

Title	Report of the Working Group on Jurisdiction
Document	Prel. Doc. No 7 of February 2022
Author	PB
Agenda Item	Item II.3
Mandate(s)	C&D Nos 8 and 9 of CGAP 2021
Objective	To report on the progress of the Working Group on the Jurisdiction Project and to present the recommendations of the WG at its second meeting
Action to be Taken	For Action <input type="checkbox"/> For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input checked="" type="checkbox"/>
Annexes	Annex I: Report of the Chair of the Working Group on matters related to jurisdiction in transnational civil or commercial litigation
Related Documents	<ul style="list-style-type: none"> - Prel. Doc. No 5 of February 2020, “Third Meeting of the Experts’ Group on Jurisdiction” for the attention of CGAP 2020 - Prel. Doc. No 3 of February 2021, “Report on the Jurisdiction Project” for the attention of CGAP 2021

Report of the Working Group on Jurisdiction

I. Introduction

- 1 At its meeting of 1 to 5 March 2021, the Council on General Affairs and Policy (CGAP) of the HCCH mandated the establishment of a Working Group on matters related to jurisdiction in transnational civil or commercial litigation (WG), and invited Professor Keisuke Takeshita (Japan) to be its chair.¹
- 2 CGAP mandated
 - a. The Working Group to develop draft provisions on matters related to jurisdiction in civil or commercial matters, including rules for concurrent proceedings, to further inform policy considerations and decisions in relation to the scope and type of any new instrument.
 - b. The Working Group to proceed in an inclusive and holistic manner, with an initial focus on developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims), and acknowledging the primary role of both jurisdictional rules and the doctrine of *forum non conveniens*, notwithstanding other possible factors, in developing such rules.
 - c. The Working Group to explore how flexible mechanisms for judicial coordination and cooperation can support the operation of any future instrument on concurrent proceedings and jurisdiction in transnational civil or commercial litigation.
 - d. The PB to make arrangements for two Working Group meetings before the 2022 meeting of CGAP, with intersessional work, to maintain momentum. If possible, one meeting will be held after the northern hemisphere summer of 2021, and another in early 2022, with a preference, where possible, for hosting in-person meetings.”²
- 3 In line with the above, the WG met on two separate occasions: the first meeting was held from 11 to 15 October 2021 and the second from 14 to 18 February 2022, both via videoconference, under the chairmanship of Professor Takeshita. The first meeting was attended by 62 participants, of which six were designated as alternates as the Group convened through videoconferencing. The participants represented 27 Member States from various regions, one Regional Economic Integration Organisation, and two Observers. Similarly, at the second meeting, there were 63 participants, seven of whom were designated as alternates. The participants represented 26 Member States from various regions, one Regional Economic Integration Organisation, and two Observers.
- 4 The Report of the Chair of the WG, which intends to record the points on which consensus has been reached, matters for future discussion, as well as possible next steps suggested by the WG, is attached to the document.

II. Proposal for CGAP

- 5 Based on the foregoing, the PB proposes the following Conclusion and Decision:

CGAP took note of the Report of the Chair and welcomed the progress made by the WG. To maintain momentum, CGAP invited the PB to convene two further meetings before CGAP 2023, in October 2022 and in February 2023, with intersessional work as required. These meetings should preferably be held in-person. Resources permitting, an additional meeting could be envisaged.

¹ C&D No 8 of CGAP 2021.

² *Id.*, No 9.

ANNEX

WORKING GROUP ON JURISDICTION
FEBRUARY 2022
REPORT



Annex I

Report of the Chair of the Working Group on matters related to jurisdiction in transnational civil or commercial litigation

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¹ C&D No 8 of CGAP 2021.

² *Id.*, No 9.

- 4 This Report intends to record the points on which consensus has been reached, matters for future discussion, as well as possible next steps suggested by the WG.
- 5 This Report includes two Annexes: Annex I, which contains a draft of the provisions on parallel proceedings for future discussion, and Annex II, which contains a flowchart, developed by the WG, reflecting the basic core structure of the possible future Convention, while clarifying the points in need of further discussion. All content in both Annexes is still open for discussion, including whether each of the issues will be addressed in the possible future Convention and at what stage of a proceeding an issue should be addressed by a court or courts seised. In particular, Articles 9 and 10 (including the comment) of Annex I were not discussed at this second meeting due to time constraints. As a result, these Articles are unchanged from when they were submitted to the WG by the Chair, as a starting point of the discussion. They do not reflect any outcome of the discussions in the second meeting and still need further reflection.

II. Parallel Proceedings

A. Scope

- 6 The WG considered whether the rules of parallel proceedings in the possible future Convention should apply to Contracting States only. The Group decided to focus on parallel proceedings among courts of Contracting States, recognising the need for possible further discussion on the issues related to the proceedings in courts of non-Contracting States.
- 7 The WG reiterated the working assumption that the possible future Convention would not overlap with the *Convention of 30 June 2005 on Choice of Court Agreements* (2005 Choice of Court Convention). It was agreed that choice of court agreements which are not covered by the 2005 Choice of Court Convention will be dealt with by the possible future Convention. How to deal with proceedings based on choice of court agreements will be discussed in future WG meetings.
- 8 The WG expressed its appreciation to the PB for the ongoing research that it is conducting on the relevant international instruments, with a view to evaluating the need of excluding certain subject matters from the possible future Convention.

B. Definition of Parallel Proceedings

- 9 The Chair stressed that the definition of parallel proceedings could be determined and / or revisited once the substantive rules regulating parallel proceedings had been settled. As to the phrase “same subject matter”, there was general support for its retention in the definition, with a view to being consistent with the term used in the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (2019 Judgments Convention), a complementary instrument to the possible future Convention. It was pointed out that the phrase “same subject matter” should be interpreted in a uniform manner for the operation of the possible future Convention.
- 10 It was argued that the phrase “same set of operative facts” should be retained as an option for describing the definition of the parallel proceedings. However, it was also pointed out that this might cause problems because there might be different claims based on the same set of operative facts. The Chair noted that the definition of “parallel proceedings” would continue to be considered over the course of the negotiations.

C. Exclusions

- 11 It was discussed whether to exclude from the scope “cases in which the law of one or more of the Contracting States involved provides for exclusive jurisdiction in their own courts”. As a tentative decision, the WG determined that the exclusion should not be provided in the possible future

Convention. This decision was supported by the argument that it would not be desirable to narrow the application of the possible future Convention by unilateral acts of a Contracting State, without reciprocal effects for other Contracting States.

- 12 The WG agreed that cases or subject matters over which courts have exclusive jurisdiction pursuant to their national laws should be reconsidered. To deal with this issue, introducing a separate declaration mechanism on specific subject matters was suggested. The Chair marked this issue for future consideration.

D. Principles

- 13 The WG generally supported the fact that reference to “jurisdiction” or “connections” (hereinafter referred to as “connections”) of courts in parallel proceedings would serve as the principle for the possible future Convention. The Group exchanged views on several categories of “connections” that could be adopted under the possible future Convention, noting that the categories and their settings, which have yet to be developed in detail, may change depending on the overall rules regulating parallel proceedings which are to be designed in the future. During the discussion, it was highlighted that careful consideration would need to be given to ensure that the “connections” applied by the possible future Convention to regulate parallel proceedings are adequate and not duly limiting.

1. “Exclusive” Connections

- 14 The WG discussed the inclusion of a category of “exclusive” connections in the possible future Convention. “Exclusive” connections mean that if one of the courts has or meets an “exclusive” connection under the possible future Convention, the court having this connection shall proceed with the case, and other courts shall suspend or dismiss the case. There was support for the argument that in rights *in rem* in immovable property cases, the place where the immovable property is located would qualify as one such “exclusive” connection. This is in line with the exclusive jurisdictional filter of Article 6 of the 2019 Judgments Convention.
- 15 The WG discussed the possibility of expanding this category to include cases such as those concerning the residential lease of immovable property (tenancy) or the registration of immovable property (Art. 5(3) of the 2019 Judgments Convention). It was also decided that choice of court agreements having derogatory effects should further be considered.
- 16 The Group recognised that caution was warranted with regard to the expansion of this category. It was recalled that some of the “exclusive” connections may alternatively be dealt with by way of exclusions from the scope of the possible future Convention.
- 17 It was decided that the contents of the “exclusive” connections, as well as the place where such connections would best be reflected in the text of the possible future Convention, would be further discussed in the future WG meetings.

2. “Priority” Connections

- 18 The WG discussed whether the possible future Convention should contain rules that give priority to a court if it has certain connections. Such category of “priority” connections may include connections based on party autonomy, e.g., the party’s express consent to the jurisdiction of the court (Art. 5(1)(e) of the 2019 Judgments Convention). The contents of the “priority” connections would be further considered in future meetings.

E. Time Limit

- 19 The WG agreed that the time limit issue should be further discussed in future meetings, including the definition of when a court is seised.
- 20 There were different views among the WG participants as to whether the possible future Convention should contain rules that give priority to the court first seised when the proceedings in the courts other than the court first seised did not start within a reasonable timeframe. The Group marked this issue for further discussion in future meetings. In particular, the Chair noted that due consideration should be given to the following types of cases:
- (a) Cases where the proceedings of a court, other than the court first seised, have started after the judgment was rendered by the court first seised (but the proceedings are pending in a higher court of the Contracting State). As there are some jurisdictions where a judgment of the first instance court does not have *res judicata* effect if the proceedings are pending in a higher court, it was argued that such cases should be covered by the possible future Convention, either by way of introducing this matter as one of the “priority” connections, or by introducing separate provisions, limiting the operation of the “priority” connections. However, since other jurisdictions do not consider such cases as “parallel proceedings”, it was also suggested that they should fall outside the scope of the possible future Convention.
 - (b) Cases where the proceedings of a court, other than the court first seised, have started after a certain period of time has passed since the proceedings commenced in the court first seised. There were suggestions to deal with such cases through “more appropriate” forum analysis, or under the category of “priority” connections or by separate provisions.

F. Basic Structure

- 21 The WG discussed the basic structure of the possible future Convention on parallel proceedings, reflecting the principles and issues discussed in the second meeting. As a result, the WG produced the flowchart of the basic structure of the possible future Convention which appears in Annex II. The WG will discuss and draft provisions for parallel proceedings using the chart as a basis.
- 22 The WG recognised that it may be necessary to consider the inclusion of voluntary, non-binding cooperation and / or a communication mechanism. In future meetings, the WG will explore the details of such a mechanism and its operation, including whether the communication should be conducted between courts, or through Central Authorities, and whether such cooperation should be initiated *ex officio* or raised by the parties. It was reminded that such a cooperation mechanism should be practical (e.g., addressing language barriers), and should not infringe parties’ rights nor constitutional restrictions.
- 23 For cases where more than one court has a connection under the possible future Convention, it was argued that there might be cases where it serves the interest of justice and efficiency to continue parallel proceedings and such parallel proceedings might be allowed to continue subject to specific criteria. The WG will consider the possibility of such cases in future meetings.
- 24 For cases where no courts have a connection under the possible future Convention, the possibility of providing a negative priority rule was raised. A negative priority rule means that a court of a Contracting State which only meets a connection of negative priority listed in the possible future Convention should give way to courts of other Contracting States where the parallel proceedings are pending. The WG will consider this issue further in future meetings.
- 25 For cases where only one court has a connection under the possible future Convention, it was pointed out that the possible future Convention should provide safeguards for cases where parallel proceedings of a court of a Contracting State, which has a connection under the Convention, have not started within a reasonable timeframe since the proceedings had started in a court of another

Contracting State, which does not have a connection under the Convention, and exercised its jurisdiction under its national law. There was general support in the WG for addressing this issue in the possible future Convention. Further discussion should include details of the safeguard, such as form and timeframe.

G. Supplementary Note

- 26 For various issues, there were arguments based on the necessity of respecting access to justice and / or avoiding denial of justice. The Chair noted that the possible future Convention should enhance access to justice and should not contain rules that might cause denial of justice.

III. Future Possible WG Meetings

- 27 The WG recommends to CGAP that:
- to maintain momentum, the PB be invited to convene, at least, two further meetings before CGAP 2023, in October 2022 and in February 2023, with intersessional work as required. These meetings should preferably be held in-person. Resources permitting, an additional meeting could be envisaged.

ANNEXES TO ANNEX I

Annex I

A draft of the provisions on parallel proceedings for future discussion

CHAPTER I SCOPE AND DEFINITIONS

Article 1 Scope

1. The provisions in this text shall apply to parallel proceedings in the courts of different Contracting States in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.
2. [The provisions in this text shall apply to parallel proceedings if [any of] the defendant[s] of [any of] the proceedings in a court of a Contracting State is habitually resident in another Contracting State.]
3. For the purpose of the provisions in this text, “parallel proceedings” means any proceedings in courts of different Contracting States between the same parties [on the same subject matter].¹

Article 2 Exclusion from the Scope

1. The provisions in this text shall not apply to the following matters –
 - (a) the status and legal capacity of natural persons;
 - (b) maintenance obligations;
 - (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
 - (d) wills and succession;
 - (e) insolvency, composition, resolution of financial institutions, and analogous matters[,except where the proceedings are based on general rules of civil or commercial law, even if the action is brought by or against a person acting as insolvency administrator in one party’s insolvency proceedings];
 - (f) the carriage of passengers and goods;
 - (g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average;
 - (h) liability for nuclear damage;
 - (i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;
 - (j) the validity of entries in public registers;
 - (k) defamation;
 - (l) privacy;
 - (m) intellectual property;
 - (n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;
 - (o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;
 - (p) anti-trust (competition) matters, except where the proceedings are based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State where the proceedings are pending;

¹ The term “on the same set of operative facts” was not included in the text because it was pointed out that the inclusion of the term alone might cause problems. However, the WG will revisit the issue of definition of the parallel proceedings.

- (q) sovereign debt restructuring through unilateral State measures;
- [(r) to be determined.]²

[Comment A]

Exclusive choice of court agreements and the interim measure for protection should further be considered.

2. Proceedings are not excluded from the scope of the provisions where a matter to which the provisions do not apply arose merely as a preliminary question in the proceedings, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude proceedings from the provisions, if that matter was not an object of the proceedings.
3. The provisions shall not apply to arbitration and related proceedings.
4. [This instrument shall not apply to proceedings related to contracts concluded by natural persons acting primarily for personal, family or household purposes (consumers).]
5. [This instrument shall not apply to proceedings related to individual contracts of employment.]
6. Proceedings are not excluded from the scope of the provisions by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party to the proceedings.
7. Nothing in the provisions shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

CHAPTER II *Parallel Proceedings*

Article 3 to Article 8 *Rules for parallel proceedings*

[To be considered. Drafting will be conducted based on the structure described in Annex II. All issues in the flowchart of Annex II are still open for discussion, including whether each of the issues will be addressed in the possible future Convention and at what stage of a proceeding the issue should be addressed by a court or courts seised.]

Article 9 *[Rules of [priority] Jurisdiction] [Bases for [priority] connection]*

1. A court of a Contracting State has [[priority] [jurisdiction] [connection]] if one of the following requirements is met –
 - (a) the defendant is habitually resident in the State at the time the proceedings are instituted;
 - (b) the defendant is a natural person who has their principal place of business in the State as regards a dispute [claim] arising out of the activities of that business;
 - (c) the defendant maintained a branch, agency, or other establishment without separate legal personality in the State at the time the proceedings are instituted, and the claim arose out of the activities of that branch, agency, or establishment;
 - (d) an action on a contractual obligation is brought to a court of the State in which performance of that obligation took place, or should have taken place, in accordance with
 - (i) the agreement of the parties, or
 - (ii) the law applicable to the contract, in the absence of an agreed place of performance, unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;

² There was a limb which excludes “cases in which the law of one or more of the Contracting States involved provides for exclusive jurisdiction in their own courts” before the discussion of the 2nd meeting. It was deleted because the problems arising from those cases would be dealt with by the declaration mechanism (Article 13). However, the WG will revisit the issues concerning exclusive jurisdiction including the possible exclusion from the scope.

- (e) an action on a lease of immovable property (tenancy) is brought to a court of the State in which the property is situated;
- (f) an action is brought against a defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State, if the contractual claim is brought together with a claim against the same defendant relating to that right *in rem*;
- (g) an action on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property to a court of a State in which the act or omission directly causing such harm occurred, irrespective of where that harm occurred;
- (h) an action is brought to a court of a State concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –
 - (i) at the time the proceedings are instituted, the State was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or
 - (ii) at the time the proceedings are instituted, the State is expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

This sub-paragraph only applies to proceedings regarding internal aspects of a trust between persons who are or were within the trust relationship;

- (i) a counterclaim arising out of the same transaction or occurrence as the original claim is brought in the court in which the original claim is pending, if the State of the court of the State has jurisdiction for the original claim under this Article;
 - [(j) *to be determined.*]
2. For the purpose of paragraph 1, an entity or person other than a natural person shall be considered to be habitually resident in the State –
 - (a) where it has its statutory seat;
 - (b) under the law of which it was incorporated or formed;
 - (c) where it has its central administration; or
 - (d) where it has its principal place of business.
 3. A court of a Contracting State has [[priority] [jurisdiction] [connection]] if the court is designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.

For the purposes of this paragraph, an “exclusive choice of court agreement” means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts.
 4. A court of a Contracting State has [[priority] [jurisdiction] [connection]] if –
 - (a) the defendant expressly consented to the jurisdiction of the court in the course of the proceedings, or
 - (b) the defendant argued on the merits without contesting jurisdiction within the timeframe provided in the law of the State of the court, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law.
 5. Notwithstanding the preceding paragraphs, for an action on rights *in rem* in immovable property, the courts of a Contracting States in which the property is situated have exclusive [jurisdiction] [connection].

Article 10

Determination of the [clearly] [more appropriate] [better] forum

For the application of [Paragraph 1 of Article 2a,] Paragraph 2 of Article 4[, and Paragraph 4 of Article 5 (*Option A*)], the courts shall take into account the following factors in determining the clearly more appropriate forum:

- (a) the relative strength of the connection between each of the courts seised of the case and the parties and the claims;
- (b) the existence of a non-exclusive choice of court agreement;
- (c) the burdens of litigation on the parties, particularly in view of their habitual residence;

- (d) the nature and location of the evidence, including documents and witnesses, the ease of access to and the procedures for obtaining such evidence, including the availability of measures to enforce the attendance of unwilling witnesses and the costs of presenting evidence;
- (e) the law applicable to the claims;
- (f) applicable limitation or prescription periods;
- (g) the stage of the proceedings before each court;
- (h) the possibility of obtaining recognition and enforcement of any decision on the merits;
- [(i) the fairness of imposing the public costs and burdens of litigation on the public of a particular State];
- [(j) *to be determined*]

[Comment B]

Elements of “the interests of the parties in access to justice”, “which court was first seised”, “the ability of each court to achieve comprehensive resolution of the dispute”, and “any additional factors applicable to a specific case” are to be considered.

**[Article 11
Avoiding Denial of Justice]**

[To be considered]

**[Article 12
Public Policy]**

Notwithstanding provisions from Article 3 to Article 8, the court shall not be obligated to suspend or dismiss the case if the proceedings may involve sovereignty or security interests of the forum State or the suspension or dismissal would be contrary to the public policy or fundamental principles of the forum State.]

**[Article 13
Declarations with respect to specific matters]**

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
2. *[Reciprocity to be considered]*

**Article 14
Uniform interpretation**

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Annex II

Basic structure of the possible future Convention

(Flowchart clarifying the points for future discussion by the WG)

*This flowchart is intended to help clarify the points still in need of further discussion in the WG. All issues in the flowchart are still open for discussion, including whether each of the issues will be addressed in the possible future Convention and at what stage of a proceeding the issue should be addressed by a court or courts seized.

