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Questions

Consultation on the draft text of a possible convention on parallel proceedings and related actions

Question 1 on the scope of the Draft Text

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

General Remarks

The Draft is overly extensive and detailed, offering too many alternative options. As a result, it is difficult both to comment on the text and to manage or meaningfully engage with the comments that are likely to be received.

The multiplicity of options complicates the understanding of the structure, objectives, and overall purpose of the future instrument.

Scope of the Draft Text

The Current Draft Convention is intended to complement 2005 and 2019 Conventions (according to 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). Hence, it may be expected that it is drafted along the lines of the two Conventions. Yet some alterations in the structure may be appropriate, since the purposes and objectives of the three Conventions are not identical. Here are some suggestions for improvements.

Although it may be a minor issue, it would be better that Art. 1(1) is merged with Art. 2: definition of the substantive scope followed by exceptions. It is here suggested infra under 4.1 to abandon the criterion of habitual residence when determining the geographical scope. If this criterion is retained, then the current para (2) of Art. 1 (scope ratione personae/territorial/geographical) is either to be dealt with in a separate provision, i.e., outside the context of the substantive scope of application or is to become para 3 in Art. 1.

More importantly, it is questionable whether the criterion of 'habitual residence' is appropriate to define the geographical scope of application. It is true that the residence is one of the criteria to determine 'internationality' under Art. 1(2) of the 2005 Convention, but there is no reason for analogy in the context of the current draft Convention. Instead, the only relevant criterion should be that parallel proceedings or related actions are pending before the courts of the contracting states. Thus, the geographical scope would be sufficiently determined already in Art. 1(1) - 'parallel proceedings and related actions in the courts of different Contracting States'. – for more detailed explanation, see infra, under 1.4 geographical scope of application.

Paragraph 3 of Art. 1 seems misplaced, as it is unrelated to either substantive or personal/geographical scope of application. Where it would be best to address the issue depends on the decision of the HCCH Working Group (hereinafter: WG) how to deal with the question of the recognition and enforcement, i.e., what is the relevance of a foreign judgment with respect to pending proceedings. If the effects of foreign judgment are to be excluded altogether (which may be most appropriate way to proceed considering a presumable aim of avoiding overlap with other legal instruments notably the 2019 Convention), it could be done either amongst exclusions (current Art. 2) or in the definitions (Art. 3). If the exclusion is intended only with respect to related matters in Chapter III, the current provision of Art. 1(3) may be included in Article 3 (definitions – in the context of Art. 3(1)(b) when defining 'related actions') or at the beginning of Chapter III.

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?

The definition of the substantive scope in Art. 1(1), as well as the list of exclusions in Art. 2 are largely drafted along the lines of 2005 Convention and in particular 2019 Convention. Unless there is a deliberate choice for a 'consistency' amongst different legal instruments, there are some suggestions for improvements with respect to the structure. They do not influence the substance/actual 'solutions' (1). More important are suggestions concerning the clarification of the existing exclusions and expanding the list of exclusions (2) - they are addressed infra, under 1.3.

As to the suggestions regarding the structure (1), the following improvements may be suggested, unless there is a deliberate choice of WG to maintain the consistency with 2005 and/or 2019 Conventions:

a) There would be no need for express exclusions in paragraphs 6 and 7 if they were mentioned in Art. 1(1), considering that they 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 suffice to merely add in Article 1(1) a reference to the disputes involving States which are considered 'acta iure imperii', as well as the questions of state immunity or similar wording.

b) It is not clear which line of reasoning is followed in the structure of Article 2, i.e., what is the rationale behind distinguishing between paragraph (1) on the one side and paras. 3-5 on the other, as they all pertain to certain types of 'proceedings'. 'Arbitration exception' will be separately addressed under 1.3.

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)?

1.3.1 EXCLUDED MATTERS IN in Art. 2

As to the stucture and general remarks relating to the current exclusions, see supra under 1.2, points a) and b).

Paragraph 2 of Art. 2 is in fact taken over from the 2005 and 2019 Conventions. The wording is seemingly inspired by a combination of the CJEU approach when dealing with the 'arbitration exception' under Article 1(2)(d) BIbis Regulation, Recital (12) of the BIbis, as well as the Schlosser Report. As in other two Conventions, Art. 2(2) does not apply to arbitration and related proceedings, which is regrettable indeed. Furthermore, it is questionable whether this line of reasoning is useful in the context of other 'excluded' matters/proceedings, especially as far as the second sentence of paragraph 2 is concerned. In particular, an objection to jurisdiction by invoking an arbitration agreement can by no means be identified as an objection to jurisdiction with respect to other 'excluded matters/proceedings'. Differently from arbitration, other matters involve rather the question of 'characterisation' or 'qualification' of the subject-matter of the dispute (e.g., whether a dispute concerns a 'civil or commercial matter' within the meaning of Article 1(1) or of excluded matters such as, family, maintenance, wills and succession, insolvency etc. under Art. 2). In fact, this is where the potential problems may be encountered if the law of the contracting states where parallel proceedings are pending differently 'characterise' the subject-matter of the dispute (e.g., disputes involving an insolvent debtor arising out of pre-insolvency legal transactions). To deal with the problem it may prove useful to introduce a provision on the applicable law according to which the characterisation of the nature of the dispute is to be determined (or at least some guidelines/explanation to this effect should be provided in the Explanatory Report). The CJEU case law illustrates that difficulties with

characterisation are encountered even when an international legal instrument is in place (e.g., Insolvency Regulation): it remains unclear to which matters 'uniform interpretation' applies and which are left to national laws – in the latter case which national law is the governing law. If WG concludes that no provision on the applicable law is useful or that an agreement to this end appears difficult to be reached, it may be useful to clarify in the Explanatory Report whether/how the Convention applies in cases where the courts of the contracting states reach different decisions on 'qualification/characterisation' of the subject matter of the dispute within the meaning of Art. 2.

1.3.1.1 ARBITRATION

The Draft Convention rightly excludes both arbitral proceedings, as well as court proceedings related to arbitration from its scope of application in Art. 2(3). It may be useful to further clarify the reference to the 'related proceedings', especially given the fact that paragraph 2 of Art. 2 does not apply to arbitration, as discussed supra under 1.3.1. Thus, a slight modification of the current provision may be useful to clarify that court proceedings in support of/related to arbitration (e.g., appointment or challenge of arbitrators, setting aside or annulment proceedings, as well as an action for a declaratory judgment on the validity of an arbitration agreement) do fall within the 'arbitration exception'. However, a proceeding before the court seised of a civil or commercial matter, in which an objection to jurisdiction is raised by invoking an arbitration agreement or non-arbitrability, does not fall within an 'arbitration exclusion' within the meaning of Art. 2(3) as long as the subject matter of the action (i.e., the main claim on the merits of the dispute) falls within the Convention's scope. In other words, the fact that an arbitration agreement is invoked to oppose jurisdiction has no consequence for a civil or commercial nature of the proceeding within which the arbitration agreement is relied upon. The clarification in that respect is of great importance, at least in the Explanatory Report.

Any proposal that a court the jurisdiction of which is contested would have to give priority to the court of a Contracting State in which the seat of arbitration is located or the arbitral tribunal for the determination of the existence, validity or effects of an arbitration agreement raises the question of the compatibility with Art. II(3) of the 1958 New York Convention, as well as corresponding provisions of national arbitration laws (e.g., Art. 8 UNCITRAL Model Law). It does not seem that the regulation of issues pertaining to arbitration law fits the objectives and purposes of this Convention.

Within this context, WG may address the antisuit injunctions issued in support of arbitration so as to examine their compatibility with the aims, purposes and objectives of the Convention. The conclusions on this matter should be at least clarified in the Explanatory Report. Antisuit injunctions are addressed in greater detail in this section.

1.3.1.2 CONSUMER AND EMPLOYMENT CONTRACTS

Paragraphs 4 and 5 of Art. 2: From the wording it appears that only 'contractual' disputes in consumer and labour disputes are excluded. If so, it should be clarified how assigned claims and those initiated as class actions are to be understood. In the Explanatory Report it should be clarified whether non-contractual proceedings involving consumers and employees are excluded, too. If not, it is questionable whether this is the most appropriate solution to distinguish between tort-based consumers' claims from contractual ones (e.g., in product liability cases).

1.3.1.3 MATTERS SUGGESTED TO BE EXCLUDED

PROVISIONAL MEASURES - Note to Art. 2(1) states: '[Note: Exclusive choice of court agreements and interim measures for protection should be further considered.]'. It is not certain whether Art. 2 is the best 'place' to deal with them. This is by no means to suggest that they should not be excluded from the scope: on the contrary, it should be recommended for the sake of clarity to expressly exclude both exclusive chocie of court agreements and provisions for the provisional measures. If the current structure of Art. 2 is maintained, both could be addressed in paragraph 2 of Art. 2. Otherwise, provisional measures could be best addressed under 'Definitions' so as to exclude them from the scope, i.e., to state that actions to issue such measures may not be characterised either as 'parallel proceeding' or 'related actions' within the meaning of the Draft Convention regardless of whether or not the court with which the request is filed has putative jurisdiction on the merits of the dispute. Whichever approach is taken, in WG may consider clarifying in the Explanatory Report that the exclusion covers proceedings for granting provisional measures pending in multiple countries, regardless of whether they are requested also with the court(s) having putative jurisdiction on the merits of the case.

ANTI-SUIT INJUNCTIONS

As a matter of principle, the existence of an international legal instrument on parallel proceedings should in itself both remove the need and exclude the possibility of issuing anti-suit injunctions. In other words, when the Convention applies the remedies/concepts available under national law are excluded, if they are not provided in the Convention. Yet it may apper useful to address this expressly, at least in the Explanatory Report. This is especially so considering that the approach currently employed in the Draft in Chapter III (Related actions) envisages decisions of multiple courts on whether the multiple proceedings should be decided by one court, which court(s) will stay the proceedings and the conditions for continuation. This may create a potential for different interpretations on the possibility of issuing anti-suit injunctions. Therefore, it would be useful to clarify at least in the Explanatory Report the question/extent of (in)compatibility of antisuit injunctions with the Convention. In particular, the antisuit injunctions issued in support of arbitration need be expressly addressed especially in connection with the scope/definition of arbitration exception or the clarifications in that respect in the Explanatory Report.

EXCLUSIVE CHOICE OF COURT AGREEMENTS

Indeed, the exclusive choice of court agreements do not fall within the Convention's scope and it is approprite to expressly state so, possibly in Article 7. Furthermore, the question of 'choice of court agreements' is likely to play the role in delineating the scope of application between the currently negotiated convention and the 2005 HC on Choice of Court agreements. As such, it is likely that the exclusive choice of court agreements/2005 Convention will also be dealt within the 'Final provisions', 'Relationship with other legal instruments' or similar provisions.

1.4 What are your views on the geographical scope of the Draft Text and how it would work in practice? (See paragraph 16 for further information).

As already briefly mentioned supra under 1.1, the criterion of 'habitual residence' does not appear suitable to define the geographical scope, bearing in mind that the purpose of the Draft Convention is not to unify the rules on jurisdiction. Instead, the objective is to prevent parallel proceedings and avoid conflicting or irreconcilable judgments. Therefore, the scope would be more appropriately defined if it refered to litigations pending in the Contracting States, regardless of the habitual residence of the parties. For example, the applicability of

the provisions on lis pendens is not conditioned by the requirements of Article 6(1) in the BIbis Regulation (i.e., the domicile of the defendant with some notable exceptions). This is justified by certain policy considerations demanding that the rule must be interpreted broadly (CJEU C-351/89 Overseas Union Ins Ltd). This is not surprising, considering that Art. 29 is not a rule on jurisdiction. Consequently, WG may reconsider the habitual residence as the criterion to determine the geographical scope of application and alter the current position so that the only requirement would be that the proceedings are pending before the courts in contracting states as indicated in current Art. 1(1). This would render paragraph 2 of Article 1 redundant.

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.

2 As argued previously, the habitual residence is not appropriate criterion to determine the geographical scope of application. However, if WG decides that the habitual residence should be kept, the following adjustments may be considered.

3 1) A definition of the habitual residence of natural/physical persons should be provided or a provision on the applicable law to determine habitual residence (a provision comparable to Art. 62 BIbis Regulation relating to 'domicile').

4 2) The definition of the 'habitual residence' of a legal person Article 3 para 2 is drafted along the lines of both 2005 and 2019 Conventions. Unless WG decides that the constancy with the two Conventions is to be maintained, some adjustments may be useful in this context. Firstly, it may be appropriate to clarify the difference between (a) and (b). If it is wished to distinguish (i.e., cover both, the 'real seat' and 'statutory seat') it seems better to simply state so. The current wording may be confusing since 'statutory seat' is likely to coincide with the 'law of incorporation'. If it is meant to refer to 'real seat' under (b), it would be better to use the wording such as the state 'in which it carries out its commercial activity' or to simply use the expression 'real seat'.

5 Article 3 para 1(a) defines 'parallel proceedings' as 'any proceedings in courts of different Contracting States between the same parties on the same subject matter'. The 2005 Convention uses the wording 'the same cause of action'. If the consistency with other HCCH legal instruments is to be maintained, WG may consider replacing the wording 'on the same subject matter' by 'the same cause of action'.

When determining the 'related actions' the wording in Article 3 para 1(b) is vague, rather complicated and as such is likely to frequently raise questions of interpretation. Instead, it may be replaced by more suitable criteria such as the expedient resolution of a dispute and avoidance of irreconcilable judgments..

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

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Question 4 on Article 5 obligations

What are your views on Article 5?

6 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'. It should be clarified what

the wording '[other relevant person]' refers to. Besides, with the exception of Art. 6, it may be questioned whether '[other relevant person,] or through the communication mechanism established pursuant to Article 16' is compatible with 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 in the text or clarified in the Explanatory Report 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.

7 It follows from the Note '[Note: Further consideration of the recognition and enforcement of foreign judgments and on the detailed rules is required]', as well as from paragraph 2 that the future Convention is likely to deal, in a certain way, with the question of recognition and enforcement. It is not quite clear how this is to be aligned with the envisaged complementary nature of the future Convention to the 2005 and 2019 Conventions as indicated in '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', which implies an intention to avoid overlap in the scope of application. In general, it would be expected that the question of recognition and enforcement is to be left to other legal instruments – national and/or international and accordingly outside the scope of the future Convention. In any case, the scope of application and relationship with other instruments, in particular the 2019 Convention, should be clearly defined.

8 If the question of recognition and enforcement is to be dealt with in the Convention, it raises a number of questions. The current Draft seems to make a difference between parallel proceedings and related actions: it does address the recognition issue with respect to the former in Article 5(2), whilst it excludes the application of the Convention with respect to related actions if one of the courts seised has issued a judgment on the merits in Art. 1(3). It is useful to clarify the 'different treatment of the judgments' in the Convention in cases of parallel proceedings on the one hand and related actions on the other. In general, it would be more appropriate to leave the question of recognition and enforcement outside the scope.

9 Regarding paragraph 2 of Article 5: it is important to clarify whether actions for declaratory judgments are considered as parallel proceedings or related actions (probably in Article 2 relating to definition). If they qualify as parallel proceedings then the reference to 'dismiss the case' should be reconsidered.

Paragraph 3: the wording should be adjusted so as to refer at a later moment than the moment when the suspension was granted. E.g., 'is unlikely' should be rather 'later appears unlikely' or 'becomes unlikely'.

Question 5 on priority jurisdiction / connection

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

General comment on the provisions on jurisdiction: WG may discuss/re-consider whether it is necessary to include detailed rules on jurisdiction. If it appears likely that WG could agree on this, it may be more efficient if some general criteria that meet internationally accepted standards (possibly with the exclusion of exorbitant heads of jurisdiction) are provided. Whilst detailed rules on jurisdiction may appear needed for recognition and enforcement it is worth discussing in WG whether they are necessary within the context of this Convention which does not extend to recognition/enforcement. And if so, WG may discuss whether it is really most appropriate approach to follow closely the rules on jurisdiction under the 2019 Convention. Presumably, the reason is a general idea on the complementary nature of the Draft Convention with other HCCH instruments,

i.e., that a subsequent judgment would be enforceable under the 2019 Convention. Yet, national laws on enforcement may be more favourable, i.e., not requiring such strict compliance with the jurisdiction rules. As it is expressly provided in Art. 15, the 2019 Convention does not prevent the recogniton or enforcement of judgments under national law, with the notable exception of Art. 6.

Article 6

The text which includes the wording in […] seems more appropriate, if WG opts for 'aligning' it with Art. 5(3) 2019 Judgment Convention, as indicated in the third Note.

The second Note, second sentence refers to further discussion on the possible exclusion of the rule for tenancies, i.e., whether the rule on tenancies should include an exception for cases where the tenant is habitually resident in a different State. It is not clear why there should be such an an exception. If this implies that the court of the Member State of a tenant's habitual residence should have jurisdiction instead, it is not obvious why this factor attributing jurisdiction should 'prevail' over forum rei sitae. It may be approriate to provide an exception only if both a tenant and a landlord have common habitual residence in a different state. It is then necessary to discuss further whether there would be a general exclusion or onlyan exclusion regarding the short-term tenancies (as under Art. 24(1) BIbis Regulation).

Article 7

This provision raises a number of queries, especially when accompanied with the 'Notes'.

Paragraph 1 refers to 'one or more' courts, while paragraph 2 excludes an 'exclusive choice of court agreement'. The reference to 'one' court usually implies an exclusive choice of court agreement. Therefore, the wording 'unless such agreement states that it does not deprive any other court or courts of jurisdiction' appears determinative in this context, i.e., to establish when a choice of 'one' court falls within the Convention's scope. However, the wording 'states' may be understood as requiring that an express agreement to this effect must be made (e.g., 'the court in … will have non-exclusive jurisdiction'). It does not seem likely that the intention of WG is to demand such an express statement. Rather a conclusion on the 'exclusive' or 'non-exclusive' nature of the agreement is likely to follow from the wording and its interpretation (e.g., permissive wording 'may' instead of 'shall' or a narrow definition of matters falling within the scope of a choice of court agreement). Therefore, the wording 'unless it may be inferred from the wording of the agreement that it does not deprive any other court…' or similar would be more appropriate when there is a reference to 'one' court.

A choice of 'more' courts (in different states) is in itself is a 'non-exclusive' agreement. If the wording, either in an exclusive or 'non-exclusive' choice of court agreement, implies that general rules on international jurisdiction remain unaffected, then such agreement has no derogating effect. Yet it does retain its prorogating effect: it confers jurisdiction on the court(s) which otherwise would not have jurisdiction. As such it does not qualify as an agreement under Article 7 but has the same 'rank' as other jurisdiction grounds/connection provided in Art. 8(2). Consequently, the same priority in ruling on its jurisdiction under Art. 9(1) should be given to one of the prorogated courts if this is the court which is first seised. It can be done either by providing for a jurisdiction ground/connection in Art. 8(2) and/or referring to this in Art. 7(1).

In case a non-exclusive choice of court agreement points to more specified courts (excluding thereby any other court), it would be expected that the same criterion of the 'court first seised' applies, i.e., the priority in deciding should be vested with the first seised court since all of them have the basis/source of jurisdiction of equal 'ranking'. Regrettably, it cannot be concluded from the current text of paragraph 1 which states that when 'only one of the courts seised is designated

under such agreement as having jurisdiction, then that court shall proceed with adjudication.' Thus, it seems that jurisdiction of one of the courts seised on the basis on a non-exclusive prorogation clause prevails over grounds of jurisdiction/contacts under Art. 8, but not if another court is subsequently seised on the basis of the same prorogation clause. It would be most useful to clarify in the Explanatory Report what the rationale for this solution is.

Most importantly, it is not clear how to understand paragraph 3 of Art. 7 in connection with the provision on tacit prorogation in Art. 8(2)(j). In accordance with the principle of party autonomy, which is the basis of prorogation of jurisdiction, a failure to invoke a choice of court agreement to object to jurisdiction of the court seised before a submission on the merits (i.e., enters an appearance without contesting jurisdiction), is considered as a waiver of the right to object to jurisdiction (tacit prorogation). In other words, it is presumed that both parties are in the agreement not to abide by the originally concluded choice of court agreement. Accordingly, the court seised may not invoke a prorogation clause ex officio, as it would violate the principle of party autonomy. This is a widely accepted concept both with respect to prorogation clauses, as well as in the case of arbitration agreements (see e.g., Art., II (3) 1958 New York Convention, as well as corresponding provisions in national arbitration statutory laws). Therefore, it is essential that it is clarified which purpose is intended to be achieved by paragraph 3 of Art. 7 (an express consent) whilst a similar effect follows from Art. 8(2)(j). The latter is a widely accepted ground of jurisdiction when 1) the parties had concluded a choice of court agreement, and 2) neither of the parties relied on the choice of court of agreement – claimant had filed the suit with a non-prorogated court and the defendant did not invoke the agreement before submitting the arguments on the merits. The only exceptions may be in the case of a 'weaker party' disputes (i.e., those involving consumers and emplyees), but they are excluded from the scope of this Convention. Under the current text, it seems that only express consent to jurisdiction within the mening of Art. 7(3) would prevail over Art. 7(1). Hopefully, this is not a deliberate choice of WG. However, if this is a deliberate choice, for the sake of clarity, understanding and application in practice it is crucial to spell out the reasons/objectives and purposes of the choice and to explain how this can be compatible with the principle of party autonomy in the context of prorogation of jurisdiction.

Also, it is important to explain the relevance and position of tacit prorogation with respect to other grounds of jurisdiction/contacts under Art. 8: usually tacit prorogation prevails over other grounds of jurisdiction, except in cases when the objection to jursidiction may be raised ex officio (e.g., in the case of exclusive jurisdiction), but it is by no means clear under the current text. In general, a failure to object to jurisdiction timely (i.e., before arguing on the merits) and yet raising the objection at a later stage can be considered as venire contra factum proprium.

The formal validity of the choice of court agreement should be addresed.

Article 8

Instead of multiple alternatives (claim relates, action relates to etc), the wording 'in a dispute on …' or 'dispute involving' could be used in paras d) et seq. in a consistent manner.

Art. 8(1)

Para (1): it is doubtful whether it is appropriate to use the wording 'suspend or dismiss' in both cases under (a) and under (b). In the case under (a), to 'dismiss' the claim seems to be an option since the court lacks jurisdiction, whereas another court does have jurisdiction under Art. 8. However, in general it does not seem prudent to 'dismiss' the case before the court having jurisdiction under 8(2) has actually decided on its jurisdiction. Even if the court had jurisdiction under national law (e.g., a head of jurisdiction not provided in Art. 8), the more appropriate may be

only the court having jurisdiction under Art. 8. On the other hand, there would be no point in 'suspension' if another court having jurisdiction under Art. 8(a) has been seised and already ruled positively on its jurisdiction. The purpose of a suspension would be 1) if another court having jurisdiction under Art. 8(2) has not decided yet on its jurisdiction and 2) the court seised has jurisdiction under national rules on international jurisdiction, but not under Art. 8(2).

The case under (b) is not entirely clear which circumstances are here meant. It seems that the presumption is that both courts have jurisdiction under Art. 8(2). Firstly, it should be clarified whether the wording 'proceedings in that court were not started within a reasonable timeframe after proceedings were commenced in the court first seised having jurisdiction' under Art. 8(2), means in any case that the proceedings with another court were not started before the court first seised decided on its jurisdiction. In addition, instead of a 'reasonable timeframe' it may be more appropriate to state a time frame within which the proceedings before another allegedly more appopriate court should be commenced.

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

6.1 What are your views on the 'jurisdiction / connection' list in Article 8(2)?
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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?
Click or tap here to enter text.

6.3 Are there any additional factors that you believe should be included?
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Question 7 on the determination of the more appropriate court

7.1 What are your views on the approaches proposed in Article 9 for determining which court should adjudicate the dispute in cases of parallel proceedings which Articles 6 – 8 have not resolved?
Article 9

It seems that there are two options: Art. 9(1)-(5) and 9(1)(2), whereby the latter is narrowed down to the points generally agreed upon. Yet the latter also contains the wording in brackets - accordingly, it seems that the text in the brackets in Art. 9(1)-(2) is also envisaged to be further negotiated/altered, but this is by no means clear.

In any case some improvements may be suggested. A stay of proceedings before a court second seised is to be mandatory.The sequence of paragraphs 1 and 2 in the first option of Art. 9 should be changed, so that para 2 becomes para 1.

As a matter of principle, jurisdiction of multiple courts should be avoided, bearing in mind the purposes and objectives of the Convention there should be no role for any court second seised for any ruling on jurisdiction/continuation of proceedings before the first seised court has decided on it. Instead of the reference to 'exceptional circumstances', it would be more efficient/appropriate to provide a time frame for rendering of a decision by the court first siesed. The criteria 1, 2 and 3 in para 5(b) of the first option and para 2(b) of the second

option are rather vague. In particular, it is not clear why both courts are to decide on the basis of the same criteria in Art. 10 as provided under the criteria 2 and 3: if this court is clearly more appropriate, it does not impl;y that multiple courts should be deciding on the same issue under the same criteria.

7.2 What are your views on how the two approaches may work in practice?
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7.3 Do you have a preference for either approach? If so, please explain why.
Click or tap here to enter text.

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)?
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8.2 Do you have any views on how Article 10 might work in practice?
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8.3 Are there additional considerations that, in your view, should be taken into account?
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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.
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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.
Chapter II - Related actions

Article 9

There is a departure from the approach taken in 'parallel proceedings' in Chapter II which provides that the decision lies in principle with the court first seised, yet regrettably with some notable exceptions. Chapter III refers to 'any such court shall, upon application of a party, determine within a reasonable time' to determine whether a single court should decide over an entire claim or any part of the related actions and if so, which court is the most appropriate to do so. The possibility of multiple courts deciding on the same issue on continuing the proceedings includes the risk of contradictory or irreconcilable decisions. As such, it does not seem easily aligned with the presumable purpose of the Convention – which is to avoid parallel proceedings and its consequences.

The idea of reaching an agreement between the courts is certainly best way to proceed. However, in order to facilitate reaching the agreement it would be useful to provide some safeguards. Thus, the 'coordination' is better to be kept with one court - the court first seised, by using the mechanism

for communication and cooperation under Chapter IV. Thereby, necessary safeguards may be provided such as a) time frame within which the court first seised is to bring the decision, after consultation/communication with other courts under Chapter IV, b) standards for jurisdiction of the court first seised, c) discretionary nature of the stay by the court second seised, d) possibility to consolidate the proceedings.

A provision concerning the rules on jurisdiction, at least some general formulation may prove useful (e.g., jurisdiction based on the grounds complying with international standards with the exclusion of 'exorbitant jurisdictional grounds').

Arts. 12(1) and 13(1) use the wording 'suspend' or 'dismiss' – in particular, it should be clarified when it would be appropriate to 'dismiss' the case at this stage. In general, any reference to 'dismissal' should be carefully considered and explained. lick or tap here to enter text.

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?
Chapter IV – Cooperation and Communication

Art. 15 Cooperation

There is in fact no obligation or a 'method' of cooperation provided in the Draft, just an 'encouragement' to Member States to cooperate. Given such an 'advisory' nature of this provision it is questioned what will be achieved by dealing with it in the normative part.

Article 16

Paragraph 1 provides for the ways of communication with other courts, either directly or indirectly.

Direct communication

Under 2 (a) it is referred to the so-called 'ex parte'. It is not clear how this expression is to be understood in this context. Usually, this expression refers to the proceeding in which only one party participates, i.e., without participation of the other party. However, the wording of Art. 16(2)(b) is here confusing as referring to 'the presence of the parties or their representatives'. Accordingly, it should be clarified what the expression 'ex parte' in this provision really means: 1) direct communication upon a request of one party without the necessity of informing the other party or 2) direct communication without involvement of either party, i.e., on the initiative the courts without the need that it is requested by either party and even without informing/involving either of the parties.

Indirect communication

Methods of communication under (2(b) and 3) are 'indirect'. 1) through 'central authorities' (2 para (2)(b)) through the parties to the proceedings (para 3).

Combination

Paragraph 2(c) refers to ‘a combination (a) and (b) with each Contracting State using its preferred method’. However, it is not entirely clear what kind of ‘combination’ of (a) and (b) are here envisaged. Does it mean that both ‘direct’ (courts under a) and ‘indirect’ (central authorities under b) without involvement of either party may be used. If this is meant, it may then be concluded that paragraph 2 refers to communication withouth involvement of the part(ies). If so, this shoul dbe clarified, as well as how will this work in practice (e.g., when one and when another method will be used, particularities about Central authorities, etc.).

General Clauses Chapter V

11.2 Are there particular advantages and challenges you foresee in applying these methods?
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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?
General Clauses - Chapter V

As to Art. 22: It is not clear which ‘specific matters’ are here envisaged. Besides, it may be questioned whether it is desirable to further limit the substantive scope application (which is already narrowly defined/provides for many exceptions) by providing for such broadly drafted reservation and, accordingly, further complicate the application of the future convention. If reservation(s) are to be provided, they should be specified and not left to be determined ‘unilaterally’ by each Member State – this may result in many matters been excluded, diversity in application of the Convention and ‘open ended’ list of reservations.Article 23:

It is doubtful whether the reliance on the so-called ‘uniform interpretation’ is appropriate where: 1) there is no legal framework for harmonisation or approximation of legislation in general (like in the EU) – if it is intended to ‘exclude’ the applicability of national law in certain matter it should be stated probably under ‘Definitions; and 2) there is no instance, such as CJEU to facilitate a ‘uniform interpretation.’

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.
Click or tap here to enter text.

13.2 Do you have any views on whether the proposed rules set out in the Draft Text would improve the status quo?
Click or tap here to enter text.

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?
Click or tap here to enter text.

Question 14 - comments

What other comments, if any, do you have?

Click or tap here to enter text.