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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 interaction between the Convention's scope and the arbitration exclusion in Article 2(3) merits further consideration, particularly regarding complex commercial relationships involving multiple agreements. Scenario for consideration: Parties may have a Framework Agreement subject to court jurisdiction and a subsequent specific agreement subject to arbitration. A conflict may arise where a court is asked to enforce the Framework Agreement (e.g., ordering the renewal of relations) while an arbitrator has already ruled that the specific agreement was lawfully terminated. Implications: If the exclusion is absolute, the Convention may fail to provide a mechanism to resolve such "irreconcilable judgments." Conversely, including arbitration-related matters risks conflict with the New York Convention. The drafters might consider whether specific coordination mechanisms for "mixed" disputes could be introduced without affecting the validity of arbitration agreements.

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?

Consideration should be given to the scope regarding "mixed" disputes where corporate law intersects with contractual disputes. Scenario: A dispute arises involving corporate officers who are not signatories to the contract containing the jurisdiction clause, but are alleged to be the "alter ego" of the company or personally liable. Implications: In some jurisdictions, courts extend jurisdiction clauses to such non-signatories to prevent fragmentation. If the Convention's scope is too narrow regarding "parties," it may allow for parallel proceedings against officers in a different forum. If too broad, it may infringe on the principle of privity of contract. This balance requires careful drafting.

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)?

2 The arbitration exclusion in Article 2(3) is understandable but results in a significant gap regarding the effectiveness of the Convention in complex commercial disputes. The "Missed Opportunity" in Mixed Disputes: Situation: As discussed, complex transactions often mix Court Jurisdiction (Framework Agreements) and Arbitration (Specific Agreements). Implication: By excluding arbitration entirely, the Convention renders itself inapplicable ("no impact") to the coordination of these mixed disputes. While this avoids conflict with the New York Convention, it means the Convention fails to solve the problem of "irreconcilable judgments" in one of the most common commercial scenarios. Result: Parties in these mixed scenarios will remain in the status quo, facing the costs and uncertainty of uncoordinated proceedings, whereas a more nuanced approach could have allowed the Convention's "Related Actions" mechanisms to facilitate coordination between courts and arbitral tribunals (e.g., discretionary stays).lick or tap here to enter text.

1.4 What are your views on the geographical scope of the Draft Text and how it would work in practice? (See paragraph 16 for further information).

The geographical scope requires careful consideration, particularly regarding the bracketed text in Article 1(2) which limits application based on the defendant's habitual residence.

Scenario for consideration: Contract-Based Jurisdiction vs. Residence. Situation: A dispute arises from a contract performed in Contracting State A. The defendant is habitually resident in a Non-Contracting State (Third State). Parallel proceedings are initiated in Contracting State A (based on place of performance) and Contracting State B (based on assets). Implication of Article 1(2): If the bracketed text in Article 1(2) is adopted, the Convention would not apply to this dispute because the defendant is not resident in a Contracting State. Result: This creates a significant gap. In modern commerce, jurisdiction is often founded on contractual submission or place of performance, not residence. Limiting the scope via residence would exclude a vast number of commercial disputes involving multinational entities headquartered in Third States, rendering the coordination mechanisms unavailable even when two Contracting States are seized. Recommendation: The geographical scope should focus on the courts seized (i.e., whether two Contracting States are seized) rather than the residence of the parties. This ensures that the Convention's coordination tools are available whenever two member courts face parallel proceedings, regardless of where the defendant is domiciled.Click or tap here to enter text.

Question 2 on definitions

What are your views on the definitions of parallel proceedings and related actions? In particular, please share your views on how these definitions might operate, and be applied by parties and courts, in practice.

The definition of "Related Actions" in Article 3(1)(b) requires reflection regarding multi-contract scenarios. Scenario: Agreement A (under Court A's jurisdiction) mandates the existence of Agreement B, but Agreement B (under Court B's jurisdiction) has been declared lawfully terminated. While the causes of action differ, the findings are irreconcilable. Implications: If the definition does not clearly encompass such "collision" scenarios, courts may lack the tools to consolidate or coordinate these actions. The drafters should consider clarifying whether "related actions" includes separate contracts that form part of a single economic transaction but contain different dispute resolution clauses.

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

Article 4 provides a standard definition of lis pendens (time of seizing), but it requires careful consideration in light of the "race to the court" tactics discussed in previous answers. Scenario for consideration: The "Procedural Gap". Situation: Article 4(a) deems a court seized when the document is lodged, while 4(b) deems it seized when received by the service authority if service is required first. Implication: In cross-border disputes, there is often a significant time lag between "lodging" and "service." A party might lodge a claim in Court A (freezing the "seized" time under 4(a)) but intentionally delay service to keep the other party in the dark, while the other party unknowingly files in Court B. Tactical Risk: This creates a "secret lis pendens." If the Convention adopts a strict "First-in-Time" rule (Approach 1 in Article 9), a party could secretly "reserve" a favorable jurisdiction by lodging a claim and sitting on it. Recommendation: The Article should ensure that a court is only deemed "seized" if the claimant takes active and timely steps to effect service. A provision requiring "reasonable diligence in service" would prevent parties from filing "placeholder" claims solely to block future proceedings in other forums.

Question 4 on Article 5 obligations

What are your views on Article 5?

Article 5 sets out the core mechanism for suspension and dismissal. However, the threshold for dismissal in Article 5(2) requires critical reconsideration regarding the finality of judgments. The Risk of Premature Dismissal (Article 5(2)): Scenario: Court A suspends proceedings in favor of Court

B. Court B issues a judgment which is provisionally enforceable in State B but is immediately appealed. Under a strict reading of "capable of... enforcement," Court A might be obliged to dismiss its proceedings immediately. Implication: If the judgment in Court B is subsequently overturned on appeal, the claimant is left without a remedy because the proceedings in Court A have already been dismissed (and potentially cannot be revived due to limitation periods or procedural rules). Recommendation: The Convention should distinguish between suspension and dismissal. Suspension should continue as long as the foreign judgment is subject to ordinary review (appeal). Dismissal should only occur when the foreign judgment has become final and conclusive (res judicata) and is no longer subject to ordinary appeal. Relying merely on "enforceability" creates a risk of denial of justice if the foreign judgment is reversed.Article 5(3): Resumption of Proceedings Scenario: Court A suspends in favor of Court B. Court B takes an unreasonable amount of time to render a decision (e.g., due to judicial backlog or procedural stalling by the defendant). Implication: The provision allowing resumption if the other court "is unlikely to render a judgment... within a reasonable time" is crucial. However, "reasonable time" is subjective. Risk: This could lead to friction between courts, with Court A effectively declaring Court B "too slow." To avoid diplomatic tensions and uncertainty, the Convention might benefit from a non-binding guideline or "soft law" definition of what constitutes unreasonable delay (e.g., inactivity for a certain period).

Question 5 on priority jurisdiction / connection

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

The hierarchical structure (placing Exclusive Jurisdiction (Art. 6) and Party Autonomy (Art. 7) above General Jurisdiction (Art. 8)) is logical and commercially sound. However, the practical interaction between these articles in complex disputes requires consideration. Interaction between Article 6 (Exclusive/Priority) and Article 7 (Party Autonomy): Scenario: Parties enter into a commercial lease for immovable property in State A. The lease contains an exclusive jurisdiction clause in favor of the courts of State B (e.g., for financing reasons). Practical Operation: Article 6 (rights in rem in immovable property) generally overrides Article 7. However, in practice, disputes often mix in rem claims (ownership/possession) with contractual claims (unpaid rent). Implication: If Article 6 is interpreted broadly to cover mixed claims, it effectively nullifies the parties' choice of forum (State B). This creates uncertainty. The Convention should clarify whether Article 6 applies only to "pure" in rem proceedings to preserve party autonomy for the contractual aspects of the dispute. Article 7 (Party Autonomy) in Practice: Scenario: A "Battle of Forms" where Contract A has a jurisdiction clause for State X, and a related Purchase Order (Contract B) has a clause for State Y. Practical Operation: Article 7 mandates that the non-chosen court suspend proceedings. In a "collision" scenario, both courts might consider themselves the "chosen court" under their respective contracts. Implication: Without a mechanism to determine which contract prevails (the "center of gravity"), Article 7 might lead to a stalemate where both courts refuse to suspend, or both suspend, rather than resolving the conflict. Article 8 (General Jurisdiction) as a "Fallback": View: Article 8 functions well as a safety net when no exclusive grounds exist. However, as noted in Q6.2, treating the list in Art. 8(2) as exhaustive for retaining jurisdiction (and requiring dismissal otherwise) is risky in complex cases where the connection is genuine but doesn't fit a specific box (e.g., "necessary party" jurisdiction).

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

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

Article 8(2)(d) regarding the "place of performance" raises complex issues in multi-contract relationships that require consideration. Scenario: An obligation in Agreement A is to enter into Agreement B, which is to be performed in a different state. Implications: Determining the locus of the obligation in such cases is ambiguous. A strict interpretation might fragment

the litigation based on technicalities rather than the center of gravity of the dispute. The drafters should consider whether a "center of gravity" test or a hierarchy of contracts is needed to avoid artificial splitting of jurisdiction.

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?

The factors are generally appropriate as they reflect standard grounds of jurisdiction (habitual residence, place of performance, etc.). However, treating this list as an exclusive threshold for retaining jurisdiction may be problematic in complex commercial scenarios. Scenario for consideration: The "Gap" in Mixed Disputes. Situation: A dispute involves a complex transaction with a "Framework Agreement" (governed by the law of State A) and a "Shareholders' Agreement" (governed by the law of State B). A court in State A is seized based on a ground not explicitly listed in Article 8(2) (e.g., "necessary party" jurisdiction or "property" jurisdiction that doesn't fit the strict definitions of 8(2)(e) or (f)). Implication: If Article 8(1) obliges the court in State A to dismiss the case because it lacks a specific Article 8(2) connection—even though it is the most logical forum to hear the entire dispute—it forces fragmentation. The court would have to dismiss the part of the case it "technically" shouldn't hear, leaving the parties to litigate piecemeal in State B. Scenario for consideration: The "Negative" Jurisdiction. Situation: A court is seized not to enforce a contract, but to declare that no contract exists (negative declaratory relief), based on the fact that negotiations took place in its territory (a ground that might be tenuous under 8(2)(d) if no obligation was "performed"). Implication: If the list is applied strictly to dismiss such proceedings, it effectively prevents parties from seeking clarity in the forum where the negotiations occurred. Conversely, if applied loosely, it validates "torpedo" actions. Conclusion: While the factors are appropriate as primary grounds, making them the sole basis for retaining jurisdiction (and obliging dismissal otherwise) might be too rigid. It risks prioritizing formal jurisdictional boxes over the commercial reality that some disputes have a "center of gravity" that doesn't fit neatly into a single list item.

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

Yes, consideration should be given to adding a factor that addresses "Joinder of Necessary Parties" or "Center of Gravity" in multi-contract disputes. Scenario for consideration: As discussed (e.g., in Q1.1 and Q10), complex commercial transactions often involve a web of contracts (Framework Agreements, Guarantees, Service Agreements) and multiple parties (Parent Companies, Subsidiaries, Directors). Currently, Article 8(2) focuses on the connection between the defendant and the forum (residence) or the claim and the forum (place of performance/tort). It does not explicitly account for the connection between co-defendants or related contracts. Proposed Factor: A provision similar to "Necessary or Proper Party" jurisdiction: "The court has jurisdiction if a claim is brought against a defendant who is a necessary or proper party to proceedings already pending before that court against another defendant who is habitually resident in that State." Why this is needed: Preventing Fragmentation: Without this, a claimant might be forced to sue the Company in State A (based on residence) and the Director in State B (based on residence), even if the claims arise from the exact same fraud. This would provide a clear jurisdictional hook for the "related" parties discussed, preventing the need for courts to stretch the definitions of "contractual obligation" or "tort" to fit these peripheral defendants. Efficiency: It aligns with the objective of reducing litigation costs by allowing a single forum to hear the entire dispute, provided there is a genuine connection to at least one anchor defendant.

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 present distinct trade-offs that should be weighed: Approach 1 (First-in-time): Offers high legal certainty and predictability but risks a "race to the court" in a forum with a weak connection to the dispute. Approach 2 (More appropriate court): Allows for addressing complex commercial realities (such as the multi-contract scenarios described above) but introduces judicial discretion that could lead to satellite litigation regarding which court is "more appropriate." Recommendation: The drafters should consider which value: certainty or substantive appropriateness, is paramount for the Convention's success, particularly in light of complex cross-border transactions

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

The two approaches will likely lead to fundamentally different litigating behaviors and outcomes in practice. Approach 1: The "First-in-Time" Rule (Strict Priority). Practical Operation: This approach creates a mechanical, "stop-watch" style of justice. The court seized second must suspend proceedings. Consequence (The "Italian Torpedo"): In practice, this encourages parties to race to file a lawsuit in a jurisdiction known for being slow or inefficient (the "torpedo") simply to block the other party from suing in the appropriate forum. As seen in complex commercial disputes, a party anticipating a claim might file a preemptive declaratory action in a favorable but unconnected forum. While this approach offers certainty ("who filed first wins"), it often does so at the expense of justice and efficiency, forcing disputes into forums with weak connections. Approach 2: The "More Appropriate Court" Rule (Discretionary). Practical Operation: This approach allows the court seized second to continue if it determines it is the "clearly more appropriate" forum. Consequence (The "Battle of the Forums"): In practice, this mitigates the race to file but replaces it with a "battle of the forums." Parties will spend significant resources arguing over the factors in Article 10 (convenience, evidence, etc.). The "Collision" Scenario: However, for the complex multi-contract scenarios, this approach is practically superior. It allows a court to look at the "big picture" of the transaction and consolidate proceedings in the forum that makes the most commercial sense, rather than being bound by the arbitrary timing of who filed the first writ. Conclusion: In practice, Approach 1 favors the claimant (who controls the timing), while Approach 2 favors the facts (where the dispute actually belongs), but at the cost of higher initial litigation expenses.

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

Preference: Approach 2 (The "More Appropriate Court" / Discretionary Approach). Reasoning: Mitigating Tactical Litigation ("The Torpedo"): Approach 1 (First-in-Time) creates a perverse incentive for parties to race to file proceedings in a slow or favorable jurisdiction solely to block litigation in the natural forum. In complex commercial disputes, a party anticipating a claim should not be able to dictate the forum merely by filing a preemptive declaratory action first. Approach 2 provides the necessary judicial discretion to dismiss such abusive filings and ensure the dispute is heard where it belongs. Handling Multi-Contract "Collisions": As discussed in other answers (e.g., Q1.1, Q10), commercial transactions often involve multiple contracts with different jurisdiction clauses. A rigid First-in-Time rule (Approach 1) is blind to this complexity. It would force a court to suspend proceedings even if it is the only forum

capable of resolving the entirety of the commercial dispute. Approach 2 allows a court to assess the "center of gravity" of the dispute—considering the interaction between the Framework Agreement and specific contracts—and consolidate proceedings in the forum that can provide a complete resolution (as per Article 10(e)). Substance Over Form: While Approach 1 offers theoretical certainty ("the rule is clear"), Approach 2 offers commercial certainty. It ensures that disputes are resolved in the forum with the closest connection to the facts, evidence, and applicable law, rather than the forum that was accessed fastest. For sophisticated commercial parties, the quality and appropriateness of the adjudication are often more valuable than the mere speed of establishing jurisdiction.

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)?

The list of factors generally reflects accepted principles of private international law. However, the application of specific factors in complex commercial disputes requires further consideration to ensure they do not inadvertently favor tactical litigation. Factor (a): "The burdens of litigation on the parties / convenience...". Scenario: A large multinational corporation sues a smaller entity or an individual officer (as in the Lagziel scenario) in a forum that is legally connected but geographically distant and expensive for the defendant. Implication: While "convenience" is a standard factor, it is highly subjective. If courts weigh this factor too heavily, it could be used to override valid jurisdiction agreements or objective connecting factors (like the place of performance) based on a party's financial arguments. The drafters might consider clarifying that "convenience" should not override the commercial expectations of sophisticated parties. Factor (c): "The law applicable to the claims". Scenario: As discussed in Q6.1, a contract may choose the law of State A but be performed in State B. Implication: This factor is crucial but double-edged. It promotes efficiency (courts applying their own law). However, in scenarios where parties split jurisdiction and governing law across different contracts. If a court uses "applicable law" as a primary reason to seize jurisdiction, it might undermine the parties' intentional choice to split the forum from the law. Factor (e): "The likelihood that one court may provide a complete... resolution of the dispute". Scenario: A multi-contract dispute where Court A can only hear claims under the Framework Agreement, while Court B can hear claims under the Specific Agreement (due to a different jurisdiction clause). Implication: This is the most powerful factor for resolving the "collision" of contracts. It encourages consolidation. However, it carries the risk that a court might use it to expand its jurisdiction over "related" matters (like the liability of non-signatory officers) simply to achieve "completeness," potentially disregarding the separate legal personality of the defendants.Click or tap here to enter text.

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

3 In practice, the application of Article 10 is likely to generate significant "satellite litigation," where the battle over where to litigate becomes as costly and complex as the dispute itself. Scenario 1: The "Battle of Affidavits" regarding Evidence (Factor b). Situation: Factor (b) requires courts to assess the "ease of accessing evidence." In a complex commercial fraud case involving a corporate officer, one side will argue the key evidence is the digital server located in State A, while the other will argue the key witnesses are in State B. Practical Operation: Courts will be forced to conduct a "mini-trial" on the merits just to determine where the evidence lies. This often leads to conflicting affidavits and expert opinions on foreign procedural law (e.g., "Can State B compel these witnesses?"), causing significant

delays before the main case even begins. Scenario 2: The "Applicable Law" Dilemma (Factor c). Situation: Factor (c) considers the "law applicable to the claims." In a scenario, where different contracts have different governing laws (Irish, English, Israeli). Practical Operation: If a dispute involves claims under multiple contracts with different laws, Article 10 offers little guidance on how to weigh them. A court might struggle to determine which law is "central" to the dispute. This uncertainty encourages parties to frame their claims creatively (e.g., framing a contractual dispute as a tort claim) to align with the law of their preferred forum, effectively gaming the system. Scenario 3: Enforcement Risk Assessment (Factor f). Situation: Factor (f) looks at the "likelihood of recognition and enforcement." Practical Operation: This requires a court to predict the future behavior of a foreign court ("Will State B enforce my judgment?"). This is practically difficult and politically sensitive. A court might be reluctant to declare that a judgment from a fellow Contracting State would likely be unenforceable, rendering this factor somewhat theoretical or diplomatic rather than practical.

8.3 Are there additional considerations that, in your view, should be taken into account?
Consideration: "Good Faith and Procedural Conduct". Scenario: A party engages in "torpedo" actions (preemptive filings in slow courts) or hides relevant documents to delay proceedings in the foreign forum. Implication: The current list focuses on objective convenience and efficiency. It lacks a factor addressing the conduct of the parties. Adding a factor regarding "the procedural good faith of the parties" would allow courts to penalize tactical maneuvering when determining the appropriate forum.Click or tap here to enter text.

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.

The framework represents a significant improvement over the current patchwork of national rules, particularly by prioritizing party autonomy (Article 7) . However, its effectiveness in practice will depend on its ability to handle "non-standard" parallel proceedings where parties or causes of action are not identical. Advantage: Reinforcing Party Autonomy. Scenario: A commercial contract contains an exclusive jurisdiction clause. One party attempts to sue in a different forum based on a tort claim arising from the same facts. Implication: The framework (specifically Article 7) effectively mandates that the non-chosen court suspend proceedings. This provides high commercial certainty and reduces the costs associated with challenging jurisdiction in non-contractual forums. Disadvantage: The "Same Parties" Loophole. Scenario: As discussed in Q13.3, a claimant sues a company in the contractual forum but simultaneously sues the company's director in a different forum based on personal liability for the same events. Implication: If the definition of "Parallel Proceedings" (Article 3) is interpreted strictly to require identical parties, this framework may fail to catch such tactical splitting. The proceedings against the director would not technically be "parallel," allowing the tactical litigation to proceed unchecked unless the "Related Actions" rules are robust enough to fill the gap. Practical Operation: The Article 9 Tension. Scenario: A "race to the court" where Party A files a preemptive declaratory action in a slow jurisdiction (Court A) to block Party B from suing in the natural forum (Court B). Implication: The effectiveness of the framework hinges on the choice of approach in Article 9. If the framework adopts a strict "First-in-Time" rule, it may inadvertently reward such "torpedo" actions. If it adopts the "More Appropriate Court" rule, it mitigates the race but invites satellite litigation where parties spend years arguing over which court is "appropriate" before addressing the merits. Conclusion: To be effective in practice, the framework must provide a "fast track" mechanism for courts to dismiss abusive

parallel filings without getting bogged down in a full forum non conveniens analysis.Click or tap here to enter text.

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 framework in Articles 11-13 is particularly relevant for complex commercial setups. Scenario for consideration: A "conflicting obligations" case where Court A is asked to enforce a general obligation while Court B has ruled on a specific termination. Implications: Without a robust consolidation mechanism (Article 12), a party might be held compliant in one jurisdiction but in breach in another. However, the drafters should also consider the risk that the "Related Actions" mechanism could be used to override valid, separate jurisdiction clauses agreed upon by sophisticated parties. A balance must be struck between preventing contradictory judgments and respecting party autonomy in structuring split jurisdictions.

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?

The effectiveness of the communication methods will likely depend heavily on the compatibility of the legal systems involved. While the framework is theoretically sound, practical operation faces significant hurdles due to the "opt-in/opt-out" nature of Article 16. Scenario for consideration: Asymmetry in Methods. Situation: Court A (in a jurisdiction favoring direct judicial communication) attempts to coordinate with Court B (in a jurisdiction that requires communication via a Central Authority under Article 16(2)(b)). Implication: The "lowest common denominator" will dictate the speed of the process. In fast-moving commercial disputes (e.g., where an anti-suit injunction or asset freezing order is sought), the delay caused by routing communication through a Central Authority may render the coordination mechanism ineffective. The dispute might be effectively decided by a "race to judgment" before the communication channel is even established.

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

Advantage: Mitigating "Blind" Decisions. Scenario: In a multi-contract dispute (as discussed in Q1.1), Court A might be unaware that Court B has already issued a ruling on a related contract that affects the validity of the claims before Court A. Implication: The mechanism allows Court A to be informed of the status of proceedings in Court B, preventing the issuance of practically unenforceable or conflicting orders. Challenge: Due Process and the "Black Box" Risk. Scenario: Judges engage in direct communication to determine the "center of gravity" of a complex dispute involving multiple corporate officers and contracts. Implication: There is a risk that substantive views on the merits might be exchanged informally without the parties' presence or ability to rebut. While Article 18 mandates respect for procedural rights, the practical implementation is difficult. If parties feel that the venue was decided in a "secret channel" between judges rather than based on open arguments, it may lead to challenges against the recognition of the eventual judgment. Recommendation: Consideration should be given to stricter protocols regarding the record of such communications to ensure transparency, especially in adversarial legal systems where ex-parte communication is viewed with suspicion.

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?

The safeguards appear essential for the acceptance of the Convention, but their practical operation requires careful calibration to avoid undermining the Convention's primary rules. Article 19: Avoiding Denial of Justice. Scenario: A court is required to suspend proceedings in favor of a foreign forum under the Convention's priority rules. However, due to war, political instability, or discriminatory laws in that foreign jurisdiction, the claimant effectively cannot pursue their claim there. Implication: This safeguard is critical. Without it, a rigid application of the Convention could leave a party with no forum at all. However, "denial of justice" must be interpreted strictly to prevent courts from retaining jurisdiction merely because they believe their own procedures are superior. Article 20: Prevention of Abuse of Process. Scenario: As discussed in Q13.3, a party manufactures a "related action" by joining a corporate officer as a defendant solely to anchor jurisdiction and bypass a contractual forum selection clause. Alternatively, a party initiates a preemptive declaratory action in a "slow" jurisdiction to stall proceedings elsewhere (the "Italian Torpedo" tactic). Implication: This is perhaps the most practically important safeguard for commercial litigation. It provides the necessary tool for courts to dismiss tactical maneuvers. The drafters should consider whether the text gives sufficient guidance on what constitutes "abuse" to ensure consistent application across different legal cultures. Article 21: Public Policy. Scenario: A dispute involves a contract that is valid in the foreign forum but illegal or contrary to fundamental values in the forum state (e.g., certain gambling contracts, or contracts involving the sale of cultural heritage). Implication: While standard in private international law, this safeguard creates a risk of broad interpretation. If courts use "public policy" to protect local commercial interests rather than fundamental legal principles, it could erode the Convention's goal of uniformity. Overall View: These safeguards are necessary "safety valves." However, their operation in practice will depend heavily on whether courts apply them as exceptional measures or as routine grounds to refuse suspension.

Question 13 on the objectives of the Draft Instrument

13.1 Would the rules set out in the Draft Text achieve the objectives of a future instrument?

> The objective of a future instrument is to enhance legal certainty, predictability and access to justice by reducing litigation costs, and to mitigate inconsistent judgments in transnational litigation in civil or commercial matters.
>
> The Draft Text makes significant strides toward these objectives, particularly regarding standard "parallel proceedings." However, regarding the objective to "mitigate inconsistent judgments," further consideration is needed to ensure the rules are effective in complex commercial realities. Scenarios for consideration regarding effectiveness: Multi-Contract "Collisions": As noted in previous answers, legal certainty is at risk in scenarios where separate contracts within a single transaction contain different dispute resolution clauses (e.g., Court A vs. Court B, or Court vs. Arbitration). If the Convention does not provide a clear mechanism to coordinate or consolidate these "mixed" disputes—especially given the arbitration exclusion—the objective of mitigating inconsistent judgments may not be fully realized. Parties might still face contradictory obligations from different forums. Tactical Litigation: The objective of "reducing litigation costs" could be undermined if the rules on "Related Actions" or the definition of "Parties" are not sufficiently tight. If parties can easily manufacture jurisdiction by adding non-signatory corporate officers as defendants (as noted in Q13.3), this will lead to increased satellite litigation rather than reduction. Implications: To fully achieve the stated objectives, the instrument may need to balance the rigidity required for predictability (e.g., respecting separate jurisdiction clauses) with the flexibility

required to prevent inconsistent judgments (e.g., consolidating related actions even when based on different contracts). Without addressing these "grey areas," the instrument might solve simple cases but leave the most costly and complex transnational disputes unresolved.Click or tap here to enter text.

13.2 Do you have any views on whether the proposed rules set out in the Draft Text would improve the status quo?
The proposed rules would likely improve the status quo by providing a structured mechanism for coordination that is currently lacking in many jurisdictions, though the degree of improvement depends on how specific tensions are resolved. Scenario 1: The "Race to the Court" (Lis Pendens). Status Quo: Currently, without a convention, courts often apply divergent national rules to parallel proceedings. Some apply a strict "first-in-time" rule, while others apply a discretionary forum non conveniens test. This creates uncertainty and encourages a race to file. Impact of Draft Text: The Draft Text (specifically Article 9) improves this by establishing a uniform standard (whether Approach 1 or 2 is chosen). This reduces the incentive for tactical filing solely to secure a favorable procedural rule. Scenario 2: Complex Multi-Contract Disputes. Status Quo: Courts often respect the strict separation of contracts. If Contract A has a jurisdiction clause for State X and Contract B for State Y, courts will generally enforce this split, even if it is inefficient. While inefficient, this provides high predictability regarding party autonomy. Impact of Draft Text: The "Related Actions" framework (Articles 11-13) attempts to improve efficiency by allowing consolidation. Consideration: However, if this framework allows a court to override valid, separate jurisdiction clauses too easily in the name of "efficiency," it might actually worsen the status quo regarding legal certainty and party autonomy. Sophisticated commercial parties often intentionally split jurisdiction to take advantage of specific legal expertise (e.g., English courts for finance, local courts for real estate). Conclusion: The Draft Text improves the status quo if it includes safeguards ensuring that consolidation does not trample on the legitimate expectations of parties who structured their transaction with separate dispute resolution mechanisms.

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?
There is a potential risk that parties might manufacture "related actions" to draw a dispute from a contractually agreed forum into a broader dispute in another jurisdiction. Scenario I: A party facing a claim in a specific forum (based on a specific contract) initiates a broad declaratory action in another forum (based on a framework agreement), claiming the issues are intertwined. Implications: If the threshold for "related actions" is too low, it may undermine exclusive jurisdiction clauses. The safeguards in Article 20 (Abuse of Process) should be reviewed to ensure they provide courts with sufficient discretion to dismiss such tactical maneuvers without engaging in lengthy jurisdictional battles. Scenario II: A party wishes to avoid a contractual exclusive jurisdiction clause agreed with a corporate entity. To do so, they initiate proceedings in a different forum against a corporate officer (e.g., a director or CEO) personally (who is not a signatory to the contract) alleging fraud or personal liability. They then argue that the claim against the company should be heard in the same forum to avoid inconsistent judgments, effectively using the officer as an "anchor defendant." Implications: Circumvention of Agreements: If the Convention’s rules on "Related Actions" are applied too broadly without considering the corporate veil, valid jurisdiction clauses could

be easily circumvented by simply adding a personal claim against an officer. Satellite Litigation: This creates immediate satellite litigation regarding whether the officer is bound by the company's jurisdiction clause and whether the claims are genuinely distinct. Recommendation: The drafters should consider whether specific safeguards or a "substance over form" test are needed to prevent the joinder of corporate officers from being used solely as a procedural device to fragment litigation or bypass agreed forums.Click or tap here to enter text.

Question 14 - comments

What other comments, if any, do you have?
Click or tap here to enter text.