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Statement by the Special Commission of the Second Commission of the German Council on Private International Law on the draft text of a future Hague Convention on parallel proceedings and related actions

Authors: Professors *Martin Gebauer* (Tübingen) und *Wolfgang Hau* (Munich)

The German Council on Private International Law is an autonomous academic advisory body that advises the German Federal Ministry of Justice and Consumer Protection on legislative work in the field of private international law. This statement is submitted to the Hague Conference on Private International Law as part of the consultation on the 'draft text of a possible convention on parallel proceedings and related actions'. Correspondence address of the Special Commission: Professor Dr. Jan von Hein (chair), Institute for Comparative and International Private Law, Dept. III, Albert-Ludwig-University Freiburg, Niemensstraße 10, D-79098 Freiburg (Germany), <jan.von.hein@jura.uni-freiburg.de>.

Considerations on the draft Hague Convention on parallel proceedings and related actions

1. Concurrent legal proceedings between the same parties (with identical or opposite roles) in several countries concerning the same subject matter or related subject matters should be either avoided or at least coordinated at an early stage: for reasons of procedural economy and to avoid divergent decisions, which disrupt legal coherence and nullify the cross-border effectiveness of the decisions rendered. The chances of concurrent proceedings being handled in a manner that is in the interests of all parties are significantly increased if the courts involved apply the same rules to determine which proceedings should be suspended and which should be continued, and if the courts can exchange views on the proper application of these rules.

2. With regard to the coordination of proceedings, the continental European tradition of Roman canon procedural law works with the *exceptio litis pendentis*, a concept that is related to and precedes *res judicata*, and in principle assumes that the court first seised has priority (unlike the tradition of *common law*, which does not focus on determining which court was seised first, but rather which forum has the closest connection to the subject matter). However, even based on the continental European principle of priority, there have always been uncertainties and divergences in dealing with competing court proceedings in two or more countries. In view of this, an intergovernmental approach seems advisable, and thus, already at the beginning of the nineteenth century, the effect of *lis pendens* was to be recognised under international treaties. Today's EU regulations also follow this tradition.

3. The EU's competence under Article 81(2)(c) TFEU to adopt 'rules applicable in the member states concerning conflict of laws and of jurisdiction' is not limited to intra-European constellations. The EU's power to accede to a future Hague Convention on parallel proceedings and related actions derives from its external competence under Article 216(1) and Article 3(2) TFEU. However,

provisions corresponding to Article 26 Hague Choice of Court Convention and Articles 26, 27 Hague Judgments Convention should be included in the draft (see also consultation, para. 3). Furthermore, it would have to be clarified that Articles 27-30 of the Lugano Convention remain applicable for conflicts of jurisdiction between EU member states and the contracting states of the Lugano Convention (Iceland, Norway, Switzerland).

4. For civil and commercial matters, the Brussels Ibis Regulation already contains provisions on concurrent legal proceedings in member states and third countries (see Recital No. 23). Article 33 Brussels Ibis Regulation concerns cases of so-called concurrent litigation in a third country (actions concerning the same cause of action between the same parties, in accordance with the intra-European rule in Article 29 Brussels Ibis Regulation; Hague terminology: *parallel proceedings*, Article 3(1)(a) of the draft), Article 34 Brussels Ibis Regulation, on the other hand, concerns proceedings in member states and third countries that are only related (in accordance with the intra-European rule in Article 30 Brussels Ibis Regulation; Hague terminology: *related actions*, Article 3(1)(b) of the draft).

5. So far, provisions equivalent to Articles 33, 34 Brussels Ibis Regulation have not been included in other EU regulations governing family, inheritance, and insolvency matters. According to Article 2(1) of the draft (in accordance with Article 2(1) Hague Judgments Convention), the future instrument will not apply to such matters, but also exclude other matters covered by the Brussels Ibis Regulation. It is noteworthy that, unlike the Hague Judgments Convention and the Brussels Ibis Regulation, but in accordance with Article 2(1)(a) and (b) Hague Choice of Court Convention, the Hague Proceedings Draft Convention does not apply to consumer and employment matters (Article 2(4)(5) of the draft; see consultation, para. 14).

6. Articles 33, 34 Brussels Ibis Regulation only allow the suspension of proceedings in a member state in favour of proceedings in a third country if the latter were initiated earlier (priority principle) and if, in addition, it is expected that the court of the third country will give a judgment capable of recognition and enforcement in the member state. A uniform EU standard applies to this prognosis if the third country is a contracting state to the Hague Judgments Convention (and that this is also applicable in substance); otherwise, recognisability is determined by the respective member state law (including any international treaties with the third country concerned).

7. It should be noted that Articles 33, 34 Brussels Ibis Regulation only provide for a stay of proceedings if the jurisdiction of the member state court is based on Article 4, Article 7, Article 8, or Article 9 Brussels Ibis Regulation, but not if it is based on another rule foreseen in the Regulation or, pursuant to Article 6(1) Brussels Ibis Regulation, on the law of the member state. This shows that Articles 33, 34 Brussels Ibis Regulation do not establish a conclusive rule for resolving conflicts of jurisdiction between member states and third countries, but rather provide an autonomous answer to the question of under what conditions the courts of the member states may refrain from exercising jurisdiction conferred on them by the Brussels Ibis Regulation in view of parallel proceedings in a third country. If the jurisdiction of the member state court is based on a ground of jurisdiction that is foreseen in the Brussels Ibis Regulation but not listed in its Articles 33, 34 (such as Articles 11–14, Article 18, Articles 21-22, Article 24, Article 25 Brussels Ibis Regulation), it follows by implication from Articles 33, 34 Brussels Ibis Regulation that the member state proceedings must be continued regardless of the given conflict of jurisdiction. If, on the other hand, the jurisdiction of the member state court (in accordance with Article 6(1)

Brussels Ibis Regulation) arises from member state law, Articles 33, 34 Brussels Ibis Regulation do not apply; rather, the question of how to react to a conflict of jurisdiction with a court of a third country is then governed by member state law.

8. European law therefore only regulates cases of third-country *lis pendens* to the extent that the material scope of the Brussels Ibis Regulation applies and, in addition, jurisdiction follows from the Brussels Ibis Regulation itself. If, for example, in German proceedings, the defendant domiciled in the United Kingdom objects that parallel proceedings concerning the same subject matter have been initiated in London, the Brussels Ibis jurisdiction rules do not apply (see Article 6(1) Brussels Ibis Regulation; rather, in Germany, for example, § 23, § 29 or § 32 Code of Civil Procedure are relevant). In consequence, Article 33 Brussels Ibis Regulation is also inapplicable and the relevance of the parallel proceedings in London is to be assessed based on German law (analogous and modified application of § 261(3) and § 148(1) Code of Civil Procedure). If, on the other hand, a British party sues a defendant domiciled in Germany before a German court, jurisdiction follows from Article 4 Brussels Ibis Regulation and the relevance of parallel proceedings already pending in London must be assessed based on Article 33 Brussels Ibis Regulation. The applicability of different regimes in these two constellations seems inappropriate and can lead to contradictions in assessment, which could be avoided by a uniform instrument.

9. In other respects, too, Articles 33, 34 Brussels Ibis Regulation only partially answer the questions that arise in such cases. On the one hand, these provisions only allow for suspending proceedings in a member state, but do not regulate whether or under what conditions a member state court is allowed to issue an anti-suit injunction if parallel proceedings in a third country are initiated later or appear inappropriate for other reasons. On the other hand, the unilateral nature of Articles 33, 34 Brussels Ibis Regulation naturally does not give rise to any obligation on the part of a third-country court to suspend its own proceedings or to refrain from issuing an anti-suit injunction against proceedings in the EU.

10. The aforementioned limitations of the existing EU rules highlight the advantages of a multilateral instrument within the framework of a future Hague Convention. In relation to contracting states, all constellations could be assessed according to a uniform regime, regardless of the respective place of residence or domicile of the parties. Above all, this would also result in an obligation of the courts of non-EU contracting states to take into account proceedings in the EU. In addition, a future Hague Proceedings Convention could impose a ban of anti-suit injunctions between all contracting states (which is not yet provided for in the present draft). A further advantage would be the possibility of autonomously determining the date of commencement of proceedings for all courts involved in a conflict of jurisdiction (Article 4 of the draft, cf. consultation para. 23 et seq.; corresponding to Article 32 Brussels Ibis Regulation) and to regulate communication between the courts (Chapter IV of the draft, cf. consultation para. 75 et seq.).

11. As far as can be seen, there are no plans to allow only contracting states of the Hague Judgments Convention to accede to the future Hague Proceedings Convention. From the EU's perspective, however, it would make sense to be allowed to declare a reservation whereby EU courts would only apply the Hague Proceedings Convention in relation to contracting states of the Hague Judgments Convention. This would avoid an overly complex legal situation that would arise if a member state court had to examine the admissibility of proceedings conducted outside the EU either on the basis of the new Hague rules, or on the basis of Articles 33, 34 Brussels Ibis Regulation or, lastly, on the

basis of the autonomous law of the member state, whereas the relevant recognition prognosis would have to be made on the basis of the Hague Judgments Convention or the law of the member state. Against this background, it also seems desirable to fully harmonise the material scope of application of the Hague Judgments Convention and the future Hague Proceedings Convention, i.e. to include consumer and employment matters in the Hague Proceedings Convention (contrary to Article2(4)(5) of the draft). If the future Hague Proceedings Convention, with regard to the applicable Hague Choice of Court Convention, should not apply to exclusive jurisdiction agreements but only cover non-exclusive jurisdiction agreements (cf. Article 7 of the draft), it would seem sensible to also foresee a reservation whereby the EU would only have to apply the future Hague Proceedings Convention in relation to contracting states of the Hague Choice of Court Convention.

12. As regards the underlying principles, from a continental European perspective the Hague Proceedings Draft Convention breaks new ground in that it attaches significantly less importance to priority in time. Instead, the draft primarily focuses on a hierarchy between the grounds for jurisdiction in competing proceedings and, in the event of equal ranking, on judicial discretion in accordance with the doctrine of *forum non conveniens*, which is particularly common in Anglo-American law. The draft is characterised by a high degree of flexibility, which is also characteristic of Articles 33, 34 Brussels Ibis Regulation (to a greater extent than in the provisions for intra-European cases in Articles 29, 30 Brussels Ibis Regulation) and this appears to make sense in the context of a potentially global instrument. In a functional comparison, the criteria to be applied to competing proceedings in the Hague Proceedings Draft Convention are quite similar to those applicable under Articles 33, 34 Brussels Ibis Regulation; in particular, in view of the right of access to justice, both systems provide for a positive prognosis of recognition, although this is less prominently emphasised in Article 10(1)(f) and Article 11(1)(g) Hague Proceedings Draft Convention than in Article 33(1)(a) and Article 34(1)(b) Brussels Ibis Regulation. Otherwise, there are no significant differences, except for the fact that EU law always requires the third-country proceedings to have temporal priority in order to be taken into account. From a European perspective, however, a departure from the traditional priority principle appears acceptable, provided that a global Hague Convention can be negotiated that provides an overall appropriate and not overly complex solution to the problem of cross-border concurrent proceedings that is sufficiently manageable for the courts and predictable for the parties.