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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?

The fact that the Draft applies only to parallel proceedings and related actions is a problem. It does not protect against proceedings brought by Party 1 in an inappropriate jurisdiction (State A). In order to obtain its protection (whether as a court first or second seised), Party 2 must seek some basis (probably in Article 8, and perhaps no more than a claim for a negative declaration) on which to commence proceedings in State B, when Party 2 may not really want to start proceedings anywhere.

The Draft will in these circumstances tend to lead to a rush to start protective proceedings, in order to obtain the benefits of first seisure. That is the opposite of what a solidly based convention should encourage.

Further, the Draft is not only restricted to situations of parallel proceedings, but is also restricted to situations where the parallel proceedings are in Contracting States (and, it appears, where at least one Party is resident in a Contracting State, though the draft is not clear - see Question 1.4 below). Proceedings may therefore be commenced in a Contracting State on any domestic ground of jurisdiction, and not merely on Article 8(2) grounds, even though they parallel proceedings in a non-Contracting State, which may be obviously the more appropriate forum. It may be that the domestic law of the Contracting State in which such proceedings were commenced would stay them in favour of the non-Contracting State. But it is clear that the Draft would not represent a complete solution to any problem of parallel proceedings.

It is, furthermore, not obvious why either of two parallel proceedings in Contracting States should have priority under the Draft Convention, if a third non-Contracting State is obviously the most appropriate jurisdiction of all three. This could under the Draft occur even in circumstances where, without the Convention, neither of the Courts involved in the parallel proceedings might think it appropriate to exercise jurisdiction. In short, a third non-Contracting State (State C) may have a stronger claim to adjudicate upon an issue which is already before a Court of a Contracting State (State A), but that claim can under the Draft be over-ridden by the expedient of commencing a third set of proceedings in a second Contracting State (State B).

1.2 Does the subject matter scope of the Draft Text cover those matters for which rules on parallel proceedings and related actions would be beneficial?
See the previous answer.

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)?

t is not clear to me that Draft Article 2(2) and (3) are satisfactory to achieve the stated aim of taking outside the Draft proceedings where there is a dispute about the validity (including, presumably, applicability) of an arbitration agreement Such a dispute can easily arise in parallel proceedings in both Contracting States A and B (e.g .where Party 1 commences proceedings in State A claiming that there is no relevant arbitration agreement and Party 2 ripostes by commencing proceedings in State B for a declaration or injunction to enforce an alleged agreement to arbitrate in State B. Would there not then be a common issue, preliminary in A and central in State B, within the terms of Article 2(2)?

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).

The proliferation of brackets in Article 1(2) makes it difficult to comment. Beyond noting that its general aim is to limit geographical scope of the Draft, I am not sure of the rationale of this limitation. Further, as presently formulated, it is unclear what is meant by "another" Contracting State. Does it mean a third State other than States A and B involved in the parallel proceedings, or does it mean a Contracting State other than the one in which the "defendant" or "any of the defendants" to which Article 1(2) refers is defendant? Or does it simply mean "any" Contracting State?

The word "any" would, if used, certainly appear too wide, if is means that it would suffice if one of say six defendants was resident in whatever is meant by "another" Contracting State. That would again be a recipe for artificial adding of defendants who would not otherwise have been sued at all.

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.

The terminology "on the same subject matter" is in notable contrast to that used in, for example, the Brussels Regulation No. 1215/2012, Article 29(1), viz "involving the same cause of action ". "On the same subject matter" is arguably materially wider, and will certainly open the way to disputes.

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

Acceptable. The existence of the two different systems is understood.

Question 4 on Article 5 obligations

What are your views on Article 5?

Article 5(3) , which requires a court in State A to proceed if the other court in State B "is unlikely to render" or "has not rendered" a judgment on the merits within a reasonable time is a recipe for invidious disputes before State A (apparently at any stage of the proceedings) as to whether the courts in State B have acted with reasonable despatch. The court in State A is not even given a discretion or a power to overlook minor but unreasonable delay.

Question 5 on priority jurisdiction / connection

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

The general hierarchy is understood and accepted. The subject-matter of Article 7(1) is rather obscure, even with knowledge of the 2005 and 2010 Conventions. Article 7(3) appears too narrowly defined, at least if the words "positively" and "by written or oral format and addressed either to the court of to the claimant" are retained. Why is the general concept of submission not sufficient?

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

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

It is not really possible to answer this question until it is decided whether, in a multi-party case, the list is to operate separately between each claimant and each defendant and/or in respect of each subject-matter in issue, or whether some assessment falls to be made "for the proceedings as a whole" (see HCCH Note to Article 8(2)).

Either approach is likely to have undesirable consequences. The latter approach opens the way to tactical joinders of parties and/or issues as well as a potentially difficult "overall" evaluative judgment. The former approach seems the more likely to be adopted, but, if so, would potentially scissor up complex proceedings by allocating them to different jurisdictions.

A basic problem about Article 8(2) is that it is only a limited list of some of the grounds on which it may be appropriate for a court to take jurisdiction, or which it may be relevant for a court to take into account when deciding whether to exercise jurisdiction.

But the list:

(a) omits other such grounds;

(b) is inappropriate as a basis on which a claimant by commencing proceedings in State A can gain presumptive priority over proceedings later begun in State B; and

(c) fits uneasily with the needs of complex, multi-party and/or multi-issue proceedings.

A classic example of the potential problems is where it is necessary or expedient to join one or more co-defendant(s) in respect of which none of the presently listed Article 8(2) grounds would exist: see Article 8(i1) of the Brussels Regulation No. 1215/2012.

But there are plenty of other examples: see e.g. the case where a defendant wishes to involve a third party by third party proceedings: see Brussels Regulation, Article 8(2).

Further, even the place where a contract was made and/or the law under which it was made may operate as sufficient triggers in current practice, though it might be arguable that Article 6(2)(g)(iii) could cover some such cases (depending on how generously the concept of a "market" is understood). Would use of standard terms, such as the ISDA terms, be taken axiomatically to mean that there was a relevant "market"? Both the place where unjust enrichment occurs and the place where the act or omission causing it occurs can have a strong claim as a basis of jurisdiction, so Article 6(2)(g)(ii) and (iii) should be framed in the widest sense indicated by the square brackets.

A more general problem presented by the Draft is that the broader the list adopted in Article 6, the easier it will be for Party 1 to commence proceedings in what is objectively an inconvenient forum (State A), in order to forestall proceedings by Party 2 in what Party 2 regards as a more natural forum (State B). The risk of this occurring will in turn mean a rush to litgate, with Party 2 seeking to commence proceedings in State B, before Party 1 can do so in State A.

That brings us back to paragraph 1.1 above - viz the fact that the draft deals only with situation where there are parallel proceedings, and does not, in the absence of parallel proceedings, address the problem of tactically motivated litigation in inappropriate fora.

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?

For reasons already given:

(a) The focus on parallel proceedings is not a satisfactory basis on or from which to start addressing issues of jurisdiction.Rather, it is likely, if anything. to create as many issues as it solves, in the form of a rush to litigation, sometimes for tactical reasons in an inappropriate jurisdiction, followed by attempts to operate the complex (and at the moment uncertain) machinery by which a court first seised may lose its priority under Article 9 and 10 or, possibly, through appeals to the (at present equally uncertain) concepts of denial of justice, abuse of proces and/or public policy (Articles 19 to 21).

(b) The list of grounds of jurisdiction is too restricted to meet the day-to-day requirements of the administration of justice by modern courts addressing multi-party and/or multi-issue disputes: see the answer to Question 6.1 above..

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

Please see the answer to Question 6(1) above.

Question 7 on the determination of the more appropriate court

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

First seisure in State A by virtue of Party 1 being able to invoke one of the heads of jurisdiction in Article 8(2) does not give State A a strong claim to determine which is the more appropriate State in which a dispute should be decided if parallel proceedings follow. This is particularly when State A may have been first seised with the object of forestalling proceedings in the more appropriate and convenient State B. On that basis, either Option 2 or Option 3 in the second version of Article 9(2)(b) would seem more appropriate, with the omission of the phrase "In exceptional circumstances" at the start of Article 9(2).

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

The court second seised ought to be able to operate the process envisaged by the Anwer to Question 7.1 above.

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

Yes, see Answer to Question 7.1 above.

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)?

I do not at present understand at what situation factor (f) is aimed. Subject to that think that the phrase "having regard to the proper administration of justice" (or something similar - perhaps "having regard to the interests of justice") is important, and that all the factors identified are potentially relevant. I would prefer to see them as factors to be taken into account "inter alia" or "among any others", rather than "in particular".

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

It should work. Common law courts are certainly familiar with this sort of exercise.

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

None save those already mentioned.

Question 9 on the effectiveness of the framework for parallel proceedings

Do you have an overall view on the effectiveness of the framework developed in the Draft Text for dealing with **parallel proceedings** in an international context? Please explain any advantages and / or disadvantages of the framework, and how you think it will work in practice.

I am very sceptical about the net value of this Draft Convention, much though I acknowledge the thought that has already been devoted to it. I do not think that it is likely to lead to a workable or attractive Draft Convention for acceptaance by States. The work done seems to me to disclose the problems that I have already identified. I am also not sure that competing litigation is in day-to-day practice so really pressing a problem, save perhaps from time to time in relation to the United States and, currently, Russia. Most courts have devised sensible means of addressing inappropriate proceedings and the present Draft, in aiming to impose an agreed international approach to such situations as between Contracting States (which will probably not include Russia and may well not include the United States) ,seems likely to create as many additional problems as those it aims to solve.

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.

Again, the suggested framework only caters for related actions pending in the courts of different Contracting States. It does not address the underlying problem of proceedings commenced in an inappropriate forum - unless Party 2 in proceedings brought against it in State A itself takes steps to initiate related proceedings in State B. Even then, it does not address the possibility that a third non-Contracting State may be more appropriate than either State A or State B.

The proposed mechanism appears to depend upon an application being made under Article 11 in both related actions, since it is only when both Courts seised determine that one of them should adjudicate the entirety of the related actions that Article 12 applies. Normally, one might expect a different Party to be applying in each related action. But one Party might not wish to make any such application at all. I suppose that one and the same Party could then apply under Article 11(1) in both related actions, in the hope of triggering the mandatory dismissal or suspension provided by Article 12(1)..

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?

Direct liaison or communication between different courts is likely to be something of a novelty. It has, I believe, occasionally occurred between different courts administering an international insolvency on a unitary basis. But that is a different context to the present. I fear that a need to keep the Parties informed about any communications outside the normal open-court process would make such procedures quite cumbersome and difficult to manage. That said, common law courts would no doubt do their best to operate them fruitfully.

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

See the Answer to Question 11.1.

Question 12 on safeguards

What are your views on the three safeguards provided in the Draft Text (Articles 19-21), particularly as to how they will operate in practice?

Denial of justice, abuse of process and public policy are all likely to be understood restrictively, although there have been significant recent cases where inability to obtain justice (e.g. due to lack of legal aid or assistance, or possible partiality, in a foreign jurisdiction) has altered the outcome of forum conveniens applications: see e.g. Dicey, Morris & Collins on The Conflict of Laws (6th ed.) paragraphs 12-026 to 12-027.

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.

The stated objectives are all as such laudable, but the wording omits the overall interests of justice in ensuring that disputes are resolved in as convenient and holistic a forum as possible. Further, the Draft attempts a limited solution to a limited problem by introducing a fixed list of "permitted" heads of jurisdiction, onto which it then seeks to graft an evaluative judgment about the appropriateness of their being used to determine which of two parallel proceedings should have priority in the particular case.

The Draft is also problematic in ways already discussed. It only addresses situations where there are already on foot parallel proceedings or related actions, and it does not address the more basic issue how to deal with proceedings brought in a inappropriate jurisdiction. It opens the door to tactical preemptive litigation to gain such advantage as attaches to first seisure. It only addresses parallel proceedings or related actions in two Contracting States. It does not address parallel proceedings where one State is not a Contracting State, but may have a strong claim to exercise jurisdiction (including on grounds which, had it been a Contracting State, would have fallen within Article 8(2)).

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

Yes. I am not persuaded that it would do so, and it would in some significant respects make matters worse.

13.3 Do you consider there are any risks of tactical or satellite litigation arising from any of the provisions, or the overall approach of the Draft Text? Are these risks greater or fewer than those that currently exist? Are there any ways that such risks could be addressed in the Draft Text?

The approach and terms of the Draft in my view give rise to serious risks of tactical or satellite litigation. The prescriptive nature of the Draft Convention's terms means that these risks could in some respects be more difficult to address than at present. The Draft's limitations and its attempt to marry clearcut jurisdictional rules with evaluative assessment of the convenient forum, albeit only as between two Contracting States, militate against an attempt to recast the present, limited but very open-ended Draft as an international instrument.

Question 14 - comments

What other comments, if any, do you have?

I have no further comments.