CCBE response to the HCCH 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?

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?

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)?

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).

Assuming that the geographical scope of application of the draft convention will be similar to that of the Convention on Choice of Court Agreements (2005) and of the Convention on the Recognition and Enforcement of Foreign Judgments (2019), particularly in relation to EU legal instruments such as Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter “Brussels Ia” or “Brussels Regulation”), the draft convention will only have relevance and added value for EU Member States in situations involving third States that are contracting parties.

From a practical perspective, this would be of greatest importance in relations between the EU Member States and the UK, as well as the US. However, the ratification by the United States of the Convention on Choice of Court Agreements (2005) and of the Convention on the Recognition and Enforcement of Foreign Judgments (2019) remains outstanding. Neither can be expected under the current political administration. Against this background, work on the new draft convention should indeed be pursued. Political and diplomatic efforts, however, should primarily be directed towards achieving broader acceptance of the two conventions that already exist.

Furthermore, the CCBE would like to highlight that the additional requirement set out in Article 1(2) that the defendants in the proceedings in a court of a Contracting State must be habitually resident in another Contracting State might be impractical. On the one hand, it narrows the scope of application quite significantly. On the other hand, it creates possible disputes over the definition of "habitual residence", in particular, with regard to legal entities. See, e.g., the many different opinions on the concept of "Center of Main Interest" (COMI) in the context of the European Insolvency Regulation. Should this requirement of application be maintained, the list in Article 3(2) should also be kept in the final draft to prevent potential difficulties in determining habitual residence.

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 "parallel proceedings" appears to be appropriate if the terms "the same parties" and "the same subject" are construed in accordance with, or similar to Article 29 of the Brussels Regulation, meaning, e.g., that a claim for payment, launched by A (plaintiff) against B (defendant), and a claim which is launched by B against A, which is aimed a declaratory judgment stating that B does not owe A the said amount, would constitute "the same subject". As regards the definition of "related actions" it might be useful to also refer to the text of the Brussels Regulation, in particular, Article 30, and the respective jurisprudence of the European Court of Justice (ECJ).

Question 3 on when a court is deemed to be seised
What are your views on Article 4?

Question 4 on Article 5 obligations
What are your views on Article 5?

As previously noted, the convention would only be relevant for EU Member States in their relation to third States that are contracting States to the convention. Article 5 of the draft sets out criteria that are similar to those in Article 33 of Brussels Ia, which is applicable when parallel proceedings occur between an EU Member State and a third State:

- a judgment capable of recognition (Article 5(2) of the draft) is similar to Article 33(3) of Brussels Ia),
- to render a judgment within a reasonable time (Article 5(3) of the draft is similar to Article 33(2)(b) of Brussels Ia).

Therefore, from an EU perspective, the criteria in the draft being similar to those in Brussels Ia, the applicability of the convention between EU Member States and third contracting States would not make a significant difference, except that third contracting States would also be bound by the convention. This could potentially facilitate the resolution of parallel proceedings between EU Member States and third contracting States, subject to the actual geographical scope of application of the future convention. This, in turn, raises the question of whether a convention on parallel proceedings is needed from an EU perspective (see above “Scope of application”).

However, the CCBE wishes to flag that, in the international context of a future HCCH Convention, the obligation in Article 5(2), appears to be probably overly far-reaching if dismissal is based on the mere "capability" of recognition and enforcement of the other judgment. In practice, it can sometimes be difficult to predict whether even a final and unappealable judgment will be recognised and enforced in another country.

In particular, Article 5(2) links the dismissal of proceedings to the situation in which 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. In order to limit margins of interpretative discretion, it would appear appropriate to reformulate this provision so as to present these scenarios as alternatives rather than cumulative conditions, i.e. by referring to “a judgment capable of recognition or, where applicable, of enforcement in that Contracting State”.

More generally, several provisions of the draft convention refer to situations in which a court may stay or terminate proceedings, including Articles 7(3), 8(1), 9(3) and (4), 12(1)(b) and 13(1)(b). In the interest of coherence and legal certainty, it could be made more apparent that the court’s power to terminate proceedings under these provisions is subject to the conditions laid down in Article 5(2).

It would therefore appear more appropriate to formulate the closing part of these provisions as follows: “Any other court shall stay or dismiss adjudication of the dispute where the conditions laid down in Article 5(2) are met. This would ensure that the requirements of Article 5(2) are not overlooked.

Question 5 on priority jurisdiction / connection
What are your views on Articles 6 – 8 including how they will work in practice?

Article 6 appears to be appropriate. It should be reconciled, however, with the exclusion of residential leases of immovable property (tenancies) according to Article 5(3) of the 2019 Judgments Convention.

Article 7(1) last sentence provides only for suspension. If one compares this with the provision in Article 31(3) of the Brussels Regulation one might want to consider dismissal, instead of mere suspension. The requirement in Article 8(1)(a) that one or more of the other courts has or have such jurisdiction/connection might be problematic to assess before that other court has rendered its decision on its jurisdiction/connection.

Question 6 on Article 8(2) jurisdiction / connection requirements
6.1 What are your views on the ‘jurisdiction / connection’ list in Article 8(2)?

The list of jurisdiction/connection requirements in Article 8(2) of the draft is similar (however, not identical) to the connecting factors in Articles 4 and 7 in Brussels Ia.

Article 8(2)(d) of the draft is similar to Article 7(1)(a) of Brussels Ia with the place of performance of a contractual obligation as a connecting factor. However, this factor is subsidiary in Brussels Ia. Indeed, it proved to be difficult in practice. The Court of Justice of the European Union (hereinafter “CJEU” or “CJEC”) had to specify what to do in case of several actions concerning a contractual obligation (CJEC 15 January 1987, case 266/85), what exactly is the “place of performance” (CJEC 6 October 1976, case 12-76), the legal effect of the agreement of the parties on the place of performance (CJEC 20 February 1997, case 106/95), how to determine the place of performance of a contractual obligation “not to do something” (CJEC 19 February 2002, case 256/00). In order to address this difficulty, Article 7(1)(b) of Brussels Ia provides more specific connecting factors for contracts concerning the sale of goods and the provision of services, respectively the place of delivery of the goods and the place of provision of services. The draft text

does not provide for this rule. Some of the issues raised by the place of performance seem to be anticipated in the draft through Article 8 (2) (d) points (i) and (ii). It remains to be seen whether these precisions will be sufficient to make the application of Article 8(2)(d) convenient in practice.

Article 8(2)(g) of the draft is also similar to Article 7(2) of Brussels Ia. Article 7(2) of Brussels Ia states that the connecting factor is the place where the harmful event occurred or may occur, which is understood as the place where the damage occurred and the place of the event giving rise to it, thus resulting in an option for the plaintiff (CJEC 30 November 1976, case 21-76). Similarly, Article 8(2)(g) of the draft refers to the place of the act or the place of the harm as connecting factors but adds further criteria: conduct specifically directed toward the State where the harm was suffered (ii), a purposeful engagement of the defendant with the market (iii). These criteria could potentially be very well adapted to complex cases of torts where the harm is suffered in several States. Case law on Brussels Ia showed the need to adapt the connecting factors to such situations, especially to acts committed online. The CJEU often relies on the method of accessibility and the method of focalisation depending on the right that was violated. It should be noted that a significant part of this case law on Brussels Ia concerns cases of violations of privacy and intellectual property, which shall be excluded from the scope of the convention (Article 2(1)(k), (l) and (m) of the draft. Therefore, the criteria set out in Article 8(2)(g)(ii) and (iii) should be kept in the final draft to prevent difficulties in determining the place of harm under the convention.

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?

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

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 regards Article 9(5), point (a), it would appear more appropriate to link the resumption of the proceedings to a short limitation period for the party concerned (e.g.: 30 days), running from the notification of the "decision of the court first seised", rather than from the date of that decision itself.

This would, on the one hand, avoid any reference to a "reasonable time" and, on the other hand, prevent the lodging of the "first defence on the merits" from operating as a preclusive barrier, since the provision could otherwise be used for dilatory purposes.

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

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

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)?

Cross-border cases involving UK and EU-based parties alleging civil fraud have given rise to parallel proceedings even if many of the parallel proceedings are interim measures proceedings (freezing orders, anti-suit injunctions etc.) rather than pure parallel proceedings between two courts asserting jurisdiction over the main dispute. The factors listed in Article 10 of the draft text could potentially help address such situations. However, since these disputes often arise in English-speaking jurisdictions, there may be a question as to whether the HCCH should instead incorporate the principle of forum non conveniens rather than lis pendens as the point of departure. At present, the draft appears to adopt lis pendens in principle, but subject to such wide exceptions that, in substance, its practical application seems to reflect forum non conveniens.

Moreover, similar consideration already provided under Question 4 above should apply to Article 10(1)(f), which currently refers to “the likelihood of recognition and, where applicable, enforcement” of any resulting judgment given in the Contracting State of any other seised court.

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

Indeed, the convention provides for a case-by-case approach through the determination of the more appropriate court: once the jurisdiction of the court first seised is established, this court must proceed to a second examination and evaluate whether there is a more appropriate court (Article 9(1)). The court must consider numerous factors listed in Article 10, which could delay the start of proceedings and pose practical difficulties for judges. These include, for instance, determining the stage of the proceedings before each court seised and any applicable limitation or prescription periods (Article 10(d)), the likelihood that one court may provide a complete or significantly more complete resolution as a whole (Article 10(e)).

However, among the factors to be taken into particular consideration when making a determination pursuant to Article 9, Article 10(1) does not include any reference to the existence of choice of court agreements between the parties, which are instead expressly taken into account in the context of related actions (cf. Article 11(2)(c)). This absence may be questioned, given the central role that party autonomy traditionally plays in matters of international jurisdiction.

Chapter IV of the draft provides rules on the cooperation and communication between courts, which may facilitate the application of Article 10. Nevertheless, it remains to be seen whether courts would face greater difficulty in resolving parallel proceedings as they have done so far, or under Article 10. Indeed, it remains to be seen whether a bright line lis pendens rule and a list of factors to take into consideration such as the one in Article 10 are adapted to the international context.

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

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 draft text appears to be, at least in some aspects overly complex. The draft text might want to consider more simple solutions such as the provisions of Articles 29 - 34 of the Brussels Regulation.

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 rules differ between the draft text and Brussels Ia when it comes to related actions. Chapter III of the draft provides that related actions may be adjudicated separately, with one court handling part of the related actions and another court handling another, whereas Brussels Ia does not allow for such separation. Therefore, applying the convention instead of Brussels Ia could make a significant difference for EU Member States in their relation to third contracting States.

The factors to take into consideration in determining the more appropriate court for the resolution of the entirety or part of the related actions under the convention (Article 11(2) of the draft) are somewhat similar to the criteria laid down in Article 34 of Brussels Ia, particularly the possibility of delay and the likelihood of recognition of the judgment. However, similar concerns to those noted in the context of parallel proceedings may arise for other factors. Therefore, it remains to be seen whether courts would face greater difficulty in resolving related actions as they have done so far, or under Chapter III of the convention. Indeed, it remains to be seen whether the separate adjudication of related actions is suitable for the international context and would prove effective in practice while yielding desirable outcomes.

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?

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

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?

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.

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

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?

Question 14 - comments

What other comments, if any, do you have?

The CCBE would like to stress that the criteria of a future HCCH Convention should be compatible, and aligned to the extent possible, with the criteria in the Brussels Regulation. Ensuring such compatibility and alignment is particularly important for practical application. While certain similarities between the criteria in the draft text and those in the Brussels Regulation have been noted, substantive differences remain, potentially leading to overcomplex legal questions and interpretation issues. Work on the new draft convention should be pursued to ensure consistency and coherence with the Brussels Regulation.