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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 Draft Text accurately identifies 'parallel proceedings' and 'related actions' in civil or commercial matters as the most salient issue to be addressed in the future legal instrument. In recent decades, domestic courts have increasingly resorted to unilateral means of coordinating international legal disputes, such as the doctrine of forum non conveniens and anti-suit injunctions (ASI), thereby contributing, rather than reducing, the litigiousness of individual cases and giving rise to – what I like to call – escalating patterns of distrust between jurisdictions. This is evident even in legal systems that are not based on the common law. For example, the People's Republic of China (PRC) has devolped its own "Act Preservation Measures"【行为保全措施】as well as the discretionary power to decline the exercise of jurisdiction in accordance with Art. 103 and Arts. 280-282 respectively of the PRC Civil Procedure Law. In the same vein, German courts – although not (yet) issuing initial prohibitive injunctions in that regard – have adopted countermeasures in the form of anti-anti-suit injunctions based on a substantial claim theory (e.g. Regional Court Munich I, 2 October 2019 – 21 O 9333/19). Meanwhile, the traditional approach in civil law jurisdictions to the management of parallel lawsuits, i.e. a strict lis pendes rule, is also susceptible to targeted litigation strategies, such as so-called (reverse) "torpedo actions" (e.g. Art. 31 (1)-(3) Brussels Ibis Regulation and CJEU, 4 May 2017, C-29/16 – HanseYachts AG). As a result, there is definitely a regulatory need for a binding (!) legal instrument that places the coordination of concurrent proceedings on a cooperative basis and finds common ground among legal cultures.

At the same time, in my opinion there are two aspects that warrant further attention:

First, the CGAP may also wish to consider including in the future instrument a provision that expressly establishes the exclusivity of its mechanism for the management of multiple proceedings (at least with regard to Chapter II). In particular, this provision should require all Contracting States to refrain from interfering with the functioning of this mechanism by taking any measures, e.g. orders, decrees or injunctions, on whatsoever basis, designed to restrain a party from commencing or maintaining legal proceedings in another Contracting State. In terms of legislative technique, inspiration could be drawn from Art. 13 (2) of the HCCH 2019 Judgments Convention and include (declaratory) exceptions deemed necessary by Member States (e.g. ASI in favour of exclusive choice of court agreements pursuant to Art. 3 (a) HCCH 2005 Choice of Court Convention), but also from Principle 7.1 Leuven/London Principles ("Where the States involved are parties to an international convention providing common rules for the exercise of original jurisdiction, no court may issue an antisuit injunction"). Thereby, the future instrument would not only put a hold to the "Ping-Pong Olympics" of potentially infinite anti-anti-anti-... suit injunctions (see e.g. Higher Regional Court Düsseldorf, 7 February 2022, I-2 U 27/21), but also anticipate recent – albeit currently still rather subtle – tendencies that also allow anti-suit injunctions to be granted in favour of proceedings in an otherwise unrelated foreign forum (see UniCredit v. RusChem, [2024]

UKSC 30, at paras. 72 et seq.). Although, from a general point of view, "rarely used and applied only in exceptional circumstances" (Prel. Doc. No. 3 of February 2021, Annex II, para. 11), the use of ASIs may, in individual cases, lead "to a considerable increase in procedural costs for all parties, considerable legal uncertainty and a race to the bottom" (HCCH/WIPO Report of December 2022, p. 10). Overall, addressing this issue, would certainly add value to the future instrument and serve as additional incentive for ratification.

Second, given the efforts to integrate the future instrument into the 'suite' of HCCH Conventions in the area of transnational litigation (CGAP, C&D 2020, para. 35), it seems appropriate that the Draft Text refrains from regulating direct grounds of jurisdiction, but rather – just like the HCCH 2019 Judgments Convention – provides for implicit 'bases' of proceedings. As the exercise of jurisdiction to adjudicate is closely linked to national sovereignty, such an approach could well have proven to be an obstacle for the widespread adoption of the future instrument. The HCCH itself had to learn this lesson during the preliminary failure of the Judgments Project (see U.S. Department of State, letter of 22 February 2000, p. 5). However, this greater inclusiveness might come at the expense of the effectiveness of the future instrument. In particular, the absence of an explicit prohibition of certain exorbitant grounds of jurisdiction ('black list') – as envisioned by the original proposal in 1992 – must be viewed with regret (for this concept, see below at 6.3). Hence, under the Draft Text, neither is a defendant per se protected from being sued (and having the resulting judgment enforced against him) in an inconvenient and remote forum, nor can the potential claimant assess the available fora with the legal certainty required for litigation planning. Nonetheless, a responsible party can still make use of the proposed framework by proactively bringing about a situation of double pendency with another, presumably more appropriate court, thus enabling at least a second-best solution in this regard (for the protection of weaker parties, see below at 1.3). Furthermore, the inclusion of direct jurisdiction rules would necessarily increase the complexity of the geographical scope (see below at 1.4).
Despite my support for the solution found in the Draft Text, it must still be noted that the remaining subject matter may not be sufficient to justify yet another "HCCH Jurisdiction Convention" since all legal consequences virulent in legal practice would already be covered by the existing instruments. Thus, there is an inherent risk that the overall scope of the achieved 'suite' or 'package' of HCCH Conventions would not correspond to that of the original Judgments Project pursued since 1992 as a "convention double" …

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?
In principle, the material scope of 'civil or commercial matters' covers all relevant disputes for which there is concern of internationally conflicting decisions, and is also consistent with the HCCH 2005 Choice of Court and HCCH 2019 Judgments Convention. Perhaps a new attempt could be made to draw up the legal definition of 'court' (see also Work. Doc. No. 166 of February 2017). In any case, the Explanatory Report should reiterate that the branch of jurisdiction to which the adjudicating body belongs is irrelevant as long as it rules on a "civil and commercial matter".

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)?

Most of the proposed exclusions are well reasoned and established in HCCH Conventions and instruments of Private International Law (PIL) in general.

Kindly allow me, nonetheless, to highlight four pertinent aspects:

First, Art. 2 (2) Draft Text deliberately states that the future instrument still applies when the excluded matter arises as a preliminary question and not as an "object of the proceedings". “Object” is intended to mean the matter with which the proceedings are directly concerned, and which is mainly determined by the plaintiff´s claim. Given the central importance, the Draft Text attributes to the determination of the "same subject matter" (see below, at 2.1), the Explanatory Report should provide specific guidance on the delineation of these terms (also with regard to the same terminology in Art. 7-8 Draft Text). Furthermore, it might be advisable to explicitly specify that the resolution of preliminary questions is also essential for the proper administration of justice and may thus be taken into account when determining the more appropriate court in accordance with the catalogue of factors in Art. 10 Draft Text.

Second, the comprehensive exclusion of intellectual property appears premature. On the one hand, disputes on standard essential patents (SEP) involving the determination of fair, reasonable and non-discriminatory (FRAND) licensing terms are at the heart of the counter-productive ASI "Ping Pong Olympics" (see e.g. Ericsson Inc. v. Samsung Electronics, 2021 U.S. Dist. LEXIS 4392; Xiaomi v. InterDigital, [2020] E 01 Zhi Min Chu [169.1]). Although, the recent decision of an WTO Arbitration Panel in European Union v. China will probably unfold a mitigating effect for these cases (see WTO MPIA, WT/DS611/ARB25, 21 July 2025), the issue of concurrent proceedings will remain, e.g. in form of far-reaching heads of jurisdiction (CJEU, 25 February May 2025, C-339/22 – BSH Hausgeräte). On the other hand, the HCCH 2005 Hague Convention even made it possible to include at least copyright and related rights within its scope (Art. 2 (2) lit. n), o) HCCH 2005 Choice of Court Convention).

Third, in terms of arbitration, the Draft Text is modelled on the total disconnection clause contained in the HCCH 2005 Choice of Court and HCCH 2019 Judgments Convention. The draft text is based on the severance clause for arbitration proceedings contained in HCCH 2005/2019. This approach is particularly advantageous with regard to parallel proceedings, as the relationship between court and arbitration proceedings is already complex at national or regional level and the effects of a global regulation would therefore be particularly difficult to predict (see e.g. CJEU, 20 June, C-700/20 – London Steamship). Similar to the HCCH 2019 Convention, the court seised must therefore also be released from its international obligations under Art. 5 of the Draft Text if it is satisfied that an arbitration agreement exists.

Fourth, further consideration should be given to the exception for proceedings related to consumer and individual employment contracts. Nowadays, the strong position of arbitration as the preferred method of international dispute resolution among larger corporations still remains undisputed (QMUL/SIA Survey 2025, p. 5). Accordingly, the relevant beneficiaries of improved rules of cross-border litigation, which will be governed by the HCCH Conventions, including the future instrument, as default rules, are primarily small and medium-sized enterprises (SME) and natural persons who, due to a widespread lack of legal ressources, are particulary dependent on an affordable and time-efficient justice system (see e.g. OECD Public Governance Policy Papers No. 79, p. 3). While it is true that the protection of typical structural weaker parties in these contracts is usually achieved via specific heads of direct jurisdiction in the domestic and regional legal systems and consumers as well as (most) employees can hardly be required to proactively bring about a situation of double pendency just to fall within the scope of the Draft Text, it is also difficult to understand how the position

of these groups would be worse than it is under the current fragmented situation of diverse domestic regimes of civil procedure. Moreover, the HCCH has already been successful in implementing an international obligation in these areas within the framework of the HCCH 2019 Judgments Convention. From the perspective of (what I like to call:) "trust management" between judicially cooperating jurisdictions, the impact of foreign judgments on the sovereign domestic administration of justice appears to be far more intense than the mere decision to grant priority to foreign proceedings, especially since the resulting judgment must still be recognised and enforced in order to have any effect in the domestic territory. Against this background, it seems promising to reconsider, whether the protective bases of Art. 5 (2) HCCH 2019 Judgments Convention cannot be transferred to the framework of the Draft Text, either as a 'priority basis' according to Art. 6, as an exception to the primacy of 'party autonomy' in Art. 7, as an additional 'basis of proceedings' pursuant to Art. 8, and/or as another 'determination factor' within the catalogue of Art. 10.

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).

For successful practical application, the geographical scope of the future instrument will need to be based on straightforward and simple elements that can be easily assessed by the courts seised so as not to give in itself rise to additional litigation costs. In this respect, the working group has correctly limited this aspect to parallel proceedings and related actions pending in the courts of different Contracting States. When the existence of the other proceedings is brought to the attention of the court (by the parties), it is therefore very likely that the Convention will apply, as the prima facie connection between the two cases will ordinarily amount to at least 'related actions'(but see also below at 2.4).

As with the HCCH 2019 Judgments Convention, an additional element of habitual residence should thus be dispensed with. Moreover, such a requirement would be counterproductive as it could jeopardise the applicability of the Draft Text in relation to International Commercial Courts (ICC) as potential proponents of the HCCH Conventions, which regularly promote themselves as neutral dispute resolution centres for non-residents (SIDRA Report 2024, pp. 55 and 57 et seq.). However, if the drafters decide to include direct jurisdiction rules, another element will of course be needed to establish a cross-border connection.

## 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.

In addition to the partial definition of 'habitual residence' in Art. 3 (2), the Draft Text distinguishes between two independent categories of concurrent proceedings with rather different legal consequences (see below at 9). While the definition of the term 'parallel proceedings' in Art. 3 (1) lit. a) Draft Text is aligned with the concept in Art. 7 (1) lit. f), (2) of the HCCH 2019 Judgments Convention, instead of the narrower concept in Art. 9 lit. g), 22 (2) lit. b) HCCH 2005 Choice of Court Convention, 'related actions' represent the broader concept novel to the HCCH framework, which is to be assessed on the basis of a three-prong "relatedness test" according to Art. 3 (1) lit. b) Draft Text. Both categories correspond to and are presumably inspired by the approach taken in the Brussels Ibis Regulation (see e.g. Prel. Doc. No. 1 of December 2018, para. 201: "Kernpunkt").

Please allow me to make five brief comments on the possible implications of these definitions:

First, in view of the potentially diverse range of cases worldwide, it is generally to be welcomed that the definition of 'parallel proceedings' is based on the broader term 'subject matter' and not on the same 'cause of action'. However, the concept is not yet firmly established within the framework of the HCCH Conventions, apart from referring to the 'central or essential issue' of the proceedings. Accordingly, substantial guidance is needed in the Explanatory Report and in subsequent HCCH Special Commissions in order to promote the uniform application of the instrument in this regard. Subject to the following, it seems thus almost inevitable that domestic courts will initially be tempted to refer to the national concepts with which they are more familiar.
Certainly, cautious inspiration could be drawn from the case law of the CJEU (see e.g. CJEU, 8 December 1987, C-144/86 – Gubisch Maschinenfabrik). This would require that both proceedings arise from the same set of facts (e.g. a contractual relationship) and revolve around the same legal issue (e.g. validity of that contract), while the legal remedy sought must not be identical (e.g. damages v. declaratory judgment). "Put another way, the search is for commonality in the essential elements, not an essential element." (Wright v Granath [2021] EWCA Civ 28, para. 84). Still, in the absences of a supranational body responsible for interpretation (aside for the HCCH Special Commissions), it will be extremely difficult to achieve uniform application of these multi-layered normative issues at a global level …

Second, it has already been pointed out elsewhere that the criterion of 'same parties' is particularly susceptible to litigation tactics. This is particularly true in view of the fact that the internal structure of the draft so far suggests a strictly literal interpretation of this term (see e contrario Art. 3(1)(b)(i): 'some of which are identical'). If the framework for parallel proceedings is supposed to have an autonomous scope of application (for the opposite position, see below at 9), the Explanatory Report should clarify that it also operates where some, but not all, the parties are identical (see e.g. CJEU, 6 December 1994, C-406/92 – The Tatry, para. 2). Furthermore, determining when multiple parties are the 'same' again involves a number of normative determinations that hamper the uniform application of the future instrument. For example, under the Brussels regime, litigants are considered to be the 'same parties' if their interests are "identical to and indissociable" from each other (CJEU, 19 May 1998, C-351/96 – Drouot Assurances). Beyond that, the rigid construction of this requirement seems particularly ill-suited to effectively concentrating collective redress proceedings in a single forum.

Third, in contrast, the three prongs of the "relatedness test" according to Art. 3 (1) lit. b) Draft Text appears straightforward and simple to apply even at the global level. Due to the negative element ("not parallel proceedings"), however, in practice it will primarily serve to substantiate the definition in Art. 3 (1) lit. a) of the Draft Text. Given this direct link between the two concepts, it appears safe to say that the broader the tested issues in Art. 3 (1) lit. b) is, the narrower will be the construction of the definition in Art. 3 (1) lit. a) Draft Text. Apart from that, only the 'risk' requirement gives rise to some uncertainty with regard to the degree and standard of proof (see e.g. Research in Motion UK v. Visto Corp., [2008] EWCA Civ. 153, para. 37) which should be addressed in the Explanatory Report. Moreover, the future instrument should seek alignment with the terminology of the previous HCCH Conventions and also adapt an "inconsistency" requirement defined as the "[impossibility] to act in accordance with one without violating the other in whole or in part."

Fourth, no mechanism is in place for the situation that the (two or more) courts involved disagree on the application of the specific framework, i.e. 'parallel proceedings' or 'related actions', or the future instrument in general, i.e. on the existence of concurrent proceedings. The most obvious solution would be to explicitly extend the provision of Part IV (Cooperation and Communication) to cover the issue of the applicability of the Convention or the specific part. Perhaps, the disagreeing courts could be allowed, by default, to apply the broader framework of 'related proceedings'. To

avoid even further complications in this regard, interim measures of protection (with the exception of ASI) should not fall under the future instrument.

Fifth, and last but not least, the definition for the 'habitual residence' of non-natural persons is well known from both, the HCCH 2005 Choice of Court Convention and the HCCH 2019 Judgments Convention, where the possibility of multiple residences serves to promote the applicability and the favor recognitionis of either Convention. However, one has to bear in mind, that in the possible future instrument, the same approach makes the occurrence of parallel proceedings more likely as more courts will have a suitable basis for their proceedings under Art. 8 (2) lit. a) of the Draft Text.

Sixth, consideration may also be given to incorporating the Convention's definition of the term of 'judgment'. A potential definition should as far as possible be modelled on Art. 3 (1) lit. b) HCCH 2019 Judgments Convention, excluding the part concerning the "determination of costs or expenses of the proceedings by the court", as these do not involve the specific risk of inconsistent decisions that an instrument on concurrent proceedings is concerned with. Moreover, So far, the term has not been used in a uniform manner throughout the draft text, although this does not appear to intentionally imply any substantial differences (Art. 5 (2): "judgment"; Art. 5 (3): "judgment on the merits"; Art. 10 lit. f)/Art. 11 lit. g): "any resulting judgment").

### Question 3 on when a court is deemed to be seised

What are your views on Article 4?

According to the Consultation Paper, this provision "provides that a court shall be deemed to be seised at the time when the first step in the initiation of proceedings is taken under the national law of the Contracting State in question". This is definitely the right approach if one wants to minimise the risk that temporal deviations, which arise solely from differences in legal culture, will arbitrarily become significant for the operation of the future legal instrument. Furthermore, the definition found will probably also be used to answer the similar questions arising from Art. 16 (2), 22 (2) lit. c) HCCH 2005 Choice of Court and Art. 7 (2) lit. a), 16 HCCH 2019 Judgments Convention.

I would nevertheless like to offer three small observations:

First, the Draft Text or Explanatory Report should explicitly clarify that Article 4 solely refers to the point in time relevant for the application of the future legal instrument, but still presupposes that all courts have been duly seised in accordance with their respective domestic rules of civil procedure (or specific rules of criminal procedure in adhesion procedures). This understanding would also render superfluous additional safeguards against frivolous or vexatious actions, such as those provided for in Article 32 of the Brussels Ibis Regulation. Thus, even if the institution of legal actions under the law of a Contracting State would require the service of process on the defendant, any prior mandatory filing of the complaint with the court should still be considered the relevant point of time according to Art. 4 lit. a) Draft Text. Similarly, the application for conciliation filed with a mandatory meditation/conciliation board of a Contracting State – such as the Swiss "Schlichtungsbehörde" (Art. 197-212 Swiss Civil Procedure Code) – should already be considered sufficient for the determination of the relevant point of time for the purpose of the Draft Text, even if, following the eventual failure of the conciliation attempt, ordinary court proceedings still had to be formally initiated by filing another action (see Art. 209 (3) Swiss CCP). If the domestic law itself assigns the effects of lis pendens to the conciliation application (see e.g. Art. 62 Swiss CCP), this result will directly follow from Art. 4 lit. a) Draft Text. However, if domestic law does not prescribe such an effect, the application to the conciliation board, provided that it is mandatory under

domestic law, should at least be considered an 'equivalent document' according to Art. 4 lit. a) Draft Text. (see. e.g. CJEU, 20 December 2017, C-467/16 – Schlömp).

Second, the Explanatory Report should also offer some guidance on how to deal with cases where the defendant has voluntarily decided to waive his/her right to formal service of process in jurisdictions that generally require the service of process to establish pendency before its courts (see e.g. R. 3 Minnesota Court Rules). If these jurisdictions apply a legal fiction of service (R. 4.05 (d) MNCR: "these rules apply as if summons and complaint had been served on the date of signing of the waiver"), the future instrument should adapt the same approach under Art. 4 lit. b). Alternatively, the obligatory notice and request for the waiver could also be considered "service" under Art. 4 lit. b) Draft Text. In the same vein, it should be made clear that a private process server is not an "authority" responsible for service according to Art. 4 lit. b) Draft Text.

Third, the explicit inclusion of a provision for cases where an additional subject matter becomes pending during the proceedings, e.g. in the form of a counterclaim, should be contemplated. An example is provided in Art. 145 (2) ELI/UNIDROIT Model Rules: "Where a statement of claim is filed during proceedings it becomes pending at the time when it is invoked in the hearing or when it has been filed with the court or served on the other party."

### Question 4 on Article 5 obligations

What are your views on Article 5?

Assuming that the courts involved have unanimously determined that 'parallel proceedings' exist, Art. 5 Draft Text sets out the central (and only) international obligations imposed on the Contracting States by the future legal instrument: suspension, dismissal, continuance. I welcome the approach taken to stipulate the general obligations in a separate provision preceding the more specific conditions of these obligations.

That said, the three paragraphs still need some further refinement:

First, on the level of legal technicalities, it remains unclear whether the legal obligation follows directly from Art. 5 (1) Draft Text ("shall do so"), while the requirements that trigger this legal consequence ("must suspend proceedings") are filled in by the conditions of Art. 6-10, or rather whether the legal consequence is prescribed in Art. 6-9 Draft Text and is merely supplemented in detail by Art. 5. Draft Text. Either way, the wording should reflect the preferred option more accurately to maintain the textual integrity. For example, if the international obligation ("shall do so") is – similar to the overall structure of the HCCH 2019 Judgments Convention – contained in Art. 5 (1) Draft Text, the other provisions should be phrased "must suspend" (see e.g. Art. 6 cl. 2, Art. 7 (1) cl. 2, 8 (1), 9 (2), (3)). However, the same issue is, admittedly, not as pronounced with Art. 5 (2) and (3).

Second, in accordance with the Draft Text's definition of 'judgment' (see above, at 2.6), it is worth considering whether Art. 5 (2) Draft Text could be further aligned with the HCCH 2019 Judgments Convention by also refering to 'judicial settlements (transactions judiciaires)'. The main reasons for this are that the delineation between these two concepts is usually rather fluid, courts are often heavily involved in the negotiations, and in some Contracting States 'judicial settlements (transactions judiciaires)' may even have the effect of res judicata, meaning that – contrary to the HCCH 2019 Judgments Convention – may be capable of recognition and enforcement under domestic laws (for the 'Civil Mediation Statement'【民事调解书】according to Art. 100 PRC Civil Procedure Law, see e.g. Bank of China Limited v Chen, [2022] NSWSC 749, para. 105).

Third, for the purpose of avoiding inconsistent decisions, it seems appropriate to link the obligation to suspend proceedings to the issuance of a recognisable or enforceable decision in the court that has taken priority under Art. 5 (2) Draft Text. Not least because this requirement is likely to be further harmonised among the Contracting States with the increasing adoption of the HCCH 2019 Judgments Convention. However, until that time, recognition and enforcement remains subject to the domestic rules of civil procedure. As the Draft Text, in principle, also applies to appeal proceedings (arg. e. Art. 10 lit. d) Draft Text), this reference may result in considerable differences, depending on whether a legal system "simply" requires a 'final and conclusive' decision or whether it also demands that the judgment is no longer subject to ordinary forms of appeal ('formelle Rechtskraft', 'autorité de chose jugée'). To avoid temporal disparities in its application, Art. 5 (2) Draft Text could, once again, in alignment to Art. 4 (3) HCCH 2019 Judgments Convention, be amended with another clause along the lines of "A judgment shall not be considered incapable of recognition and, where applicable, enforcement for the purpose of this paragraph solely on the gorunds that it is subject of review or that the time limit for seeking ordinary review has not expired".

Fourth and interestingly, the subsequent continuance of proceedings provided for in Art. 5 (3) Draft Text is drafted as an international obligation imposed on the court ("shall"), even though it is ostensibly an exception to the general obligation to suspend in Art. 5 (1) Draft Text, and one would thus usually assume that this decision would be left at discretion of the court ("may"). In practice, this distinction will probably not prove to be all that relevant, as the court – depending on the eventually adopted wording – will retain a significant degree of autonmy in either the assessment of 'a reasonable time' or the diffucult prognosis of the "likelihood" that the other court will still render a judgment on the merits – if applicable, in that time period –, respectively.
If the future instrument were eventually to adopt the prognosis element ('unlikely to render') the inclusion of another safeguard could be contemplated concerning the case that the resulting judgment will evidently(!) not be enforceable in that Contracting State (e.g. due to a conflict with the (exorbitant) exclusive jurisdiction in the requested State, see e.g. Art. 300 (1), 301 (2), 279 (3) PRC Civil Procedure Law for the performance of sino-foreign joint venture contracts). This would prevent the need to resort prematurely to the public policy exception in such cases.

### Question 5 on priority jurisdiction / connection

What are your views on Articles 6 – 8 including how they will work in practice?
At the heart of the Draft Text's attempt to find common ground between the legal cultures, the 'bases for proceedings' provided for in Art. 6-8 seek to reflect the legal certainty usually associated with the lis pendens rules in civil law jurisdictions. To this end, they must first and foremost be designed in such a way that their existence can be easily determined by two or more courts at the same time (and possibly even jointly, in accordance with Art. 15-17 Draft Text). As a secondary concern, the selected criteria should, as far as possible, maintain consistency with the other HCCH Conventions in the area of transnational litigation.

Against his background, kindly allow me to point to a few aspects of the Draft Text:

First, in contrast to the HCCH 2019 Judgments Convention, which only sets minimum standards, the hierarchical structure of the Draft Text's 'bases' have to resolve any case comprehensively, without the possibility of resorting to domestic law as a fallback rule. Hence, as a starting point of the negotiation, Art. 6 Draft Text should ideally cover all 'exclusive' and quasi-exclusive 'bases for recognition and enforcement' in Art. 6 and 5 (3) HCCH 2019 Judgments Convention respectively. However, since 'residential lease' refers to a contract for the use of living accommodation for

personal, family or household purposes in exchange for rent, these matters are, at the moment, already excluded from the material scope of application according to Art. 2 (4) Draft Text.

Second, similarly, Art. 7 Draft Text on 'party autonomy' should be drafted consistently with Art. 7 (1) lit. d) HCCH 2019 Judgments Convention. Since that provision allows to disregard proceedings "that were contrary to […] a designation in a trust instrument", such a designation should also be given preference under Art. 7 of the future instrument (instead of Art. 8 (2) lit. h) (i) Draft Text). In principle, the same rationale would also argue in favour of the non-inclusion of any form requirement or (choice of law) rule on the material validity of the described choice of court agreement. However, albeit it is crucial for the proper application of the consolidation framework that all courts involved operate on the same understanding of the case and the construction of forum selection clauses happens to belong to the areas of law that may differ significantly between Contracting States (see e.g. the default rule for the exclusivity of such an agreement, K&V Sc. Co. v. BMW, 314 F.3d 494 in contrast with Art. 25 (1) cl. 2 Brussels Ibis Regulation). For this reason, it seems even more valuable than under the HCCH 2019 Judgments Convention to receive some guidance on the proper interpretation of these agreements, such as the "deeming provision" in Art. 7 (2) cl. 3 Draft Text.
Furthermore, I would strongly advise against exempting 'exclusive choice of court agreements'. While this provision serves to ensure consistency with the HCCH 2005 Choice of Court Convention, there is simply no objectively compelling reason why parties in parallel proceedings to whom the future but not the older instrument – whether due to a difference in the material scope or in the Contracting States – should not benefit from the Draft Text. The effectiveness of the HCCH 2005 Choice of Court Convention can be better preserved by including a compatibility clause providing for the primacy of the more refined mechanism in Art. 5, 6 HCCH 2005 Choice of Court Convention. In addition, Article 7(3) Draft Text should be given precedence over Article 7(1) Draft Text, as in these situations it can typically be assumed that the parties have implicitly agreed to amend the original choice of court agreement.
Finally, there appears to be no mechanism for resolving situations where an agreement confers jurisdiction only on the two or more courts seised to the exclusion of the court of any other State ("derogating non-exclusive choice of court agreement"). Under the Draft Text, two solutions are available: Either the courts must resort to domestic rules, since Article 7 of the draft precludes the application of other provisions of the Draft Text, or Art. 7 (1) Draft Text does not apply at all, since on the grounds that "not only one of the courts seised is designated under such agreement", which produces the result that the courts involved must demonstrate another basis for the proceedings in accordance with Art. 8(2) Draft Text. Neither of these approaches is convincing. For one thing, parallel proceedings may potentially require difficult considerations and complex assessments which have to be coordinated between two or more courts, which would thus benefit from the communication channels in Art. 15-17 Draft Text as well as prospectively even from the infrastructure and expertise of the HCCH. For another thing, the autonomous choice of the parties is generally sufficient for the assumption of jurisdiction, without the need for it to be justified by a further objective basis of jurisdiction, to be substantiated by, effectively, another ground of jurisdiction. Therefore, in these cases Article 7 Draft Text should preferably be amended with a reference to Articles 9-10 Draft Text. At least the list in Article 8(2) Draft Text should provide a further basis for this specific situation.

Third, Art. 8 (1) Draft Text marks the transition from the civil law approach of precise grounds of jurisdiction that are suitable for ex-ante determination to a discretionary ex-post analysis, as a result of the common law doctrine of forum non conveniens, which inspired Art. 9, 10 Draft Text. In other words, the 'bases' of Art. 8 (2) Draft Text already pre-structure the subsequent

determination of the more appropriate court. In this context, the substantive assessment implied in Art. 8 (2) Draft Text would better not to be obstructed by simultaneously allowing for resorting to a criterion of pendency ‘within a reasonable timeframe’ from each other, which essentially amounts to a softened and ambiguous "first in time rule" as it is proposed in Art. 8 (1) lit. b). Evident temporal disparities of this kind can be taken into account appropriately within the enumerated factor of Art. 10 litd. d) Draft Text.

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

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

The ‘bases for proceedings’ enumerated in Art. 8 (2) Draf Text are essentially modelled on Art. 5 HCCH 2019 Judgments Convention. This appears to be perfectly reasonable, as the management of ‘parallel proceedings’, on the one hand, is generally understood in Private International Law to pre-filter foreign judgments that are not suitable for recognition and enforcement and, on the other hand, these bases have already proven to be internationally compatible due to the success of agreeing on the HCCH 2019 Judgments Convention. Furthermore, from the perspective of a "trust management" between states that cooperate judicially, giving effect to a foreign decision represents a far greater impediment to national sovereignty, so that the HCCH Conventions would become inconsistent if the same bases did not also justify the relatively minor interference associated with the "recognition" of ‘parallel proceedings’.

However, these provisions cannot simply be transplanted into the Draft Text, but must rather be adapted to the new regulatory context, at least in three respects:

First, under the HCCH 2019 Judgments Convention, the requested court is confronted with a formalised decision that can be reviewed comprehensively – and unilaterally – within the necessary timeframe. In contrast, the Draft Text obliges multiple courts to make the ideally identical assessment at a time when the proceedings may still be changing dynamically and their subject matter is still difficult to assess. Accordingly, the ‘bases for procedings’ must be founded on criteria that can be easily determined at different stages of the proceedings and leave as little room as possible for divergent assessments across legal cultures

Second, within the framework of the HCCH 2019 Judgments Convention, the ‘bases for recognition and enforcement’ serve to limit the international obligation and thus the impact on the sovereignty of the Contracting States to certain clearly defined types of judgments, while further recognition remains possible at any time under domestic law according to Art. 15 HCCH 2019 Judgments Convention. However, since the Draft Text's provision on the consolidation of parallel proceedings inevitably applies exclusively without recourse to domestic law, the much greater impairment of sovereignty, i.e. the decline of jurisdiction to adjudicate, results, inversely, from narrow ‘bases for proceedings’. In particular, Contracting States that have regulated their rules on direct jurisdiction differently from the list in Art. 8 (2) Draft Text could be deterred from ratification. Thus, generally speaking, the ‘bases for proceedings’ can be drafted in a broader manner than the ‘bases for recognition and enforcement’ under the HCCH 209 Judgments Convention, and should also cover the prevailing approaches of the HCCH Member States, as long as they are not evidently less appropriate as basis for proceedings than those contained in Art. 8 (2) Draft Text (on the implicit notion of a ‘white list’, see below at 6.3).

Third, in legal practice, the greatest difficulty in applying the future legal instrument will arise from the fact that the draft text simultaneously assumes the perspective of two or more

courts involved. Hence, the Convention's text or Explanatory Report should reflect this and lay down explicit rules on the burden of proof and the applicable law for this assessment.

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?
Subject to the above (see at 6.1), most of the 'bases for proceedings' provided for in Art. 8 (2) Draft Text are modelled on grounds of direct jurisdiction that are already well established in the HCCH Member States.

Nevertheless, all 'bases' must be described so clearly that their (non-)applicability is immediately apparent to all courts involved: First and foremost, the basis for contractual obligations transplants the compromise reached for the HCCH 2019 Judgments Convention between legal systems that perceive the place of performance as the reasonable basis for contractual jurisdiction and those jurisdictions that put a special emphasis on the business activities carried out in the forum state (see e.g. Prel. Doc. No. 6 of September 2017) to the framework of the Draft Text. However, appplying this provision is very challenging. Not only must the place of performance be determined separately for each contractual obligation - which may already be perceived differently by the courts involved - be determined in accordance with the contractual arrangement or, alternatively, the potentially rather differing legal (choice of law) frameworks of multiple courts, but the solution is also subject to the rather ambiguous safeguard of 'purposeful and substantial connection'. For this reason, consideration could be given to amending the basis for contractual proceedings – as it has been done for non-contractual proceedings in Art. 8 (2) lit. g) Draft Text – so that they alternatively provide for an independent basis where "the activities of the defendant in relation to the transaction did clearly constitute a purposeful and substantial connection to that State".

6.3 Are there any additional factors that you believe should be included?
It seems to me that Arthur von Mehren's original model of 'mixed convention' resurfaces in the concept of Art. 8 Draft Text: The 'bases for proceedings' provided for in Art. 8 (2) Draft Text correspond to the 'white list' of required grounds of jurisdiction in that original approach. Since the link between recognition and enforcement is removed in the Draft Text, the implication of this list is that it supersedes all other grounds of jurisdiction that may still be accepted under national law and effectively corresponds to the 'grey area'. With this in mind, it could be useful to also include a 'black list' of prohibited 'bases for proceedings' that cannot under any circumstances serve as a suitable basis for proceedings and must therefore give way to any court operation on a basis from the 'grey area'. Such additional factors could - perhaps, besides protective bases for consumer contract proceedings - draw inspiration from Art. 18 (2) HCCH 1999 Draft Convention (e.g. nationality, habitual residence of the plaintiff, seizure of property unrelated to the proceedings etc.).

More specifically, the basis for contractual proceedings could be explicitly modified to include the 'place of conclusion of the contract' (see e.g. Art. 276 PRC Civil Procedure Law) and, with regard to actions for breach of contract, the 'place where the breach occurred' (R. 17. 02 lit. f) (iv) Ontario Rules of Civil Procedure). Furthermore, consideration could be given to a separate basis for proceedings regarding obligations arising from unjust enrichment

(see e.g., on a purely technical level and leaving aside for a moment the political dimension, Art. 247 (1) subpara. 5 Russian Procedural Arbitration Code【АРБИТРАЖНЫЙ ПРОЦЕССУАЛЬНЫЙ КОДЕКС】).

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?

Both approaches have in common that all courts other than the court first seised must initially suspend their proceedings in favour of the court first seised. The main difference lies in the questions of which court must take the initiative to address the situation of 'parallel proceedings'.

On the one hand, the first approach focuses more strongly on identifying the most appropriate court, thereby mitigating the position of the court first seised as the forum that will decide the dispute. This would be particularly evident if the mechanism were to be applied to parallel proceedings between courts designated in a derogating non-exclusive choice of court agreement, as the court would then appear to be effectively reviewing the parties' choice. On the other hand, the second approach places particular emphasis on preserving the decision-making autonomy of the court first seised. It is not obliged to conduct a 'more appropriate court' test, nor is it bound by the decisions of the courts seised later. The autonomy of the other courts are only affected insofar as they are only permitted to continue their proceedings under certain conditions.

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

Given that discussions are still in progress, it is currently difficult to assess the implications of the two approaches; nevertheless, some preliminary considerations can be made:

The first approach appears to be more susceptible to subsequent legal actions, which could undermine the proceedings before the court first seized, as the latter is obliged to conduct a 'more appropriate court' review upon request. The extent to which this actually contributes to avoiding 'parallel proceedings' preliminary depends on the specific structure of the list of criteria in Art. 10 Draft Text and on whether several courts apply this list in a way that would typically lead to the same result. Open lists of criteria, which carry a high risk of diversity of outcomes, can be compensated for, at least in part, by the fact that the decision of one court – typically the court first seized – is considered to have greater weight or a stronger binding effect in practice. Furthermore, a flexible list of criteria may have a deterrent effect on legal systems with more formalised rules of jurisdiction and reduce their willingness to ratify.

The second approach appears ambivalent as well in regard to the objective of avoiding 'parallel proceedings'. There is an increased risk in practice that parallel proceedings will continue in practice, precisely because the court where the proceedings were first brought is not obliged under the Draft Text to examine whether it is the 'more appropriate court', and because it is not obliged to take into account a decision of another court seised. This holds

particularly true, if the court where the action was first brought follows a tradition of strict lis pendens considerations, whereas the other courts do not.

7.3 Do you have a preference for either approach? If so, please explain why.
The first approach should be preferred. It is crucial to the success of the instrument that the courts involved are encouraged to pro-actively discuss the situation of parallel proceedings. The passive role of the court first seised under the second approach would be detrimental to this objective. Furthermore, the temporal criterion of lis pendens also allows for a clear structuring of the proceedings under the Draft Text. In this sense, the court first seised would not have the advantage of priority over subsequent proceedings, but would nevertheless have the advantage of being the first to give its opinion on the 'more approriate court', which would then form the benchmark that the other courts would have to contend with. However, the court first seised should expressly have the option of concluding that continuing separate proceedings is in the best interests of the administration of justice, as sometimes one court is no more suitable than the other. Nevertheless, a certain threshold should be set for this conclusion in order to prevent misuse as a simple way out.

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)?
Even though the role of Art. 10 Draft Text varies depending on the approach chosen under Art. 9 Draft Text, the list of factors enumerated therein plays a central role in both models. Under the first approach, they structure both the decision of the court first seised and, under certain circumstances, the decision of the courts seised later on the more appropriate forum, and is thus of central importance for the functioning of the entire mechanism. Under the second approach, the factors set the legal benchmark for the courts seised later for deciding whether proceedings can continue, while they are of no relevance for the court first seised.

At present, Art. 10 Draft Text contains a non-hierarchical, largely exhaustive list of flexible factors that predominantly reflect considerations of fairness between the parties and procedural efficiency (for the inclusion of public interest factors, see below at 8.3). Although their content has not yet been fully discussed, many of these aspects are a more concise restatement of criteria already known from other endeavours (see. e.g. the HCCH 2001 Interim Text, Leuven/London Principles). As the courts are not obliged to take all of the listed aspects into account in the first place, the application of these factors should be supplemented by a reference to the guiding principle 'proper administration of justice'.

8.2 Do you have any views on how Article 10 might work in practice?
I would like to highlight the impact on European and German procedural law in my remarks, as these are the jurisdictions I am most familiar with:

First, many of the factors are familiar from the context of EU Civil Procedure Law. They guide the interpretation of the concept of 'proper administration of justice' within the framework of Art. 33, 34 Brussels Ibis Regulation according to Recital 24 of that Regulation: "Such

circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time." However, it is particularly controversial whether the law applicable to the case may also be taken into account as an independent factor.

Second, domestic German Civil Procedure Law places particular emphasis on the relationship between negative declaratory actions and positive actions for performance, which will presumably be reflected in the interpration of these courts of Art. 10 lit. e) Draft Text. Furthermore, the 'likelihood of recognition' is recognised as a key consideration in German procedural law whent it comes to lis pendens considerations in relation to Third States. It serves to protect the national right to justice and at the same time is intended to reduce the risk of unnecessary delays that would arise if the proceedings had to be conducted again in a second country. As the HCCH 2019 Judgments Convention is already applicable in Germany, this criterion can be expected to be handled in a uniform manner that largely corresponds with the 'white list' in Art. 8 (2) Draft Text.

8.3 Are there additional considerations that, in your view, should be taken into account?
First, there has been no explicit exclusion of public interests in the determination of the more appropriate court. Hence, it appears possible to take them into account in Art. 10 Draft Text. Potentially, that could lead to less weight being given to the choice of forum by the foreign party and instead weigh heavily in favour of dismissing (see e.g. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F.2d 195 (1987). However, if public interest factors were to be excluded from Art. 10 Draft Text, this would most likely broaden the scope of the public policy exception in Art. 21 Draft Text, without the court first seised having the possibility – in accordance with the first approach in Art. 9 Draft Text – to add a further perspective to the balancing of these interests.

Second, further consideration could be given to particularly including the "language of the parties" in the list of factors in Art. 10 Draft Text (see e.g. Principle 4.3 Leuven/London Principles). Admittedly, this factor would carry more weight if the instrument also applied to consumers and employees, who are more likely to be involved in court proceedings per se.

## 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.
In general, the coordination of 'parallel proceedings' must strike the balance between control and trust in the sound administration of justice in the foreign courts, which is a delicate task. From a comparative perspective, there are examples of legal systems that have developed rather different models in this respect: While the lis pendens rules on the basis of harmonised grounds of direct jurisdiction express a high level of trust in the administration of these rules (see e.g. Art. 29 Brussels Ibis Regulation), lis pendens rules without such common grounds are often supplemented with some sort of residual control, thereby still conferring a far-reaching level of trust (see e.g. the

likelihood of recogntion and enforcement of the resulting judgment pursuant to § 328 German Code of Civil Procedure). In contrast and generally speaking, the doctrine of forum non conveniens operates only on a rather moderate degree of trust in the foreign court, and retains a quite high degree of control (see e.g. Spiliada Maritime Co. v. Cansulex), whereas the use of anti-suit injunctions manifests strong distrust in the administration of justice in the foreign court (see e.g. e.g. Sabah Shipyard (Pakistan) Ltd. v. Islamic Republic of Pakistan). In short, it is clear that a potentially global instrument must seek a middle ground between these models (as it is the case with the HCCH 2019 Judgments Convention) …

The framework developed in Art. 6-10 Draft Text, is a remarkable effort to integrate the legal certainty of lis pendens into the flexible mechanism of forum non conveniens to achieve an optimum of justice in individual cases. Such an approach is indeed promising at first glance, as it essentially provides for a balanced approach to trust in the administration of justice and its control by the other courts. However, the Draft Text relies on a multitude of normative requirements, the uniform application of which between two or more courts is complicated: The joint determination of the existence of 'parallel proceedings' themselves; the assessment of 'non-exclusive choice of law agreements' under the law of all courts; the repeated examination of a 'reasonable time frame'; the definition of a 'purposeful and substantial' connection. As the implications of such a detailed set of rules can hardly be predicted, all these requirements bear the risk of burdening the mechanism with uncertainty and render it application more intransparent, quite contrary to its initial objective.

Therefore, I would speak in favour of further consideration of ways to streamline the mechanism. Kindly allow me to offer some thoughts in this regard: It is decisive for the success of the future instrument, that courts and parties are enabled and, at the same time, encouraged and in some sense also "nudged" to act proactively and in good cooperation towards consolidation of proceedings. Given that dependency on the active judge, it seems worth contemplating to exchange the specific frameworks for 'parallel proceedings' and 'related actions' with an overall scheme for 'concurrent proceedings'. While under that scheme, the 'white list' could be reduced to Art. 6-7 Draft Text, which are still operational even withouth the requirement of the 'same subject matter', the inclusion of a 'black list' of prohibited bases as well as the exclusion of anti-suit injunctions would add further significant value to the future instrument. Apart from that, the remaining 'gray area' could be addressed by a flexible and discretionary mechanism inspired by the doctrine of forum non conveniens as it is currently provided for in Art. 11-14 Draft Text. Such an approach would remain consistent with the HCCH 2019 Judgments Convention if the catalogue of 'bases for proceedings' in Article 8(2) of the draft text were attributed the presumptive effect of being an 'appropriate jurisdiction' for the dispute, which could however be rebutted if the parties or the foreign court proved that their jurisdiction was also or even 'clearly more appropriate'. Admittedly, this way, the future instrument could not guarantee consolidation in a single forum, but would still achieve some harmonisation of "quasi-jurisdictional" grounds and further allow for the development of a legal culture of communication through the channels of Art. 15-17 Draft Text that may over time result in more and more disputes to be actually resolved in mutual collaboration without the need for an international obligation. If the definition of 'parallel proceedings' in Article 3(1)(a) of the draft were interpreted strictly according to the black letters, one could argue that the current framework already heads in this direction.

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.

The 'related actions' regime is significantly less stringent than the system for 'parallel proceedings' and relies on judicial coordination within the framework of the 'more appropriate court' analysis. Consequently, Art. 11 (2) Draft Text also require the involved courts to consider choice of court agreements (lit. c) and choice of law agreements (lit. d). Binding coordination consequences only arise if the provisions of several courts coincide; if this is not the case, there is, surprisingly, even an international obligation ("shall") to continue the case pending before the respective court, so that the proceedings generally continue separately. All in all, this approach will convey a straightforwardness and flexibility that could be really beneficial if the courts can be persuaded to make ample use of it. At the same time, however, it appears that many issues of technical design have not yet been discussed conclusively.

See also the remarks above at 9.

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?

For the reasons set out above (see, at 9), the communication mechanism of the Art. 15-17 Draft Text is essential for the common application of the coordination efforts prescribed in Art. 6-10 Draft Text. In particular, the option of holding joint hearings, as provided for in Art. 17 Draft Text, appears promising, at least in theory. In practice, however, the courts might make only cautious and restrained use of these rather novel options in civil and commercial matters (compare e.g. Art. 30 HCCH 1996 Child Protection Convention), at least at the beginning. In order to overcome this reluctance in the long term, it is therefore crucial that the communication mechanism is part of a binding legal instrument, i.e. Convention or Protocol, and not merely part of a set of soft law principles. Furthermore, effective implementation of these mechanisms requires coordination by the Permanent Bureau, including regular seminars, trainings and workshops for judges, as well as practical handbooks and maintenance of a coordination platform. Otherwise, the ambitious provisions could well become dead letter law.

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

The non-mandatory nature of the rules in general and their dependency on an additional notification by the Contracting State (Art. 16 (3) Draft Text) in particular mean that the practical effectiveness of the mechanism is largely in the hands of the Contracting States and their courts. For that reason, Art. 18 Draft Text correctly anticipates scepticism about a mandatory obligation to cooperate and communicate, not least in regard to judicial independence. However, the provisions of the Draft Text so far appear to only concern the factual basis of the determination, but in no way to interfere with the discretion of the courts at all. Moreover, intensive cooperation and communication does, of course, also place an additional burden on the courts. Yet, functionally comparable soft law provisions have existed for some time now (see e.g. Principle 5.2 Leuven/London Principles) without any significant progress being achieved in this regard. Thus, the real advantage of the communication mechanism – as well as of the future instrument as a whole – could therefore well lie in its nature as a formally binding agreement which, once ratified by the

Contracting States, would have the force of law and could thus more effectively enable the domestic courts to refer to new methods of communication with confidence on a clear legal basis.

### 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?

All of the proposed safeguards are necessary, reasonable or, as a political compromise, probably unavoidable. In an instrument on concurrent proceedings, the provision of a forum necessitatis in Art. 19 Draft Text is imperative. The same holds true for the safeguard in Art. 20 Draft Text, which may supplement Art. 5 (3) Draft Text for unforseen situations. With regard to the public policy exception in Art. 21 Draf Text, two potential fields of application have already been identified (see above, at 4.4 and 8.3). On the positive side, it will largely serve as a gap filler for non-contemplated cases in the Convention. Finally, the exclusion of specific subject matters by means of a unilateral declaration under Art. 22 (1) Draft Text is presumably considered unavoidable, in order to create an incentive for ratification. At the same time, however, this should be coupled with a reciprocity clause in Article 22(2) Draft Text so that it does not result in a disincentive for all other Contracting States.

### 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.

On the one hand, the harmonisation of the management of 'concurrent proceedings' would render the complex analysis of many decentralised and probably incompatible domestic and regional systems for the coordination of such proceedings obsolete, thus contributing to legal certainty and reducing transaction costs. On the other hand, however, the framework for the coordination of 'parallel proceedings', in particular, is rather demanding so that the application of these provisons may in themselves creaty intransparency and generate additional transaction costs. Ultimately, this problem could be overcome once the future instrument is well established and the Contracting States have become familiar with its approach, but this cannot be taken for granted.

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

As there is currently no binding instrument that sets out to cover the problem of 'concurrent proceedings' at the global level, the proposed rules would definitely improve the status quo. For example, there is hardly any case law on the operation of the similar provisions in Art. 33, 34 Brussels Ibis Regulation. Assuming a widespread adoption of the Draft Text, more courts would be required to deal with such proceedings and thus the issue would likely become more salient to the legal practice as a whole.

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?

Kindly refer to the remarks above, in particular at 1.4, 2.2 and 7.2.

In general, the framework for the coordination of ‘parallel proceedings’ is rather demanding, leaving plenty of room for tactical arguments and motions when applying it.

### Question 14 - comments

What other comments, if any, do you have?

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