship between the Recast Brussels I Regulation, which does not require the defendant to be domiciled in the EU in cases of exclusive jurisdiction, and the Convention must be clearly addressed, assuming the EU could and would accede to the Convention. Hague Conference Conventions that are open to signature by Regional Economic Integration Organisations (hereinafter "REIO") contain an REIO "give-way" clause. However, this clause will likely not give priority to the Regulation in cases where, under the definition of habitual residence in the Regulation, at least one party is habitually resident in a non-member state that is a contracting party to the Convention. This would, in effect, paralyse the exclusive jurisdiction clause and have consequences for lis pendens situations.

<u>Art. 7 – Party autonomy</u>

79. Many doubts were raised with regard to Art. 7 of the Draft Convention.

<u>Should exclusive choice of court agreements be covered by Art. 7?</u>

80. Art. 7 (2) of the Draft Convention excludes exclusive choice of court agreements in the sense of Art. 3 a) and b) of the 2005 Choice of Court Convention from Art. 7(1) of the Draft Convention. We welcome this in principle. Exclusive choice of court agreements already benefit from a highly developed and carefully calibrated regime under the 2005 Choice of Court Convention, including a dedicated *lis pendens* rule (Art. 6) and strong obligations of recognition and enforcement. Introducing an autonomous priority rule for such agreements within the Draft Convention risks normative overlap and interpretative friction, even with an express *lex specialis* clause. In practice, courts may still struggle at an early stage to determine which Convention applies, particularly where party status, temporal scope, or material exclusions are contested. In fact, the Draft Convention is structurally designed to address situations of jurisdictional competition in the absence of

clear party allocation of authority. Where parties have concluded an exclusive choice of court agreement, the problem is not one of coordination and the 2005 Choice of Court Convention addresses the matter directly and more effectively. This is why we suggest that Art. 2 of the Draft Convention should include an exception for exclusive choice of court agreements. This also makes sense because otherwise, one could think that Art. 7(2) only excludes the applicability of Art. 7(1), with the result that Articles 8 and 9 would be applicable. We think such an exception purely to Art. 7(1) was not intended.

81. However, Art. 2 of the 2005 Choice of Court Convention excludes some matters from that Convention which are covered by the current Draft Convention. In particular, this applies to "claims for personal injury brought by or on behalf of natural persons" and "tort or delict claims for damage to tangible property, and tenancies of immovable property" (Art. 2(1)(j) and (k) of the 2005 Choice of Court Convention). If Art. 7(2) of the Draft remained unchanged, exclusive choice of court agreements concerning these matters would neither be covered by the 2005 Choice of Court Convention nor by the Draft Convention. In contrast, non-exclusive choice of court agreements relating to these matters would be covered by Art. 7(1) of the Draft Convention. That seems contradictory as then, they would have a stronger effect than exclusive choice of court agreements. We understand that the matters are so sensitive that states may not wish to grant such a strong priority to the court chosen (like in Art. 6 of the 2005 Choice of Court Convention). In that case, these matters should perhaps be excluded from Art. 7 altogether. Then, in such matters Art. 7 would neither apply to exclusive nor to non-exclusive choice of court agreements. In practice, they occur relatively rarely anyway.

How should non-exclusive choice of court agreements be defined?

82. The definition of non-exclusive choice of court agreements in Art. 7(1) of the Draft Convention seems to contain a mistake. It also covers cases where parties have agreed that "one" court shall have jurisdiction. Then, according to Art. 7(1) this court shall proceed with the adjudication of the dispute "unless such agreement states that it does not deprive any other court or courts of jurisdiction". If the latter is not the case (and Art. 7(1) could be applied), there will usually be an exclusive choice of court agreement in the sense of Art. 7(2) of the Draft Convention, meaning that Art. 7(1) could not be applied. This is because according to Art. 7(2) sentence 3, a choice of court agreement which designates the courts of *one* State shall be deemed to be exclusive unless the parties have expressly provided otherwise. Therefore, a reference to "one" court usually leads to an "exclusive agreement". If they have expressly provided otherwise, the agreement "states that it does not deprive any other court or courts of jurisdiction". This means that Art. 7(1) does not apply. Therefore, we do not see when the priority rule in Art. 7(1) can be applied at all when it comes to choice of court agreements regarding "one" court. A suitable wording could be that Art. 7(1) only applies if parties have agreed that "courts in two or more States shall have jurisdiction, and only one of the courts seised is designated under such agreement".

83. Our Working Group also discussed what happens if two courts, that have both been designated under the choice of court agreement, have been seised in parallel. The majority

view is that in such a case, it is hard to develop a priority rule under Art. 7(1) as both courts are equally designated by the choice of court agreement. Therefore, the mechanism of Art. 9 (or Art. 8(1)(b)) has to show which court is more appropriate. However, the application of Art. 9 and Art. 8(1)(b) requires both courts to have jurisdiction under Art. 8(2). Therefore, non-exclusive choice of court agreements should be added as accepted grounds of jurisdiction under Art. 8(2).

What exceptions to the priority rule of Art. 7(1) should there be?

84. Under Art. 7(1), where only one of the courts seised is designated under a non-exclusive choice of court agreement, that court shall have priority. The only exception so far applies when the agreement "states" that it does not deprive any other court or courts of jurisdiction. We think that the term "state" might be ambiguous. On the one hand, it could mean that the wording must be clear. Then it would be similar to Art. 7(2) sentence 3 ("expressly provided"). On the other hand, it could be sufficient if it can be inferred from the agreement that the parties did not want to deprive any other court of jurisdiction. The last interpretation seems convincing to us. If the wording of an agreement implies that general rules on international jurisdiction remain unaffected, then such an agreement has no derogating effect. It merely confers jurisdiction to (a) court(s) which otherwise would not have jurisdiction. In other words, it is on the same "footing" with other jurisdiction grounds/connection provided in Art. 8(2). Because of that, Art. 9 of the Draft Convention should be applied. This can be reached by providing for a jurisdiction ground/connection in Art. 8(2). The alternative (referring to Art. 9 in Art. 7(1)) seems less convincing as there are other reasons why non-exclusive choice of court agreements should be mentioned in Art. 8(2), as explained earlier (see para. 83).

85. More importantly, the question is why so far Art. 7(1) only has this one exception. Art. 6 of the 2005 Choice of Court Convention has five (different) exceptions. This means that even where there is an exclusive choice of court agreement, courts not chosen do not have to suspend or dismiss proceedings in every case. Especially, they can proceed with the case if "the agreement is null and void under the law of the State of the chosen court". We think that at least this exception must also be included in Art. 7(1) of the Draft Convention. A counter-exception could then be made in cases where the defendant does not raise an objection when an alleged (non-exclusive) choice of court agreement is relied upon by the claimant. With regard to the other exceptions to Art. 6 of the 2005 Choice of Court Convention, consideration should be given to the extent to which they or comparable rules also make sense here. Furthermore, a rule on the formal validity of the agreement has to be included as already suggested by one of the Notes to Art. 7.

Art. 7(3) and its relationship with Art. 7(1)

86. Art. 7(3) confers priority to courts which have been expressly "accepted" by the defendant during the proceedings. Art. 7(1) applies to non-exclusive choice of court agreements that exclude the possibility for the parties to bring proceedings before another court. This raises the question of the relationship between paragraph 3 and paragraph 1, specifically, whether paragraph 3 can override the choice made under Art. 7(1). Due to the scope of

matters excluded from the Convention's applicability, we would suggest leaving open the possibility to override paragraph 1 in this way. With regard to Art. 7(3), the question remains whether the court should be required to inform the party of the consequences. Given the exclusion of proceedings involving weaker parties from the material scope of the Convention, we believe it should not.

87. From the wording of Art. 7(3), we assume that the conditions for an express consent are much higher than the "tacit prorogation" in the sense of Art. 8(2)(j). In our Working Group, there were discussions as to whether Art. 7(3) should already apply in the case of such a tacit prorogation. It was submitted that in practice, it could be difficult to distinguish between "expressly [and positively] consented to the jurisdiction" on the one hand and "tacit prorogation" on the other. Furthermore, it was argued that the principle of party autonomy requires priority of "tacit prorogation" (even over choice of court agreements). There were, however, general reservations about granting strict priority to the court where the defendant has not contested jurisdiction. While this was not a unanimous view, a strong opinion was, that a tacit prorogation might sometimes not be a conscious decision on the part of the defendant: If the defendant merely fails to object to jurisdiction in good time, this does not create a particularly close connection to the forum – at least not as close as in the case of non-exclusive choice of court agreements or express consent.

88. Finally, paragraph 3 requires harmonisation of the term "stay". Like in all the other Articles, the term "suspend" should be used.

Art. 8(1) – Jurisdiction and timeframe issues

General remarks

89. Art. 8(1) of the Draft Convention deals with two fundamentally different situations. Art. 8(1)(a) applies where only one of the courts seised has jurisdiction under Art. 8(2). Courts not having jurisdiction under the Draft Convention are required to suspend or dismiss proceedings. This is because certain national grounds for jurisdiction are considered so weak that these courts should "take a back seat".

90. In contrast, Art. 8(1)(b) applies where *both courts* have jurisdiction under Art. 8(2) of the Draft Convention (like in Art. 9). A court second seised shall suspend or dismiss proceedings only because it was seised after the proceedings had already been ongoing for some time at the court first seised. We doubt that this case is comparable to Art. 8(1)(a). First, we think, the strict requirement to suspend or dismiss, which fits well for Art. 8(1)(a), may be too strong for the cases described in Art. 8 (1)(b). From our point of view, there might be good reasons why the court second seised should not always suspend or dismiss the proceedings in such cases. For example, the proceedings at the court first seised might take a very long time because it is not working expeditiously. So far, the only option here is to apply Art. 21, which in our opinion should only be applied in absolutely exceptional cases. Art. 5(3) only applies if a court has already stayed the proceedings. But why should a court stay the proceedings if the proceedings at the court first seised have been going on for a long time and are not being conducted seriously by that court?

91. Second, from our point of view, there are several options to improve the structure (and the content) of Art. 8. On the one hand, Art. 8(1)(b) of the Draft Convention could be placed in a separate paragraph. On the other hand (and this might be more convincing), Art. 8(1)(b) could become part of Art. 9 or Art. 10. There, it could either be used as a strict rule (as it is now). Or it could also be only part of Art. 10. Then, the meaning of "a reasonable timeframe" would not have such a significance as it has now (on this, see our comments later).

Art. 8(1)(a) – Jurisdiction of only one court

92. A noteworthy problem regarding Art. 8(1)(a) of the Draft Convention arises from the fact that the list in Art. 8(2) does not fully correspond to national jurisdiction rules. If a court first seised has jurisdiction under its national law, but this is not considered "sufficient" under the Draft Convention, the court would have to suspend the proceedings under Art. 8(1)(a) if an action was subsequently brought before a court with "sufficient" international jurisdiction. Again, this is correct and intentional. However, this rule would also apply if the second court was seised unreasonably late, and the proceedings before the court first seised were already nearing completion. Art. 8(1)(b) would not apply as the court first seised does not have jurisdiction under Art. 8(2). Defendants could use this to their tactical advantage. They could delay proceedings before a court with jurisdiction (under national law) by initiating proceedings in another Contracting State. Art. 5(3) of the draft does not help in this case,[22] because the court first seised may only continue the proceedings if a decision by the court second seised cannot be expected within a reasonable time. To assess that, it will be necessary to wait for the proceedings there to continue. Art. 19 of the Draft Convention is also hardly helpful. It allows jurisdiction to be exercised if this would otherwise result in a manifest denial of justice. This would not be the case if sufficient protection can be obtained in the court second seised. Art. 8(1)(a) of the draft should therefore contain an exception. This should clarify that "*a court first seised does not need to suspend or dismiss the proceedings if the proceedings in the other court were not started within a reasonable timeframe and it can be expected that the proceedings in the court first seized will be completed within a reasonable period of time*".

Art. 8(1)(b) – Jurisdiction of both courts and timeframe issues

93. We have already explained above the strict rule of Art. 8(1)(b) raises doubts. Our Working Group discussed whether this is also the case because the wording "within a reasonable timeframe" is unclear and uncertain. Some have argued that such terms are common and useful because they offer appropriate solutions for individual cases which vary in practice. Some have proposed to give a time limit in Art. 8(1)(b), which would be extendable by the court first seised for a certain period of time. Others took the view that a timeframe might be determined by the court first seised. The latter cannot be considered as a solution for standard cases. This is because at the beginning of the proceedings at the court first

[22] Some members of the HCCH Working Group had a different opinion; see HCCH Working Group on Jurisdiction, Report of 2024 (https://tinyurl.com/2hx98f7f), para. 17.

seised, it is unclear whether any party will initiate parallel proceedings in other States, and, in fact, that is a rare occurrence. The courts would, therefore, have to set a time limit for the possible, but rather improbable case of possible later proceedings abroad as a precautionary measure. The court first seised might, however, be entitled to set a time limit if there are indications that one of the parties will bring parallel proceedings in another State (e.g. if one of the parties has announced to sue the other party in another country). In this sense, the following could be added as a second sentence in Art. 8(1)(b): "*Where appropriate, a court first seised may set a timeframe*".

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

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

94. The jurisdiction list plays a normative (not merely descriptive) role in the Draft Convention. It identifies the jurisdictional bases that are sufficiently legitimate to trigger coordination obligations between courts. For this reason, the use of the term "connection" might be problematic.

95. "Connection" suggests a factual or relational link of variable strength, inviting courts to engage in qualitative balancing: Which connection would be stronger enough to uphold? Perhaps some connections are too weak to consider? That might risk becoming a ground for forum shopping, particularly in common law systems familiar with concepts, e.g., "real and substantial connection" or forum appropriateness. By contrast, what the Draft Convention is doing is endorsing specific jurisdictional grounds as internationally acceptable bases for deference.

96. Existing HCCH instruments, including the HCCCA and HJC, avoid the language of connection and instead rely on clearly articulated jurisdictional bases. Departing from this vocabulary also risks doctrinal inconsistency and interpretative elasticity, especially in the absence of a supranational interpretative authority.

97. A clearer and more coherent approach would be to frame the list explicitly as "recognised jurisdictional bases". This would stress that Art. 8(2) of the Convention does not harmonise national jurisdiction rules directly. It would also preserve flexibility at the coordination stage, while ensuring that only jurisdictional assertions meeting a minimum international legitimacy will be accepted.

98. When determining the specific acceptable grounds of jurisdiction, problems arise. Insofar, the "deadlock" in the negotiations in The Hague is understandable. We would mainly like to comment on the general question whether the list in Art. 8(2) should be narrow or wide. We assume that the Convention will only be successful if neither a particularly narrow nor a particularly wide list is sought. A narrow list would promote legal certainty, as there would be fewer cases in which courts would have to determine the more appropriate court. But this is a very continental European way of thinking. In order for as many countries as possible to be able to accept the convention, one has to find a balance: The list must not

be too narrow because too many states would "miss" "their own" familiar grounds of jurisdiction. But it must not be too wide either in order to curb national rules providing for exorbitant jurisdiction. For example, it should not be a sufficient basis for jurisdiction that assets of the defendant are located in a state.

99. Regarding the individual grounds of jurisdiction, we think that the wording used should follow the 2019 Judgment Convention as much as possible. Instead of multiple alternatives (claim concerns, action concerns, proceedings have as their object etc), the wording 'in a dispute on …' or 'dispute involving …' could be used in paras. d) et seq. in a consistent manner.

100. Finally, we think it is sensible not to prioritise any of the grounds of jurisdiction in Art. 8(2) of the Convention. The Note to Art. 8(2)(j) considers whether a tacit prorogation should be prioritised. In light of the reasons we have put forward above with regard to Art. 7 (para. 87), we reject this idea.

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?

101. See our general comments under para. 98.

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

102. We think that non-exclusive choice of court agreements should be mentioned in Art. 8(2). This is because there are situations in which such agreements do not lead to a priority under Art. 7(1) of the Draft Convention. See in detail our comments in paras. 83 and 84.

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?

103. Article 9 of the Draft Convention addresses a residual but structurally unavoidable category of cases: parallel proceedings that cannot be resolved through exclusive jurisdiction (priority rules), party autonomy, or special jurisdictional bases under Articles 6–8. In such circumstances, where two or more courts have jurisdiction under Article 8(2), allowing the *"more appropriate"* court to prevail offers a pragmatic solution. At the same time, concerns about legal uncertainty and opportunistic litigation are well founded. Indeed, an unconstrained discretion to identify the more appropriate forum could incentivise tactical second filings and prolong parallel proceedings.

104. Against this background of legitimate concerns, Article 9 does not seek to replicate a domestic *forum non conveniens* doctrine. Rather, it disciplines and multilateralises

discretionary decision-making within a clearly circumscribed framework. The Draft Convention mitigates the identified risks through a set of cumulative procedural safeguards: the central role accorded to the court first seised (as specified in Approach 1 concerning Article 9(1)), the mandatory suspension of proceedings by courts second seised subject to specific grounds (as outlined in Approach 1 (Article 9(2)), strict temporal limits for applications (as outlined in Approach 1 (Article 9(5)) and Approach 2 (Article 9(2)), and further to be defined in the future Explanatory Report), and a closed list of factors (as provided in Article 10).

105. Taken together, these mechanisms might significantly narrow judicial discretion, promote coordination rather than competition between courts, and reduce incentives for forum shopping, while preserving a necessary degree of flexibility in cases where rigid priority rules would prove unworkable. In this sense, Article 9 should be read as a *control mechanism*, not an invitation to forum shopping. It channels discretion into a structured, predictable process precisely because parallel proceedings already exist. In the absence of any "more appropriate court" mechanism, rigid priority rules would either entrench tactical races to court or render the Convention unacceptable to common law jurisdictions. Article 9 thus performs an integrative function by reconciling different procedural cultures and preventing uncoordinated assertions of jurisdiction.

106. In analytical terms, to achieve these goals, the preference for a strong role of the court first seised is persuasive. A particularly convincing design choice is to give procedural priority to the court first seised in determining which court is the more appropriate forum, as reflected in Approach 1 to Article 9. This does not reintroduce rigid first-in-time priority but instead establishes an orderly *sequence* for decision-making. By centralising the initial assessment in the court first seised, the Draft Convention would avoid the immediate and destabilising scenario in which multiple courts simultaneously conclude that they are the more appropriate forum. This sequencing function is crucial. It would not only reduce the risk of competing determinations but also place a meaningful deliberative burden on any court second seised that might later consider resuming proceedings. In practice, a second court is far better positioned to assess whether it should depart from the first court's assessment than to conduct a *de novo* "appropriateness" analysis in parallel. For that reason, any power to override the decision of the court first seised must be tightly constrained and subject to clear, elevated parameters.

107. Against this backdrop, allowing a court second seised to resume proceedings merely on the basis that it *assumes* itself to be the more appropriate court as contemplated in Approach 1 (Article 9(5)(b)) and Approach 2 (Article 9(2)(b)), would significantly undermine the Draft Convention's objectives. Such an approach would predictably generate frequent conflicts of competence, encourage strategic second filings, and re-create parallel proceedings with the attendant risk of inconsistent judgments. This is precisely the outcome the Draft Convention is intended to prevent.

108. Accordingly, if an exception to the suspension obligation is retained, it should operate only under a narrowly defined and heightened threshold (such as the *"clearly more appropriate court"* threshold), rather than a parallel reapplication of the same Article 10

factors. Any such resumption of proceedings by a court other than the court first seised should not be based on that court's unilateral assessment of its own appropriateness. Rather, it should be possible only upon an application by the parties and subject to strict temporal limits. Such a design would ensure that departures from the first court's determination are exceptional, transparent, and party-driven, rather than assumption-based. This approach aligns Article 9 with the Draft Convention's core objectives of reducing parallel proceedings and conflicting judgments, while still preserving a limited degree of flexibility for genuinely exceptional cases. Otherwise, the Draft Convention would risk reproducing precisely the conflicts it seeks to avoid.

109. Furthermore, it bears emphasis that the effectiveness of Article 9 would likely be contingent upon the proper functioning of the coordination and communication mechanisms established in Chapter IV of the Draft Convention. The structured sequencing of jurisdictional decision-making presupposes timely information flows between courts, including notification of seising, suspension, and determinations under Article 9. Without these institutionalised channels of communication, the procedural safeguards built into Article 9 would risk operating in isolation, thereby weakening its capacity to manage parallel proceedings coherently.

110. Finally, procedural coherence issues such as the treatment of jurisdiction, *lis pendens*, and discretionary doctrines as part of a single judicial process in some legal systems deserve attention. The Draft Convention should clarify that Article 9 does not require courts to abandon their internal procedural structures, but rather to sequence their decisions consistently with the Convention's objectives. In this respect, time limits and mandatory suspensions are preferable to vague references to "exceptional circumstances" (e.g., options 1, 2 and 3 in para 5(b)), as they would promote efficiency without empowering courts second seised to act unilaterally. Yet we are appreciative of potential complexities of defining such time limits in a Convention, if possible. Therefore, perhaps such definitions might be left to the future Explanatory Report.

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

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

111. Taking Question 7.2 and 7.3 together:

112. With regard to Article 9, we do not express a preference for either approach in its entirety. Rather, our view is that the most workable solution in practice would likely be to combine the stronger features of both approaches, as discussed in response to Question 7.1. In particular, the emphasis placed in Approach 1 on the central procedural role of the court first seised provides an essential sequencing function and promotes legal certainty by reducing the risk of competing determinations. At the same time, certain elements of Approach 2, notably parties' application, the use of clear temporal limits and structured procedural triggers, may enhance predictability and discipline the exercise of discretion. A calibrated combination of these elements would, in our view, better reflect the Draft Convention's overarching objectives of preventing parallel proceedings and conflicting

judgments, while preserving a limited and clearly circumscribed degree of flexibility for genuinely exceptional cases. Such an integrated design would also be more likely to function effectively in practice across different procedural traditions.

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)?

Preliminary remarks

113. At the outset, we note that the list in Article 10 seems to only include private interest factors and not public interest factors. As is well known, the US doctrine of *forum non conveniens* uniquely takes into account both. This reflects the fact that parallel litigation is not only a problem (in particular, a waste of resources) for the individual litigants, but also for states. The main public interest factors taken into account under US law are 1) court congestion, 2) local interest in resolving the controversy and 3) preference for having a forum apply law with which it is familiar.

114. Some factors in Article 10, however, could be understood both as protecting private and public interest. The issue arises whether this should be clarified, forbidden, or left open to interpretation by courts.

115. In any case, public interest factors might resurface through other mechanisms established by the Draft Convention, in particular the safeguards in Art. 19-21.

Litigation burdens for the parties

116. The factor in Article 10(a) (burdens of litigation on the parties) reflects a fundamental private interest and rightly appears first in the list. It is suggested that this factor should really be about the burdens of litigation, rather than its convenience.

Ease of Access to Evidence

117. The factor in Article 10(b) (ease of accessing evidence) also reflects a fundamental private interest when the burden of gathering evidence lies with the parties. The parties, however, could request assistance from the State to obtain certain evidence (ordering a witness to appear in court, appointment of a judicial expert), and it is also conceivable that certain countries would have an inquisitorial system where the court would be in charge of gathering evidence. The issue arises, therefore, whether not only the burden on the parties, but the burden on the respective courts, should be taken into account.

118. It is unclear whether Article 10(b) should refer to the preservation of evidence. This would typically be done through provisional measures which should be available locally, and should not determine the jurisdiction to decide the case on the merits once the relevant evidence has been preserved.

Applicable law

119. The meaning and purpose of the factor in Article 10(c) should be clarified. First, we trust that the drafters of Article 10(c) did not mean to suggest that the content of the potentially applicable substantive laws and the substantive outcomes could play a role at this jurisdictional stage. It would be useful if the factor could be reformulated in a way which would confirm this.

120. If understood as a private interest factor, the sole issue would seem to be the burden for the parties in establishing the content of the applicable law. While this cost can be high in certain jurisdictions where the ascertainment of foreign law requires the appointment of private experts, it can be much lower where the court appoints experts whose fees are determined by law, and indeed nonexistent in cases where it is the court which will ascertain the content of foreign law.

121. The law applicable to the claims however also has a significant impact on the workload of the relevant courts. If foreign law is applicable, a court will have to incur additional efforts to understand it, and indeed in certain jurisdiction to establish it. In other words, applying a foreign law which is not familiar is an extra cost for any court.

122. While the substantive outcomes of the application of the potentially applicable laws should not be taken into account, the issue arises as to whether the applicability of international mandatory rules should influence the process of determining the most appropriate court. The most obvious case scenario would be that of a court having a fundamental interest protected by a forum's international mandatory rule. It is submitted that this case scenario should be dealt with through Article 21. The opposite case scenario, however, could also arise: the forum might consider that it is the most appropriate forum under Article 10, except for the existence of a foreign international mandatory rule protecting a fundamental interest of the foreign state (e.g., an Asian court considering whether it would be more appropriate than the court of an EU state to decide a contractual dispute subject to EU sanctions), and that the foreign court would thus absolutely want to apply. The question arises as to whether this consideration could be taken into account through Article 10(c).

123. One possible way to clarify Article 10(c) would be to redraft it as allowing to take into account only "the costs [for the parties] associated with the determination of the applicable law". If the applicability of international mandatory rules (whether of the forum or foreign) is to be part of the analysis under Article 10(c), it should be provided expressly.

Advancement of the proceedings

124. While one can see why resources already invested in certain proceedings should not be wasted by starting at a late stage other proceedings in a foreign court, it is unclear how the issue could arise given the requirement in Art 8(1)(b) that the second proceedings are started within a reasonable time frame after the first.

125. The issue of the possibility of a significant delay in one of the two courts should be taken into account.

126. Although it is appreciated that applicable limitations or prescription are taken into account in the doctrine of *forum non conveniens* in certain common law jurisdictions, these are issues related to the outcome of the proceedings. It is no more unjustifiable to take them into account than the eligibility of certain types of losses or the availability of punitive damages.

Complete resolution of the dispute

127. The meaning of the factor in Article 10(e) is unclear in the context of 'parallel proceedings' where both courts have jurisdiction to decide the dispute. If it is concerned with available remedies in both fora, it would imply an indefensible comparison of the potential outcomes of the proceedings.

Likelihood of recognition

128. We take a critical view of the fact that the likelihood of recognition is only one of several possible factors (Article 10(f)). This means that courts second seized can suspend their proceedings although the decisions of the court seized in another country will not be recognised and enforced in the court's own country. This threatens to undermine adequate legal protection and create denial of justice. Article 5(2) only allows to *dismiss* the case if the other proceedings resulted in a judgment capable of recognition. In the event that no such decision has been or will be issued, Art. 5(3) does not provide for the continuation of the proceedings. They would therefore remain suspended.

129. It is suggested that the factor in Article 10(f) should become a safeguard alongside Article 19-21. Alternatively, since the likelihood of recognition plays an essential role in many jurisdictions, the convention should at least allow states to make a corresponding declaration.

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

130. See above.

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

131. As already underscored, it is conceivable that one of the two courts decided certain claims in a prior judgment, and that the issue of parallel proceedings would arise for other claims brought before the two courts. A specific factor could be added to take into account the existence of the first judgment to determine whether the court which rendered it would be appropriate to decide these other claims. It is possible that this case scenario was contemplated when elaborating factor (e).

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.*

132. We think that the framework developed in the draft is very complex. However, we do not see any other way to reach a compromise between priority-/jurisdiction-based approaches and the *forum non conveniens* doctrine.

133. In our view, there is a risk of significant procedural delays in practice. The jurisdiction rules raise many questions of interpretation, and determining the more appropriate court is particularly uncertain. If the parties can still appeal against court decisions, there is a risk of long-lasting delays. The Convention will therefore only be successful in practice if courts really do decide expeditiously within the meaning of Art. 9(6)/Art. 9(3) of the Draft Convention.

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.*

134. The mechanism established in Chapter III is based, in effect, on an agreement of the relevant courts on the fact that one of them is the more appropriate court and should adjudicate the entirety of the claims. It is for this purpose that the cooperation and communication mechanisms established by Chapter IV will likely be most useful.

135. Some members of our Working Group wondered, however, whether a more ambitious mechanism could not have been established giving some form of priority to the court seized first, and relying on agreed standards of jurisdiction. However, no elaborate alternate proposal was made.

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?

136. Chapter IV is one of the Draft Convention's most innovative and forward-looking elements. By facilitating communication between courts seised of parallel proceedings or related actions, it seeks to move coordination beyond abstract obligations and towards procedural practice. In principle, this responds to the realities of contemporary transnational

litigation, where unilateral decision-making is often insufficient to prevent duplication, delay, and inconsistent outcomes.

137. In practice, however, the effectiveness of the communication mechanisms would most likely depend heavily on judicial culture, institutional capacity, and domestic procedural traditions. Many courts, particularly outside specialised commercial, maritime, or international divisions have limited experience with direct inter-court communication. Judges may be reluctant to engage actively due to concerns relating to procedural fairness, transparency, and the parties' right to be heard, especially where domestic law provides little guidance on the legal status or permissible scope of such exchanges.

138. Operational asymmetries might further complicate implementation. Differences in language, court infrastructure, case-management systems, and available judicial support might slow or discourage meaningful communication. Without standardised formats or clearer expectations regarding the purpose and evidentiary status of communications, exchanges might risk becoming *ad hoc*, uneven, or purely symbolic.

139. At the same time, the deliberately soft and permissive design of Chapter IV is also one of its principal strengths. By framing cooperation and communication as encouraged rather than mandatory, the Draft Convention would avoid constitutional and procedural resistance in Contracting States. While doubts may arise with regard to the permissive nature of the provisions and absence of a concrete obligation to cooperate and communicate, taking such a responsibility would be up to Contracting States to declare at the time of the deposit of their instruments of ratification, acceptance, approval or accession or at any time thereafter (as provided in Article 16.2). Once declared, we assume that Contracting States would be obliged to coordinate channels of cooperation and communication in either (i.e., direct, indirect or combination of both). This flexibility would allow practices to develop incrementally, most likely first within specialised courts such as commercial or maritime courts where judges are already accustomed to cross-border coordination. Certainly, such an objective would be realised subject to the willingness of Contracting States. Indeed, a permissive language of the respective provisions would also likely enhance more accessions. Over time, practice-based tools (e.g., guidance developed through best-practice protocols or judicial networks as have already been established[23] may enhance consistency and confidence without the need for rigid harmonisation.

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

140. The principal advantage of Chapter IV lies in its potential to enhance mutual awareness and coordination between courts, thereby supporting the effective operation of the Draft Convention's mechanisms on parallel proceedings and related actions. Even limited exchanges such as clarification of procedural posture or the existence of pending determination may significantly reduce the risk of contradictory decisions.

[23] See: https://www.hcch.net/en/publications-and-studies/publications2/practical-handbooks; see also https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ihnj

141. An additional advantage of Chapter IV is that, if effectively operationalised, it would work in close functional alignment with Article 9 in facilitating procedural coordination and supporting the orderly sequencing of the relevant procedural decisions essential to the operation of the (Draft) Convention. The communication mechanism is particularly important in ensuring that the role of the court first seised is respected and that any resumption of proceedings by a court second seised occurs only within the structured conditions envisaged by the Convention. Where Article 9 requires that a court other than the court first seised may resume proceedings only upon a party's or parties' application (which is proposed above), judicial communication can facilitate awareness of the procedural posture and the existence, scope, and timing of such applications.

142. In this sense, Chapter IV supports the disciplined operation of Article 9 by reducing the risk that courts second seised act on unilateral assumptions about their own appropriateness. Absent such communication, there is a real danger that Article 9(5)(b) as set out in Approach 1/ Article 9(2)(b) as set out in Approach 2 could be applied in a manner that undermines the Draft Convention's objectives, allowing courts to resume proceedings simply on the basis that they consider themselves to be the more appropriate forum. This would predictably generate conflicts of competence, incentivise strategic second filings, and re-create the very parallel proceedings and inconsistent outcomes the Convention seeks to avoid (see above in response to Question 7). Properly used, the communication framework in Chapter IV thus operates as a coordinating safeguard, reinforcing the primacy of the court first seised and ensuring that any departure from its determination is informed, transparent, and procedurally controlled rather than based on a mere assumption.

143. Possible challenges, however, are both conceptual and practical. First, Article 15 does not prescribe specific methods or minimum standards of engagement between the seised courts. While this advisory character preserves flexibility (similar to the points discussed above), it also raises questions as to the normative added value of the provisions and the extent to which it would alter judicial behaviour in practice. It is unclear whether the aim is to develop uniform standards or to refer to the national standards of the cooperating courts (Arts. 16(2) and 18 somewhat suggest that those issues would be governed by the cumulative application of the national laws of the relevant courts). We appreciate national procedural and cultural diversities which might complicate further elaborations or definitions in the normative text of the Draft Convention. Therefore, we propose that the Draft Convention either clarifies that the standards are defined at national level (and possibly made public by Contracting states in their declarations) or that the development of uniform standards is expected. In the latter case scenario, the best place to clarify such standards would be the future Explanatory Report. Furthermore, as mentioned above, practices under Articles 15 and 16 would likely be developed gradually.

144. Secondly, Article 16 would benefit from greater clarity, particularly regarding the meaning of "*ex parte*" communication under Article 16(2)(a). While read together, it seems that this expression refers to the communication of seised courts without parties' involvement. Yet the term remains potentially ambiguous. It is unclear whether it refers to the communication initiated at the request of one party without informing the other or

conducted solely between courts without the involvement or even notification of either party. Given the sensitivity of *ex parte* communications in many legal systems, further clarification in the future Explanatory Report would be valuable to avoid potential misunderstandings and resistance at the implementation stage.

145. Similar clarification could usefully be provided in the future Explanatory Report in relation to Article 16(2)(c), which allows for a "combination" of direct and indirect communication methods. In particular, the future Explanatory Report could clarify how such combinations are intended to operate in practice, especially where Contracting States would have notified different preferred methods of communication. Guidance on whether mixed method communication presupposes the absence of party involvement, and on the role to be played by central authorities in such scenarios, would enhance legal certainty and facilitate the practical application of the provision.

146. Overall, Chapter IV provides a promising and appropriately cautious framework for judicial communication. Its success is unlikely to be immediate or uniform, but it creates the institutional space for cooperative practices to emerge organically. The long-term effectiveness of these mechanisms would depend less on formal obligations and more on the gradual development of judicial trust, experience, and supporting guidance at both national and transnational levels.

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?

147. The need for safeguards in the operation of the rules is undeniable. As these safeguards apply both in the context of Article 8 and Article 9, it seems clear that they should not appear in the list of Article 10 for the determination of the appropriate forum, but rather in more general provisions.

148. Before discussing the proposed safeguard, it is submitted that an important safeguard is missing: likelihood of non recognition in the forum of the judgment to be rendered by the foreign court. It seems inconceivable that a court of a contracting state could be under the obligation to suspend proceedings if the judgment of the foreign court was unlikely to be recognized in the forum: the result would be that no judicial resolution of the dispute could ever be binding in the forum. This would amount to a denial of justice and threaten legal protection. This explains why many civil law jurisdictions and the Brussels I bis regulation have established a requirement in the operation of their rules on parallel proceedings with respect to third states that "it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in [the forum]."[24] The fact that the contracting states to the Draft Convention might also be party to the Hague 2005 and 2019 conventions cannot be a serious reason for failing to address this

[24] Brussels I bis Regulation, Art. 33(1) (*lis pendens*) and 34(1) (related actions).

issue, if only because the Hague judgments 2005 and 2019 conventions both contain grounds for denying recognition or enforcement of judgments.

149. Nevertheless, the Working Group decided against including a provision to prevent this problem. Such rules "would add additional obligations to the courts and affect the feasibility of the Draft Text".[25] The argument is unconvincing, as it suggests that the convenience of courts should prevail over the risk of denial of justice.

150. This safeguard could be included in a specific, additional provision. It could also be included in the denial of justice proviso, but it should then be expressly mentioned as one subset of denial of justice.

151. In most commercial cases, the purpose of obtaining a judgment is to enforce a monetary obligation. It could be argued that the defendant in the forum could raise as a defence that the foreign judgment could be enforced in other jurisdictions than the forum, and that the forum should thus suspend the proceedings despite the unlikelihood of enforcement in the forum.

Denial of Justice

152. The concept of Denial of Justice is too broad and insufficiently defined. Most importantly, the present wording does not allow distinguishing between procedural and substantive justice. It is believed that the safeguard should be limited to cases where it could be foreseen that the parties' fundamental procedural rights would not be respected in the foreign court. This would include a foreign court which would not be impartial or independent. In contrast, the fact that the foreign court would apply a different law on the merits or afford different procedural remedies to the parties (discovery/disclosure, cross examination of witnesses, etc…) should be irrelevant. It follows that the fact that the two competing courts would apply different standards to assess liability (e.g. strict liability v. fault based liability, different types of losses being eligible for compensation) should be irrelevant. Likewise, and although it is appreciated that common law courts have ruled otherwise in the context of the *forum non conveniens* doctrine, it cannot be justified that a court would not be an appropriate forum because the time limit for the claims would have expired. It is therefore submitted that Article 19 should be redrafted and that the standard of reference should not be labelled 'denial of justice' (or 'manifest injustice', despite its use in art 6 of the 2005 Convention), but 'fundamental procedural rights'. Also, it is unclear what the word 'reasonable' adds in the current text.

Abuse of Process

153. This provision is very important for the most common case of parallel proceedings: actions for performance colliding with actions for a negative declaration. In practice, this mainly concerns *preventive* actions for a negative declaration. The draft does not contain any specific rule on this problem. The Working Group had considered introducing a

[25] HCCH Working Group on Jurisdiction, Report of 2024 (https://tinyurl.com/2hx98f7f), para. 10.

general provision for proceedings aimed at preventing imminent or impending legal action taken in bad faith.[26] Article 20 is more general. It could, therefore, also be applied to cases of preventive actions for a negative declaration. However, from our point of view, at least an Explanatory Report should make clear that such actions are not generally abusive. They may, for example, aim to prevent legal action being brought in a highly inappropriate forum. Whether a preventive action for a negative declaration is abusive, should also be decided by the court first seized under Article 9.

Public Policy

154. Article 21 distinguishes between proceedings involving 'sovereignty or security interests of the forum State' and instances where 'the suspension or dismissal would be manifestly incompatible with the public policy or fundamental principles'. The different issues addressed by each of these two categories are unclear and should be clarified.

155. Arguably, Article 21 could offer a ground for retaining a case in spite of the rules of the Draft Convention in three cases scenarios. The first is where the case would be concerned with a dispute involving the core interests of the forum state (e.g. essential natural resources such as oil or rare earths). This case scenario seems to be captured by the first category mentioned in Article 21, but it is likely to be rare. It is submitted that it should be dealt with through Art 22 rather than Art 21. The second is where a court would consider that it has an important local interest in resolving the dispute. This could be, for instance, because the case would give the opportunity to the court to establish new principles and provide guidance for future cases (e.g. establish new safety standards after an accident – Bophal, Crans-Montana). The third is where an international mandatory rule (overriding mandatory provision in EU parlance) of the forum would apply, and its application by the foreign court would not be guaranteed.

156. Some drafters of this position paper have insisted on the fact that in their home (non European) jurisdiction, courts routinely rely on the 'public policy' nature of jurisdictional rules to refuse to decline jurisdiction in international cases, and in particular to enforce choice of court agreements. In this context, they urge the drafters not to establish a safeguard based on a vague and undefined concept of public policy, but rather to clarify how the safeguard would actually operate in the context of the Draft 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.

[26] HCCH Working Group on Jurisdiction, Report of 2025 (https://tinyurl.com/mr2ajmz6), para. 31.

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

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?

Question 14 – comments

What other comments, if any, do you have?

157. The Convention does not have important provisions on (i) declarations of the Contracting Parties limiting the application of the Convention, (ii) declarations pertaining to the proceedings involving a State, (iii) review of the operation of the Convention, (iv) relationship with other international instruments, (v) non-unified legal systems, (vi) the Regional Economic Integration Organisations. The provisions on these issues are contained in the Judgement Convention and the Choice of the Court Agreements Convention and should be adapted for the purpose of the Convention.