

Title	Working Group on Jurisdiction: Report of 2024
Document	Prel. Doc. No 2 of February 2024
Author	PB
Agenda Item	Item II.2
Mandate(s)	C&D Nos 8 and 9 of CGAP 2021 C&D No 7 of CGAP 2022 C&D No 9 of CGAP 2023
Objective	To report on the progress of the Working Group on the Jurisdiction Project and to present the recommendations of the WG following its sixth meeting
Action to be Taken	For Decision <input checked="" type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input 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	- Prel. Doc. No 2 of February 2023 – Working Group on Jurisdiction: Report - Prel. Doc. No 7 of February 2022 - Report of the Working Group on Jurisdiction - Prel. Doc. No 3 of February 2021 - Report on the Jurisdiction Project - Prel. Doc. No 5 of February 2020 - Third Meeting of the Experts' Group on Jurisdiction

Working Group on Jurisdiction: Report of 2024

I. Introduction

- 1 The Working Group on matters related to jurisdiction in transnational civil or commercial litigation (WG), under the chairmanship of Professor Keisuke Takeshita (Japan), was established following the Council on General Affairs and Policy (CGAP) mandate in 2021.¹ Since that time, the WG has met on six occasions. The first four meetings were held in October 2021, February 2022, September 2022 and February 2023. Reports on the progress of these meetings were provided to CGAP in March 2022 and 2023, respectively.²
- 2 Pursuant to the mandate given by CGAP at its meeting in March 2023,³ the WG met from 18 to 22 September 2023 (the fifth WG meeting) and 29 January to 2 February 2024 (the sixth WG meeting). These meetings were held in person, with the possibility for remote participation. The fifth WG meeting was attended by 64 experts in total, of which 35 attended in person. The experts represented 21 Member States and two Observers. Similarly, at the sixth WG meeting, there were 63 participants, representing 21 Member States from various regions and two Observers.
- 3 The fifth WG meeting was held in Buenos Aires (Argentina), with the generous support of the Ministry of Foreign Affairs of Argentina and the *Organización de Estados Iberoamericanos para la Educación, la Ciencia y la Cultura*. During the week of the fifth WG meeting, members of the WG and invited guests also convened to celebrate the 130th anniversary of the HCCH. This event was sponsored by the Embassy of the Netherlands in Argentina. The Permanent Bureau (PB) would like to again thank the Government of Argentina, the *Organización de Estados Iberoamericanos para la Educación, la Ciencia y la Cultura*, and the Embassy of the Netherlands in Argentina for their meaningful contributions which resulted in a productive WG meeting and a successful 130th anniversary event.
- 4 Over the course of the fifth and sixth WG meetings, the WG has continued to progress work on the draft core provisions of a possible future instrument (the Draft Text is set out in Annex I of the Report of the Chair of the WG which is attached to this Prel. Doc., supported by a flow chart developed prior to the third WG meeting which is set out at Annex II of the Report). During the latest two meetings, the WG discussed the definitions of parallel proceedings and related actions, noting that further time must be invested in scoping and articulating these definitions in consideration of the future rules and the framework that is being developed. In relation to parallel proceedings more broadly, the WG continued to build on the key rules and structure in the Draft Text, including rules for party autonomy, exclusive / priority jurisdiction or connection, the determination of the more appropriate / better forum, and a communication mechanism. The WG also discussed the priority of the more appropriate court and the court first seised. The WG further commenced substantive discussions on related actions and explored a proposal for a specific framework for the treatment of related actions in the Draft Text. However, given these discussions are at an early stage, further work is necessary before provisions are included in the Draft Text.
- 5 To support discussions in the fifth and sixth meetings, members of the WG submitted a total of 39 Working Documents (Work. Docs), many of which were submitted jointly by several delegations, including from different legal traditions. The intersessional work, collaboration and significant contributions made by members of the WG has facilitated discussions and enabled key aspects of a possible future instrument to be explored. The WG has also had regard to the interaction and

¹ C&D Nos 8 and 9 of CGAP 2021, available on the HCCH website at www.hcch.net under “Governance” then “Council on General Affairs and Policy” and “Archive (2000-2023)”.

² “Report of the Working Group on Jurisdiction”, Prel. Doc. No 7 of CGAP 2022 and “Working Group on Jurisdiction: Report”, Prel. Doc. No 2 of CGAP 2023, available on the HCCH website at www.hcch.net (see path indicated in note 1).

³ C&D No 9 of CGAP 2023, available on the HCCH website at www.hcch.net (see path indicated in note 1).

alignment of the provisions of this possible future Convention, where appropriate, with the *Convention of 30 June 2005 on Choice of Court Agreements* and the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*.

- 6 The Report of the Chair of the WG (Annex I) summarises the key points that were discussed during the two meetings. It highlights the points on which consensus has been reached and indicates matters that require further discussion and future work. This Report includes possible next steps recommended by the WG to continue the development of the draft Convention. The WG was unable to discuss certain agenda items at the sixth meeting, including jurisdiction, due to time constraints. These issues will be canvassed in future meetings.
- 7 During the final session of the sixth WG meeting, the Government of Japan most generously proposed to host the seventh WG meeting in Tokyo, Japan, in the week of 28 October 2024. Members of the WG supported this proposal and thanked the Government of Japan for this excellent initiative.

II. Recommendations from the WG

- 8 The Report of the Chair of the WG noted the recommendations from the WG as follows:
- Given the progress made on the text and in the discussions, the WG recommends that CGAP approve the continuation of the Group's work, including two further meetings, as well as intersessional work prior to CGAP in March 2025.

At the generous invitation of the Japanese Government, the WG has been invited to hold the seventh meeting in Tokyo, Japan. It is proposed that this meeting be held in the week of 28 October 2024.

The WG also invited the PB to explore the possibility of holding, at an appropriate time, an exchange of views with practitioners, representatives of the judiciary, and other experts with practical experience in parallel proceedings and related actions, possibly including through one or more online workshops.

The WG would further report to CGAP in 2025.

III. Proposals for CGAP

- 9 Based on the foregoing, the PB proposes the following Conclusions and Decisions:
- CGAP took note of the Report of the Chair of the WG on matters related to jurisdiction in transnational civil or commercial litigation, and the progress made by the WG to further develop provisions for a draft Convention. CGAP invited the PB to convene two further WG meetings before CGAP 2025, the first in the second half of 2024 and the second preferably in January / February 2025, with intersessional work as required. These meetings should preferably be held in person (with the possibility for online participation).

CGAP thanked the Government of Japan for the proposal to host the seventh WG meeting in Tokyo, Japan, and supported this proposal.

CGAP invited the PB to explore the possibility of holding, at an appropriate time, an exchange of views with practitioners, representatives of the judiciary, and other experts with practical experience in parallel proceedings and related actions, possibly including through one or more online workshops. CGAP invited the PB to make further arrangements to progress this initiative as appropriate and to keep Members updated on this work.

The WG will report to CGAP at its 2025 meeting.

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

Title	Working Group on Jurisdiction: Report of 2024
Document	N/A
Author	Chair of the Working Group
Agenda Item	N/A
Mandate(s)	N/A
Objective	To record the key points that were discussed during the fifth and sixth Working Group meetings with a view to preparing for future meetings
Action to be Taken	For Decision <input type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input checked="" type="checkbox"/>
Annexes	Annex I – Draft Text provisions for future discussion Annex II – Basic structure of the possible future Instrument
Related Documents	N/A

Working Group on Jurisdiction: Report of 2024

I. Introduction

- 1 The Working Group on matters related to jurisdiction in transnational civil or commercial litigation (WG), under the chairmanship of Professor Keisuke Takeshita (Japan), has worked both in plenary meetings and intersessionally to develop draft provisions for a new instrument. A total of 39 Working Documents (Work. Docs) have been submitted by delegates from different legal cultures since the first meeting of the WG.¹ These Work. Docs have included proposals on a range of complex and challenging topics relevant to developing a text (Draft Text) that aims to effectively fulfil the mandate of the WG. While the WG's task in bridging and encompassing different legal traditions in a future instrument is challenging, members of the WG continue to make steady progress on the provisions and continue to test how certain mechanisms in the instrument might work.
- 2 This Report summarises the key points that were discussed during the fifth and sixth meetings.² It highlights the points on which consensus has been reached during the last two meetings and indicates matters that require further discussion and future work. This Report includes possible next steps recommended by the WG to continue the development of the Draft Text. The WG was unable to discuss certain agenda items and Work. Docs at the sixth meeting, including jurisdiction, due to time constraints. These issues will be canvassed in future meetings.
- 3 The Draft Text developed by the WG is set out at Annex I.

II. Structure of the Draft Text

- 4 The WG has been working on a Draft Text that covers both parallel proceedings and related actions or claims. However, in the context of parallel proceedings, the WG agreed that the Draft Text would not deal with instances where courts had no jurisdiction / connection under the provisions. The WG agreed that in instances where only one court had jurisdiction / connection under the provisions (Art. 8 of the Draft Text), priority would be given to that court, though a feasibility concern was expressed, that forcing courts to suspend or dismiss proceedings based on certain jurisdiction / connections might not be attractive to some States. The WG also agreed that the Draft Text should address instances where more than one court has jurisdiction / connection under the provisions.
- 5 The WG has considered related actions on the basis that the treatment of related actions or claims, and the rules for parallel proceedings would differ. However, some delegates have noted that it may not be feasible to apply completely different rules and further exploration of these types of proceedings (parallel proceedings and related actions) is required. The Draft Text also includes a communication mechanism that is intended to facilitate cooperation between Contracting States.

A. Definitions of parallel proceedings and related actions (Art. 3)

- 6 During the previous two meetings, the WG explored key definitions that would be included in the Draft Text. The WG has included a definition of "parallel proceedings" and has included text in square brackets on the definition of "related actions", which will form the basis for future discussions. Concerns were particularly expressed about the use of the term "type of transaction" due to its implications.

¹ Available on the Secure Portal of the HCCH website www.hcch.net under "Working / Experts Groups" then "Working Group on Jurisdiction".

² The fifth meeting of the WG was held from 18 to 22 September 2023 in Buenos Aires, Argentina, and the sixth meeting from 29 January to 2 February 2024 at the Permanent Bureau of the HCCH in The Hague.

7 Members of the WG discussed the importance of and the challenges in crafting distinct definitions for parallel proceedings and related actions, as the definitions will determine which Chapter of the Draft Text will apply to the proceedings. Delegates noted the existing definition of parallel proceedings in Article 7(2) of the 2019 Judgments Convention which should be the starting point for the definition in this instrument. Discussions on the definition of related actions are at an early stage. Given that these types of proceedings may be defined differently across many legal systems, the text of a final definition will require further consideration.

B. Court seised (Art. 4)

8 The WG discussed the merits of a proposal containing rules to determine when a court is deemed to be seised and agreed to insert text in square brackets into the Draft Text. These rules would operate as general rules of application for either the provisions in current Chapter II or the broader Draft Text.

III. Parallel proceedings (Chapter II)

A. Suspension, dismissal, and resumption of parallel proceedings (Art. 5)

9 The WG agreed to include provisions governing a court's suspension, dismissal, or resumption of parallel proceedings. These provisions in Article 5 are intended to be the general provisions of the rules for parallel proceedings. Some timeframe issues highlighted by square brackets in the Draft Text remain to be discussed further.

B. Consideration of the recognition and enforcement of foreign judgments

10 At its sixth meeting, the WG discussed the relationship between Article 5 and the recognition and enforcement of foreign judgments and considered whether detailed rules would be required in this respect. Members recognised the importance that the prognosis of recognition and enforcement of a decision would play in rules governing parallel proceedings. Views differed as to whether Article 5 of the Draft Text should contain such provisions which allow a court of a Contracting State to continue or resume proceedings that must be suspended under Article 5(1) when it becomes clear that the judgment resulting from the proceedings of a court of another Contracting State, for the benefit of which the proceedings of the former court had to be suspended, is not recognised in the former Contracting State. Some members expressed the necessity of having such rules to avoid a denial of justice, noting that placing the provision in Article 5 would facilitate access to justice for the parties, and the current text of Article 11 (avoiding a denial of justice) would not sufficiently cover such cases if these provisions were not provided. However, some other members expressed a preference not to include rules on this issue in the Draft Text, as such rules would add additional obligations to the courts and affect the feasibility of the Draft Text. In addition, given that the prognosis of recognition and enforcement is already included as a factor for the determination of the [clearly] [more appropriate] [most appropriate] [better] forum in Article 10, some members queried whether it was necessary to provide such rules repeatedly in the Draft Text. It was also noted that adding such provisions in the Draft Text would only be useful for situations where only one court has jurisdiction / connection under the Draft Text.

11 The Chair invited proposals on this topic, and the WG will continue to discuss this issue in future meetings.

C. [Exclusive] [Priority] jurisdiction / connection (Art. 6)

12 Article 6 of the Draft Text reflects an agreement by the WG that the court of the Contracting State in which the immovable property is situated should have [exclusive] [priority] jurisdiction / connection in parallel proceedings which have, as their main object, rights *in rem* in immovable

property. At the fifth meeting, members agreed that square brackets should be added to the word “main” in this provision to reflect the need for further consideration of this issue. There was no agreement as to whether a court of the Contracting State in which the immovable property is situated should have [exclusive] [priority] jurisdiction / connection for proceedings involving “tenancies of immovable property or the registration of immovable property”. It was also suggested during the fifth meeting that tenancies could be excluded from the scope of the Draft Text. However, this was not sufficiently discussed by delegates during the fifth meeting and the WG will need to consider this further.

- 13 The WG also considered a proposal that would require a court to determine whether it had a priority connection based on either the object of the case concerning rights *in rem* or a choice of court agreement. This proposal sought to avoid the need for any discussion on the rules of “exclusive jurisdiction” while accomplishing the type of priority intended by the use of the concept. However, a consensus was not reached by the WG on whether to use the concept “exclusive”, and the WG did not decide to include this proposal in the text.

D. Party autonomy (Art. 7)

- 14 At the fifth meeting, the importance of avoiding an overlap, both in the scope and in the language dealing with choice of court agreements in the Draft Text, with the 2005 Choice of Court Convention was highlighted.
- 15 During discussions, problems concerning extending the use of deeming provisions in relation to the interpretation of choice of court agreements were pointed out by members, although no development of the Draft Text was made. However, it was noted that due consideration should be given to the coherence between the Draft Text and the 2005 Choice of Court Convention which has a deeming provision in Article 3(b).
- 16 In the context of WG discussions on party autonomy and the priority of a court, members acknowledged the importance of giving priority to the court where a defendant had expressly consented to its jurisdiction, subject to the rules of [exclusive] [priority] jurisdiction / connection. Accordingly, this text was placed in square brackets under the heading “Party autonomy” to reflect the need for future consideration. A note has been included in this provision explaining that “certain limitations of the timeframe within which the defendant should consent might need to be considered further”.

E. When only one court has jurisdiction / connection under Article 8(2)

- 17 The WG discussed the necessity of the safeguard for situations when only one court has jurisdiction / connection under Article 8(2). It was generally agreed that the suspension or dismissal of proceedings in the court first seised not having jurisdiction / connection would be problematic in cases where that court had almost finalised its proceedings when the court second seised having jurisdiction / connection under Article 8(2) started. Members pointed out that Article 5(3) might be useful in such situations. It was noted that Article 11 might not be sufficient for this situation given that a high threshold must be met in order for Article 11 to apply. The WG also discussed the possibility of tactical use of the future instrument by parties to the disputes. Tactical use could include: seising a second court based on an Article 8(2) jurisdiction / connection in order to force suspension or dismissal under Article 8(1) of a court first seised on other domestic law grounds; or adding claims or parties to turn the proceedings into related actions and avoid the Article 8 rules. The Chair encouraged intersessional discussions on this topic and will resume the discussion at the next meeting.

F. Priority of the more appropriate court and the court first seised (Art. 9)

- 18 Article 9 is a core mechanism of the Draft Text that remains under discussion by the WG. The WG is working to identify suitable rules that will encompass different legal traditions and that will deal effectively with parallel proceedings.
- 19 The WG discussed the following three types of rules:
- (i) Upon the application by a party, the court first seised determines the more appropriate court first and, after such determination, where appropriate, the court second seised consecutively determines the more appropriate court, if the rule includes the possibility of the determination by the court second seised.
 - (ii) Upon the application by a party, the court second seised determines the more appropriate court first and, after such determination, where appropriate, the court first seised consecutively determines the more appropriate court, if the rule includes the possibility of the determination by the court first seised.
 - (iii) Upon the application by a party, the court first seised and the court second seised concurrently determine the more appropriate court (no sequential order of courts for the determination of the more appropriate court).
- 20 Although the WG has made substantial progress on discussing an Article 9 mechanism and many issues have been distilled and usefully identified as requiring further work, no text has been adopted by the WG at this stage. Discussions will continue, including through intersessional work.
- 21 As encouraged by the Chair, the WG will further consider whether a consecutive determination by courts in parallel proceedings, or a concurrent determination is preferable. As a concurrent or consecutive mechanism might affect the roles of each court seised, the WG will also need to further consider this aspect. In addition, due consideration will need to be given to the practical timeframes involved in the application of this Article.

G. Determination of the [clearly] [more appropriate] [most appropriate] [better] forum (Art. 10)

- 22 In advance of the sixth WG meeting, there were three options listed in Article 10 of the Draft Text. Several proposals outlining different frameworks for the determination of the [clearly] [more appropriate] [most appropriate] [better] forum were submitted before and during the sixth WG meeting to replace the three options. The factors listed in these proposals were drawn from previous meetings and discussions.
- 23 The WG considered each factor listed in the proposals and decided to include only one version of the text of Article 10, based on a proposal submitted during the sixth WG meeting. The new text will be used as a starting point for future discussions.
- 24 The WG discussed whether to include the term “proper administration of justice” in the chapeau of Article 10 as the basic criterion for the determination. What the term meant was also discussed, and some members regarded this as referring only to procedural efficiency. It was discussed that further consideration would be given to the Article 10 chapeau, as well as Article 11 (Avoiding denial of justice). As for the factors listed in Article 10, members shared the view that those factors would be quasi-exhaustive and that Article 10 did not require courts to consider all factors when making a determination.

IV. Related actions (Chapter III)

- 25 The WG considered a proposal containing a framework for related actions for the Draft Text. The goals of the proposed framework include improved procedural efficiency and the avoidance of

irreconcilable judgments. The proposal discussed at the sixth meeting provided for the possibility of consolidating the proceedings, both entirely or partially, or continuing separate proceedings, supported by a cooperation and communication mechanism. Unlike the rules for parallel proceedings, the proposal did not require a court of a Contracting State to have a connection as set out in Article 8(2).

- 26 Some members appreciated the discretionary nature of the rules and the flexibility provided therein. Other members queried how frequently the rules would be applied, especially in an international context. They also discussed the practicality of such rules, as the approach suggested may seem to require multiple submissions to the courts involved, which would be time-consuming, particularly for complex cases. Some members suggested considering introducing safeguards to avoid a denial of justice. Some members also suggested that the rules for related actions should not impose extra burdens on courts.
- 27 Members considered it important to clarify the interaction between related actions and parallel proceedings. This is because different mechanisms may be developed for each of these; the rules for parallel proceedings would establish certain obligations for courts, whereas the rules for related actions would be flexible and discretionary. A concern was expressed, however, that parties may use certain litigation strategies to seek to avoid the application of parallel proceedings rules.
- 28 The WG raised several topics for future discussion including rules protecting the rights of the parties and ensuring procedural fairness, and rules concerning jurisdiction / connection to realise appropriate consolidation, in particular to protect party autonomy or exclusive jurisdiction / connection. The WG noted that further consideration should be given to the necessity of establishing certain mechanisms addressing concerns of some States that have difficulty in implementing a potential future mechanism for related actions, including in respect of the definition of related actions in Chapter I.
- 29 The WG has not yet adopted draft text at this stage.

V. Communication mechanism (Art. 15)

- 30 A communication mechanism was considered at both the fifth and sixth WG meetings. At the fifth meeting, the WG discussed several proposals and noted various questions for future consideration. These include further clarification regarding the purpose of a communication mechanism and how the communication mechanism should operate, such as through direct judicial communication, Central Authorities, competent authorities, or via the parties. Members noted that language barriers needed to be taken into account for the communication mechanism to work. It was also suggested that when drafting the text, members will need to consider whether certain elements in the Draft Text could be more appropriate for the Explanatory Note.
- 31 The importance of respecting the procedural rights of the parties, the confidentiality of information, the need for flexibility in communication methodology, and State sovereignty considerations were also highlighted.

VI. WG Recommendations

- 32 Given the progress made on the text and in the discussions, the WG recommends that the Council on General Affairs and Policy (CGAP) approve the continuation of the Group's work, including two further meetings, as well as intersessional work prior to CGAP in March 2025.
- 33 At the generous invitation of the Japanese Government, the WG has been invited to hold the seventh meeting in Tokyo, Japan. It is proposed that this meeting be held in the week of 28 October 2024.

- 34 The WG also invited the PB to explore the possibility of holding, at an appropriate time, an exchange of views with practitioners, representatives of the judiciary, and other experts with practical experience in parallel proceedings and related actions, possibly including through one or more online workshops.
- 35 The WG would further report to CGAP in 2025.

ANNEX I

Revised 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 [and related actions] in the courts of different Contracting States in civil or commercial matters. The provisions in this text shall not extend in particular to revenue, customs or administrative matters.
2. [The provisions in this text shall apply to parallel proceedings [and related actions] if [any of] the defendant[s] in [any of] the proceedings in a court of a Contracting State [is][are] habitually resident in another Contracting State.]

Article 2 *Exclusions from 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;
- (q) sovereign debt restructuring through unilateral State measures;
- [(r) *to be determined.*]¹

[Note: Exclusive choice of court agreements and interim measures for protection should be further 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.

Article 3 ***Definitions***

1. In this Convention –
 - (a) “parallel proceedings” means any proceedings in courts of different Contracting States between the same parties [on the same subject matter]²;
 - (b) “related actions” means any proceedings in courts of different Contracting States that are not “parallel proceedings” and that involve:

¹ Before the discussion of the second WG meeting, there was a limb excluding from scope “cases in which the law of one or more of the Contracting States involved provides for exclusive jurisdiction in their own courts”. It was deleted because the problems arising from those cases would be dealt with by the declaration mechanism (Art. 13 of the Revised Text). However, the WG will revisit the issues concerning exclusive jurisdiction including the possible exclusion from the scope.

² The term “on the same set of operative facts” was not included in the text because it was pointed out that the inclusion of this term alone might cause problems. However, the WG will revisit the issue of the definition of parallel proceedings.

- (i) facts that arise, in whole or in material part, from the same transaction [or type of transaction], occurrence, or series of transactions or occurrences; and
 - (ii) one or more common questions of fact or law that create a potential risk of [irreconcilable] [inconsistent] findings or judgments [resulting from separate proceedings]; and
 - (iii) parties at least some of which are the same, or substantially the same, or connected to each other]].
2. 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.

**[Article 4
Court seised**

For the purpose of [Chapter II], a court shall be deemed to be seised –

- (a) when the document instituting the proceedings or an equivalent document is lodged with the court; or
- (b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.]

[Note: Inclusion of this provision does not mean the adoption of certain types of rules [on first in time] for the suspension of proceedings.]

[Note: This Article could potentially apply not only to Chapter II, but also to the Convention as a whole.]

[Note: The WG will need to ensure that these rules are workable for their national systems. Further changes may be necessary to the text.]

**CHAPTER II
PARALLEL PROCEEDINGS**

**Article 5
*Suspension, dismissal and resumption of parallel proceedings***

1. A court that must suspend proceedings in accordance with this Chapter [shall do so as soon as it is informed] of the proceedings in the other court by a party, [other relevant person,] or through the communication mechanism established pursuant to Article 15.
2. A court that suspended its proceedings in accordance with this Chapter shall dismiss the case if the proceedings in the court for the benefit of which proceedings were suspended resulted in a judgment capable of recognition and, where applicable, of enforcement in that Contracting State.
3. A court that suspended its proceedings in accordance with this Chapter shall, on request of a party, proceed with the case if the court for the benefit of which proceedings were suspended [is unlikely to render] [has not rendered] a judgment on the merits [within a reasonable time].

[Note: For the situation provided in paragraph 1, the possibility of dismissal instead of suspension should be further considered.]

[Note: Further consideration of the recognition and enforcement of foreign judgments and on the detailed rules is required.]

Article 6
[Exclusive][Priority] jurisdiction / connection

Where parallel proceedings which have as their [main] object rights *in rem* in immovable property [, tenancies of immovable property, or the registration of immovable property] are pending before courts of Contracting States and the property is situated in one of those Contracting States, the court of the Contracting State in which the property is situated shall proceed with adjudication on the dispute. Any other court shall [, on application by a party,] suspend [or dismiss] the proceedings.

[Note: Application of this rule to parallel proceedings which have as the [main] object tenancies of immovable property or the registration of immovable property should be discussed further. Further consideration is necessary as to whether registration includes recordation and whether this term can be added to the text as well. Further discussion is needed to address whether the rule on tenancies should include an exception for cases where the tenant is habitually resident in a different State. The WG will need to consider further how the above provision aligns with Article 5(3) of the 2019 Judgments Convention.]

Article 7
Party Autonomy

1. Subject to Article 6, if the parties to the proceedings in both / all courts have agreed prior to the dispute that one or more courts shall have jurisdiction over the dispute, and only one of the courts seised is designated under such agreement as having jurisdiction, then that court shall proceed with adjudication of the dispute unless such agreement states that it does not deprive any other court or courts of jurisdiction. Any other court shall suspend the proceedings.
2. Paragraph 1 does not apply to an exclusive choice of court agreement. For the purposes of this sub-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. A choice of court agreement which designates the courts of one State or one or more specific courts of one State shall be deemed to be exclusive unless the parties have expressly provided otherwise.
3. Subject to Article 6, if the defendant expressly [and positively] consented to the jurisdiction of the court of a Contracting State [by written or oral format and addressed either to the court or to the claimant] in the course of the proceedings, then that court shall proceed with adjudication of the dispute. Any other court shall stay or dismiss adjudication of the dispute.

[Note: Possible need to address non-exclusive jurisdiction agreements with purely prorogatory effect and/or waivers of objections to jurisdiction either in this Article or in the rules on the more appropriate / better forum analysis.]

[Note: Relationship between paragraph 1 and paragraph 3 should be discussed further.]

[Note: For paragraph 1 of this Article, the formal validity of the agreement needs to be considered further. Cf. Article 3(c) of the 2005 Choice of Court Convention.]

[Note: Certain limitations of the timeframe within which the defendant should consent might need to be considered further.]

Article 8
Jurisdiction / Connection

1. Subject to Articles 6 and 7, where parallel proceedings are pending before the courts of Contracting States, a court of a Contracting State shall suspend or dismiss the proceedings [at the request of a party to the proceedings] if –
- (a) it does not have jurisdiction / connection pursuant to paragraph 2 of this Article and one or more of the other courts has or have such jurisdiction / connection; or
 - [(b) proceedings in that court were not started within a reasonable timeframe after proceedings were commenced in the court first seised having jurisdiction / connection pursuant to paragraph 2 of this Article.]

[Note: The meaning of “a reasonable timeframe” in sub-paragraph (b) should be further considered. Also, it should be noted that such timeframe issues may be dealt with by the provisions concerning the determination of the [clearly] [more appropriate] [most appropriate] [better] forum analysis. The WG needs to discuss these issues further. Further rules need to be considered in the determination of the more appropriate / better forum analysis.]

This Article is added without prejudice to the possibility that the WG will specify further circumstances in which courts would be required to suspend or dismiss the proceedings.]

2. A court of a Contracting State has jurisdiction / connection if [at least] one of the following requirements is met –
- (a) the defendant was habitually resident in that State at the time that person became party to the proceedings;

[Note: Possible need to define the term “defendant”, as a defendant may be a claimant in another State – adopt language of Article 5(1)(a) of the 2019 Judgments Convention, specifying the time at which the defendant was joined to the proceedings. Also, need to clarify the situation of multiple defendants.]

- (b) the defendant is a natural person who had their principal place of business in that State at the time that person became party to the proceedings 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 that State at the time that person became party to the proceedings in that State, and the claim arose out of the activities of that branch, agency, or establishment;

[Note: Or should the timing be tied to the activities of that branch, agency or other establishment?]

- (d) [the proceedings have as their object] [the claim concerns] [the action concerns] a contractual obligation and the performance of that obligation took place, or should have taken place, in that State, 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;

[Note: Which phrase, [the proceedings have as their object], [the claim concerns], or [the action concerns] should be adopted needs further consideration also for sub-paragraphs (d)-(h).]

- (e) the claim [is brought on] [concerns] a lease of immovable property (tenancy) [or the registration of immovable property] and the property is situated in that State;

- (f) the claim concerns 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) a claim concerns a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property and the act or omission directly causing such harm occurred in that State, irrespective of where that harm occurred;
- (h) the claim concerns 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 arises out of the same transaction or occurrence as the original claim, if the court of the State has [priority] [jurisdiction] [connection] for the original claim under this Article and the original claim is pending in that court;
- (j) 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;

[Note: Should this connecting factor in (j) be prioritised? It should be considered to whom “it is evident”.]

[(k) to be determined.]

[Note: Interaction of this paragraph with Articles 6, 7, or 9 needs further consideration.]

Article 9

[Priority of the more appropriate court and the court first seised]

[Although the Working Group has made substantial progress on discussing an Article 9 mechanism, no text has been adopted by the Working Group at this stage and discussions will continue, including through intersessional work.]

[Note: Further consideration is required as to whether a consecutive determination or a concurrent determination is preferable. A concurrent or consecutive mechanism might affect the roles of each court seised, and this will need to be further considered by the WG.]

[Note: Due consideration should also be given to the practical timeframes involved in the application of this Article.]

[Note: Drafting will be conducted based on the structure described in Annex II. All issues in the flowchart of Annex II remain open for discussion, including whether each issue will be addressed in the draft Convention and at what stage of proceedings the issue should be addressed by a court or courts seised.]

[Note: Issues concerning the provisions for non-priority [connection] [jurisdiction] should be considered further.]

Article 10

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

In making a determination under Article [xx], the court shall [have regard to the proper administration of justice, taking] [take] into account the following factors in particular:

- (a) [The burdens of litigation on the parties][the convenience of the parties], including in view of their habitual residence;
- (b) The [relative] ease of accessing evidence or preserving evidence;
- (c) [the law applicable to the claims];
- (d) the stage of the proceedings before each court seised [and any applicable limitation or prescription periods] [and the possibility of significant delay in one or more forums];
- (e) [the likelihood that one court may provide a complete or significantly more complete resolution of the dispute as a whole;] and
- (f) the likelihood of recognition and, where applicable, enforcement of any resulting judgment given in the Contracting State of any other seised court.

The courts may exchange information through the communication mechanism established pursuant to Article [...].

CHAPTER III *RELATED ACTIONS*

[The Working Group has discussed a proposal that contains a framework for related actions. The Working Group has not yet adopted draft text at this stage. Discussions will continue, including through intersessional work.]

CHAPTER IV *GENERAL CLAUSES*

Article 11 *Avoiding denial of justice*

[Nothing in the present Convention shall prevent a court from exercising its jurisdiction if that court determines it is reasonable and foreseeable that its exercise is necessary in order to avoid a manifest denial of justice.]

[Article 12 *Public policy*

Notwithstanding provisions from Article # to Article #, 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 manifestly incompatible with 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.

Article 15 [Work. Doc. No 27 REV]
Communication mechanism

[Whenever two or more courts in Contracting States are seized of [parallel proceedings [and related actions]] [concurrent proceedings] to which this Convention applies, [and when each of those courts meets one of the requirements of Article [8(2)]]

1. Each such court [shall] [shall consider] [should] [may], [to the maximum extent possible] [to the extent practicable], cooperate and communicate, whether directly or indirectly, with the other court or courts for the purposes of [determining the better forum under Article [10]].
2. Contracting States shall, at the time of the deposit of their instrument of ratification or accession, notify the Ministry of Foreign Affairs of the Netherlands whether they will allow
 - (a) direct judicial cooperation and communications, and if so, whether their laws allow for communications outside the presence of parties or their representatives (*ex parte* communications); or
 - (b) indirect judicial cooperation and communication through –
 - i. a competent authority [central authority] [; or
 - ii. the parties to the proceedings].

[Contracting States should, to the extent practicable, allow for direct judicial cooperation and communication. Nevertheless, the preferences of Contracting States shall be respected. Contracting States may amend their notification to the Ministry of Foreign Affairs of the Netherlands at any time.]

3. A Contracting State that allows for direct judicial communications may also choose one or more methods of indirect judicial communication to facilitate such communications.
4. [Contracting States that have not notified the Ministry of Foreign Affairs of the Netherlands that they allow for direct judicial communication shall choose [one or more of the following persons or bodies] to act on instructions from the court to facilitate indirect judicial cooperation and communication –

- (a) a [competent authority] [central authority]; or
- (b) the parties to the proceedings].

Such persons or bodies shall comply with all instructions from the court on whose behalf they are acting and shall deliver all communications sent by or directed to such court without delay.]

5. In implementing the cooperation and communication set out in this article, the courts may, whether directly or indirectly, communicate with, or request information from each other for the purposes of [determining the better forum under Article [10]], provided that such communication respects the procedural rights of the parties to the proceedings, and the confidentiality of information under the respective applicable domestic laws.]

[Note: Further consideration will need to be given to Article 15 including concerns that were raised regarding the notion of persons or bodies acting on instructions of the court in paragraph (4) and respecting State sovereignty in paragraph (5).]

ANNEX II

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.

