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Please indicate your profession:

- Practitioner
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- Others, please specify: Click or tap here to enter text.

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

- Yes
- No

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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?  
Click or tap here to enter text.
- 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?  
Click or tap here to enter text.
- 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)?  
Click or tap here to enter text.
- 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).  
Click or tap here to enter text.

#### **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.

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#### **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?

Click or tap here to enter text.

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

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

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Article 6: As presently drafted, the exclusive jurisdiction provision of article 6 strikes me as too capacious. Garriga Suau and Whytock correctly point out in the context of choice of law (71 Revista Española de Derecho Internacional 81 (2022)) that there are a small number of "core" property issues over which as a practical matter one jurisdiction must have control (e.g., the recordation or registration of property interests in that jurisdiction's register). Other property issues, however, may appropriately be adjudicated by more than one court, and different countries are likely to have differing degrees of willingness to assume adjudicatory jurisdiction over those issues. In the absence of widespread international agreement on the scope of exclusive adjudicatory jurisdiction over property issues, it would be more appropriate for article 6 to be as restrictive as possible in defining the range of issues covered by article 6's automatic stay/dismissal provision.

Article 7: Although the fundamental principle of private autonomy underlying article 7 is entirely unobjectionable, two provisions of article 7 (in my view inappropriately) favor the policy of

avoidance of parallel proceedings instead of seeking to ascertain parties' actually manifested intent. The presumption in article 7(2) ("A choice of court agreement which designates the courts of one State or one or more specific courts of one State shall be deemed to be exclusive unless the parties have expressly provided otherwise."), although consistent with the equivalent provision in article 3(b) of the Hague Choice of Court Convention and with the approach taken in Europe (see Brussels I (Recast) art. 25(1); Swiss LDIP art. 5(1)), is nonneutral and departs from what I understand to be the dominant approach to interpretation of choice-of-forum agreements in the United States, which generally seeks to ascertain the parties' manifested intent neutrally. A similar objection can be raised against the presumption in article 7(3). Since in the present state of the law parallel proceedings are neither universally prohibited nor particularly unusual, one cannot necessarily infer from a party's consent to the exercise of adjudicatory jurisdiction by court X in state A that the same party wishes to discontinue a parallel proceeding before court Y in state B. It would be more forthright for the convention to ascertain party intent neutrally. Unless an intent to avoid parallel proceedings can positively be ascertained, the general parallel proceedings provisions of articles 8 and 12-13 should apply.

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

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

Click or tap here to enter text.

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?

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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?

The second option will likely still appear to common law jurisdictions as insufficiently respectful of courts' inherent discretion to manage the proceedings before them appropriately in the interest of justice. I expect that the second option, if adopted, would meet with particular disfavor in the United States.

The first option, although generally preferable, will likely be more attractive in the common law world, while still advancing the objectives of the convention, if it is kept relatively flexible. In particular, I would recommend revising article 9(2) to allow for a stay not to be ordered "in exceptional circumstances" if the good administration of justice requires the case to proceed in the view of that court (for example, because the court has a very strong view that it is the appropriate forum or because the first-seised court has not rendered a decision on the article 9(1) application with reasonable dispatch). In article 9(5), I would retain the bracketed language "As appropriate" and Option 2. Option 1 is too vague (by what criteria would the accessibility of justice be determined, especially in jurisdictions such as the US where the term "access to justice" lacks a definite content). Option 3's "clearly" gives too much deference to the first-seised court; if parallel proceedings are pending, at least two

jurisdictions may take the view that they are appropriate fora, and since in the common law world the existence of parallel proceedings is not traditionally regarded as a thing always to be avoided and the first-seised jurisdiction does not have an automatic priority, appropriate allowance needs to be made for the possibility that different jurisdictions of equal dignity may have differing views on which of them is appropriate.

Whatever approach is taken, respect for parties' autonomy to dispose of their claims should require that the mechanism of article 9 operate only when a party has requested it. I would therefore retain the bracketed words, "on an application by a party."

Finally, a lacuna in article 9 as presently drafted is that it does not seem to distinguish between ordinary coercive actions and negative declaratory actions. This could perhaps be addressed by adding a language in article 10(e) to allow a court to take account of whether more appropriate relief could be accorded through a coercive action specifically.

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.

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#### **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.

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#### **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?

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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?

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**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.

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

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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?

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**Question 14 - comments**

What other comments, if any, do you have?

It would be prudent to ensure that the miscellaneous provisions render the convention self-executing in the US, if adopted there.