

Personal Details

Name: PEOPIIL (The Pan European Organisation of Personal Injury Lawyers)

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Affiliation:

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Please indicate your profession:

- Practitioner
- Judge
- Company/business lawyer
- Government official
- Legal professional in international organisation
- Academia
- Others, please specify: Not for Profit organisation

Do you have practical expertise in cross-border civil or commercial litigation:

- Yes
- No

The HCCH will publish your response to this public consultation (both in its original form and in a compiled document, together with other responses) to its Members on the Secure Portal of the HCCH. The Secure Portal is accessible by HCCH Members only. You can choose whether you would prefer to have your personal information (name and affiliation) published or to remain anonymous when your response is published. For transparency, the State, region, and the type of respondent (e.g. “profession”, “area of practice”) will be published. Your contact details will not be published.

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HCCH website

HCCH social media

News from blogs

News from associations or organisations

Others

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 Pan European Organisation of Personal Injury Lawyers (PEOPIL) was founded in 1996 and formally established as a not-for-profit organisation in 1998 by European lawyers to improve and promote judicial co-operation and mutual knowledge of legal and judicial systems of European jurisdictions in the field of personal injury law.

PEOPIL has 584 members from over 30 jurisdictions, both within and outside of Europe, with membership open to all legal professionals (lawyers, judges), academics and law students.

PEOPIL aims to develop co-operation and networking of personal injury lawyers within Europe to promote access to the legal system for consumers who sustain personal injury, to promote higher standards of care and safety for consumers, to promote fair compensation and to support and encourage the exchange of information and knowledge.

PEOPIL's members share information which aids parties to resolve cross-border personal injury claims.

Some members of PEOPIL will respond in their own right (or that of their firm / organisation) and some members of PEOPIL will have responded to this consultation through official professional bodies.

The draft text, with its narrow focus on parallel proceedings and related actions, offers little support to weaker parties to disputes, notably injury victims. These litigants are more vulnerable and require stronger, not weaker, protections. We urge the HCCH to develop appropriate safeguards, especially in the field of enforcement if combined rules on both jurisdiction and enforcement pose unassailable challenges. This might be achieved through a free-standing Convention dealing with jurisdiction and enforcement for injury/fatal accident victims.

There is a risk that the draft text will encourage or facilitate actions for negative declarations which could further disadvantage vulnerable/weaker parties by drawing them into disputes about jurisdiction between defendants and/or preventing the vulnerable party from proceeding with their claim because of such tactics or satellite litigation.

In the draft text, Article 2 paragraphs 4 and 5 specifically exclude consumer contracts with it being notable that this therefore excludes the weakest parties to litigation, individual consumers, from the scope of the proposed Convention. There are also other exclusions which extend to weaker parties but do not appear, in our view, to have a strong justification.

These exclusions appear arbitrary and lack sufficient explanation from the HCCH in a world in which consumers frequently engage in cross-border transactions (be that travel for

business or pleasure/vacation) and who may experience cross-border disputes as a result. It is entirely unclear why this category of litigants should be excluded from an international legal framework aimed at promoting certainty, predictability and access to justice. These objectives are arguably more important for the most vulnerable parties, who stand to benefit from such measures and who will be disadvantaged by their exclusion.

We are also concerned that, as drafted, there is a risk that the proposed Convention may result in a contracting state being obliged to accept jurisdiction even when a third state would be a more appropriate venue.

It is also unclear how the Convention would impact on the operation of the European regime on jurisdiction provided for in the Brussels Regulations and Lugano Convention: this requires clarification if the HCCH is to take forward the proposed Convention.

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?

It is our view that the existence of proceedings in multiple jurisdictions is not sufficiently problematic or widespread as to merit a new Convention on the topic, the introduction of which may increase delays, create satellite litigation and provide a perverse incentive to issue to take advantage of a particular jurisdiction, which would otherwise not be available, all of which is likely to further disadvantage weaker and vulnerable parties to any dispute.

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)?

PEOPIL responds to this consultation on behalf of injury victims, and therefore we do not respond in relation to Article 2(3).

As set out above, we disagree that vulnerable litigants, such as consumers, (Article 2(4)) and employees (Article 2(5)) should be excluded from any additional HCCH legislation. Consumers are more and more frequently engaging in cross-border contracts because they will purchase goods and services that may be provided by a company or companies in a different geographical location. It is vital that international legal instruments do not exclude vulnerable parties from the legal certainty that is afforded to commercial parties through international legal instruments and the Hague Convention regime.

Draft Article 2(1)(f) excludes carriage of passengers and goods. We have previously highlighted concerns as to this exclusion under Hague 2019, and note the draft Convention adopts the same approach. This could potentially extend to a claim for damages by a passenger in a car involved in a road traffic accident as well as victims of an air accident/disaster. On the other hand, the draft Convention would cover a claim made by a pedestrian injured in the same road traffic accident which gives rise to considerable unfairness, putting two innocent victims of the same accident on an unequal footing when seeking to enforce a judgment for damages. The way in which the Convention might be interpreted and the scope of its application remains unclear. However, carriage of passengers and goods are obvious areas where individuals need protection on jurisdiction

(and indeed enforcement given the gaps and uncertainty left by Hague 2019) and yet the draft Convention falls short in this area.

Absent their inclusion, the most vulnerable parties will be left to rely on domestic law of any signatory state (where they do not benefit from protections under EU law/the Lugano Convention) on issues of jurisdiction and enforcement with the resultant increase in costs and uncertainty which can be too great a barrier to access to justice to overcome. It is very concerning that such parties are exposed to a lack of any predictable and coherent regime on cross-border enforcement, with injury victims exposed to the risk of obtaining a judgment in one state and being unable to enforce that judgment in another state. This is notably the case for parties falling outside of the European regime provided for under the Brussels Regulations on jurisdiction and enforcement and the Lugano Convention.

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 drafting as set out is unclear and we would welcome clarity, particularly in relation to Article 1(2) which proposes that the Convention would apply to parallel proceedings only if the defendant(s) to proceedings in the court of a contracting state are habitually resident in another contracting state. It is not clear if this requires one or all defendants to be in a contracting state. If only one defendant is required to be in a contracting state, the limitation would not be of any benefit because it would still be possible to bring other non-resident defendants into the scope of the Convention. If all defendants are to be in a contracting state then it would be possible to circumvent the Convention by adding a defendant who is not resident in a contracting state.

The term 'another' is unclear in this context, suggesting that the defendants must live outside the forum state, which may not be intended. Article 8(2) includes habitual residence as a jurisdictional ground which implies that the intention of the Convention is that it would apply where any defendant resides in a contracting state. It is unclear why this limitation is required and as set out above it appears that the convention could be circumvented by adding non-resident defendants to a given set of proceedings.

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.

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Question 3 on when a court is deemed to be seised

What are your views on Article 4?

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Question 4 on Article 5 obligations

What are your views on Article 5?

We are concerned that Article 5(3) could give rise to satellite litigation to determine only whether a court is "unlikely to render" a judgment on the merits "within a reasonable time" such that the

original court which suspended its proceedings should proceed with the claim. This is likely to add to the complexity of cross-border litigation, thereby failing to create the legal certainty the HCCH's consultation paper cites as a key policy objective.

Question 5 on priority jurisdiction / connection

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

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

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

We are concerned that the jurisdictional grounds are very limited under Article 8(2). It appears that defendants sued in a contracting state which does not have an Article 8(2) connection will be able to commence parallel proceedings in a state which does have such a connection. This would lead to suspension of the first proceedings to allow the second court to proceed. Such a mechanism could be used tactically to derail initial proceedings and bring parallel proceedings even when the initial court is best suited to hear the case. This would have significant potential to delay proceedings and encourage tactical conduct, increasing satellite litigation.

In relation to Article 8(2)(g), injury and fatal accident victims bringing proceedings in England & Wales can rely on the wide interpretation of the tort gateway, but it is unclear how the concept of "directly causing" the harm would be interpreted under the draft Convention: would the narrow definition seen in the CJEU decision of *Lazar v Allianz*, Case C-350/14 be adopted (which we anticipate is the intention of the draft text for consistency with Hague 2019) or would the wider concept of "damage" under English law be permissible (see *FS Cairo (Nile Plaza) LLC (Appellant) v Brownlie* [2021] UKSC 45)?

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?

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

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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?

As set out above there is potential for the mechanism introduced by Article 8 to increase the likelihood of parallel proceedings continuing or being commenced to secure a court more favourable to a party. Perversely this may lead to additional parallel litigation simply to try to take tactical advantage, with the resultant increase in costs, uncertainty and delay within the litigation.

It may also lead to an attempt by some parties to issue or seek a declaration to try to secure a hearing in a particular Convention State which the party considers more favourable. Injury claimants may be caught up in such tactics which is a serious concern as it is likely to delay receipt of compensation, which is often needed urgently to meet the needs of the injured person/their families.

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

We are concerned about the possibility that the Convention will lead to increases in complexity and uncertainty and introduce delays and the risk of satellite litigation.

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

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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)?

If the Convention is to be taken forward, and should it develop the model provided by the draft text for Article 9 based on the critical and debatable notion of the "more appropriate court", the factors for determining the appropriate court will require further consideration, not only to avoid introducing uncertainty, cost and delay, but also to ensure access to justice for victims, with such weaker parties not exposed to excessive or unfair burdens in proving the appropriate court.

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

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

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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.

For the reasons set out above we do not think that such a Convention would be effective and on the contrary poses a significant risk of introducing delay and satellite litigation.

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.

There is a significant risk that no determination will be made as to suitability with more than one court determining that they would be most suitable to hear a claim. Such an outcome would render the Convention meaningless.

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?

As described we are concerned that the proposed Convention has the possibility to increase the complexity of cross-border litigation resulting in parallel and related proceedings as well as an increase in relation to costs, uncertainty and delay.

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

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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?

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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.

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

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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?

We are concerned by the scope for tactical and satellite litigation which would be introduced by this Convention.

Question 14 - comments

What other comments, if any, do you have?

We reiterate our concerns that weaker and more vulnerable parties should not be excluded from the scope of the Convention or Hague regime more generally. In particular, taking Hague 2019 on enforcement of judgments, with many cases involving weaker parties, notably injury victims, falling

outside of its scope when it is precisely this class of individual that requires the highest level of protection when seeking to enforce a judgment outside of the European regime. With the EU currently in a stalemate as to the UK's request to accede to the Lugano Convention, a significant category of litigant who need protections on enforcement the most (being cross-border injury victims) are falling through the gaps, which have not been plugged by the Hague regime, notably Hague 2019. We urge the HCCH to seriously consider these concerns in relation to existing legal instruments and when developing future legislation/reform to ensure enhanced protections for cross-border victims. It is essential that policy objectives in international legal instruments of legal certainty and access to justice extend to those who are most vulnerable in our society.