Questions

Consultation on the draft text of a possible convention on parallel proceedings and related actions

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Question 1 on the scope of the Draft Text

1.1 What are your views on the scope of the Draft Text?

1. Article 1(1) of the Draft Text is generally acceptable and matches the approach of the 2019 Hague Judgments Convention (the "**Judgments Convention**") and the 2005 Choice of Court Convention (the "**2005 Convention**"). That being said, several issues may require further discussion in terms of scope:

    (a) whether "*related actions*" (currently placed in square brackets) should be retained as a matter falling within the scope of the future convention (the "**Convention**");

    (b) whether Contracting States should be allowed to declare that the Convention will not apply to cases where a parallel proceeding or a related action abroad is manifestly incapable of resulting in a judgment that can be recognized and, where applicable, enforced in a Contracting State; and

    (c) whether Article 1(3) on the cut-off date for related actions is necessary in its current form and, if so, whether it is sufficiently precise.

2. Below, we elaborate on these issues in turn.

Inclusion of "related actions"

3. We agree that, consistent with the Council on General Affairs and Policy (CGAP) mandate to address "*concurrent proceedings*" (a notion which is broader than "*parallel proceedings*"), the Draft Text should cover "*related actions*." Related actions must be understood as proceedings that do not meet the traditional requirements of *lis pendens* but which, because of a factual or legal overlap, would benefit from being heard in a single forum in full or in part.

4. We also believe that the category of "*related actions*" may have greater utility as a matter of practice if the Convention is put in motion. The reason is that "*parallel proceedings*" (as currently defined in Article 3 and as understood in domestic systems for *lis pendens* purposes) are relatively rare. As explained in response to Question 2 below, the application of the Convention to "*parallel proceedings*" may also generate practical hurdles because domestic courts of at least some nations (including Russia) may struggle with, and exhibit conservative attitudes towards, the application of the "*same parties*" and "*same subject matter*" test for "*parallel proceedings*" (by, for example, applying a strict triple identity test which is unlikely to be satisfied in most practical scenarios).

5. Litigants may also take advantage of these difficulties by manipulating the manner in which they frame their prayer for relief or the cause of action upon which they rely in order to avoid the characterization of their case as a "*parallel proceeding.*" In those cases, Chapter III and the category of "*related actions*" can be expected to do substantial heavy lifting in terms of real-world operation of the Convention. If, on the other hand, the Convention is restricted solely to "*parallel proceedings*," the

Convention is likely to remain a niche instrument with a limited field of practical application. Moreover, absent rules on "*related actions*," parties will have stronger incentives to evade the Convention's "*parallel proceedings*" trigger through strategic pleading (including minor adjustments to the relief sought or the legal characterization), thereby further narrowing the Convention's practical reach.

6. Nonetheless, the current category of "*related actions*" – as understood in Article 3 and as regulated in Chapter III – is also a source of concern due to its breadth (as explained in our response to Question 10 below). We also expect that civil law courts will face difficulties when applying Article 11 to determine whether related actions must proceed in a single forum due to their limited experience with discretionary factors akin to *forum non conveniens*. While these concerns are partly unavoidable due to the nature of related actions and do not outweigh the benefits of extending the Convention to related actions, they could be mitigated by, *inter alia*, simplifying the definition of "*related actions*" and the rules of Chapter III, as addressed below in our responses to Questions 2, 9 and 10. Alternatively, Article 3(1)(b) could state explicitly that all three (or at least two factors) should be present simultaneously for the Convention to apply – to eliminate the possibility (potentially arising from Article 3(1)(b)(iii)) that cases are connected only by a common issue of law (which could result in a wide-ranging application of the Convention even where the parties and underlying facts are distinct).[1]

7. Therefore, we believe that the reference to "*related actions*" in Article 1(1) should be retained.

Judgments manifestly incapable of being recognized in a Contracting State

8. We understand from the Draft Text that, unlike many domestic laws and the Brussels I bis Regulation, the Convention is currently intended to apply to parallel proceedings and related actions (jointly, "**Concurrent Proceedings**") even where they are manifestly incapable of resulting in a judgment that can be recognized and enforced in the Contracting State at issue.

9. This approach has advantages:

   (a) in particular, the question of parallel proceedings and enforcement, while interrelated due to reasons of practical efficiency, are legally distinct. For this reason, it is, *inter alia*, possible that the question of enforcement would be adjudicated by a different court (or otherwise subject to a distinct venue) even under domestic laws of a particular jurisdiction;

   (b) in addition, it may be difficult for a court to assess the prospects of enforcement at the very initial stage of deciding whether to suspend proceedings. This question may also involve the need to apply domestic law

[1] If the current language of Article 3(1)(b) already assumes – as would be reasonable – that all three factors must be present for the definition of "*related actions*" to be triggered, we propose to make this explicit by, for example, using the word "*simultaneously*" before "*involve*" in Article 3(1)(b).

if no treaty governs this question with regard to specific Contracting States. As a result, if the Convention is conditioned upon enforceability of the ultimate judgment, this may reduce the room for its practical application and effectively make an international instrument subject to non-uniform rules of local law;

(c) in any event, as the Convention is largely complementary to the Judgments Convention, one can expect the Contracting States to overlap. This should eliminate the need for enforceability analysis in most scenarios as enforcement would be required by the Judgments Convention; and

(d) that being said, extreme cases (where it is, for example, obvious that a Contracting State will have no basis whatsoever to recognize a foreign judgment and will need to proceed with its own case to avoid a denial of justice or a breach of public policy, thus rendering the suspension devoid of any rational basis) can be addressed by reference to the Convention's safeguards in Articles 19–21 of the Draft Text.

10. We also welcome the fact that, although enforceability is not framed as a scope requirement of the Convention, enforceability plays a role in the application of the better forum factors in Articles 10(f) and 11(2)(g). That being said, we note that this approach may be problematic for Contracting States that are used to analyzing enforceability *when deciding on whether a foreign proceeding engages the rules on concurrent proceedings in the first place* and not merely when *determining the most convenient forum*. These concerns may be prompted by two scenarios:

(a) first, in case of parallel proceedings subject to Chapter II, enforceability analysis under Article 10(f) is, at present, only engaged if several courts have the requisite connection under Article 8. In cases where only one court has the requisite connection under Article 8, other courts (which may be hearing the dispute under domestic-law grounds for direct jurisdiction) are obligated to suspend their proceedings (Article 5(1)) – only to then resume them and issue a competing judgment if the parallel proceedings culminate in a judgment that is not capable of being recognized within their territory (which follows from an *a contrario* interpretation of Article 5(2)). In that scenario, it is difficult to see the policy rationale for a suspension under Article 5(1) which could result in a waste of judicial resources and incentivize dilatory tactics; and

(b) second, where several courts have the requisite connection under Article 8 in case of parallel proceedings or where the case concerns related actions (and thus enforceability can be assessed as part of the "*most appropriate court*" analysis), the current language of Articles 10(f) and 11(2)(g) may be read as requiring courts to analyze enforceability *on an equal footing* with each of the factors listed in Articles 10 and 11. In other words, it can be argued that a court may not refuse an application for suspension *on the sole basis* that the resultant judgment will not be capable of being recognized in its

jurisdiction without going through the other factors. If that reading is adopted, this may unnecessarily complicate the proceedings and result in unwanted litigation expenses (for example, by forcing litigants to plead each of the Article 10 factors even where it is clear that the judgment in the parallel proceeding will be unenforceable in their jurisdiction).

11. Under the current language of the Draft Text, these scenarios do not appear to be avoidable without applying the safeguards set out in Articles 19–22 of the Convention. However, Contracting States' systematic reliance on safeguards for this purpose could be undesirable for a predictable application of the Convention. As the problem is identifiable in advance and is fairly generalizable, the better solution could be to allow Contracting States to declare (similar to Article 22 of the Draft Text) that they would not apply to Concurrent Proceedings that are clearly incapable of resulting in a judgment that the Contracting State of the forum will recognize (the "**Enforceability Caveat**"). This may have several advantages:

    (a) the Enforceability Caveat can make the Convention appear more aligned with legal rules to which Contracting States are accustomed to. We recall in this regard that this would make the Convention more closely aligned with regional and domestic rules on *lis pendens* which often operate subject to an *ex ante* assessment of whether a judgment rendered by the other court is likely to be capable of recognition and, where applicable, enforcement.[2] Even in the absence of an explicit enforceability requirement, in some jurisdictions courts tend to require this in practice before applying the rules on *lis pendens*.[3] In those jurisdictions, it can therefore be expected that if the Enforceability Caveat is omitted from the Convention, it will be imported through the backdoor of the Convention's safeguards (including denial of justice) – which may have the undesirable effect of watering down the exceptional nature of the Convention's escape clauses;[4]

    (b) in addition, the Enforceability Caveat could enable Contracting States to accede to the Convention even where they are not yet party to the Judgments Convention or if they declared that they would not apply the Judgments Convention to certain states (pursuant to Article 29 of the Judgments Convention); and

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2 *See, e.g.,* Brussels I bis, Articles 33(1)(a) and 34(1)(b); Swiss Private International Law Act, Article 9(1).

3 For example, Article 252(1) of the Russian Commercial Procedure Code does not, on its face, contain the Enforceability Caveat. However, in practice, Russian courts consider enforceability when deciding on whether *lis pendens* applies. *See, e.g.*, Ruling of the Arbitrazh Court for the Moscow Circuit dated 30 June 2020 No. Ф05-5207/2020 ("*In refusing to grant the application, the court proceeded from the fact that there is no international treaty between the Russian Federation and the Pridnestrovian Moldavian Republic providing for mutual recognition of court judgments, and that the Pridnestrovian Moldavian Republic whose court issued the judicial act is not a party to the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters dated 22 January 1993*").

4 Risks of denial of justice are invoked by Russian courts, in the absence of a more explicit statutory basis, not to dismiss a claim which is identical to a claim already considered by a foreign court if the foreign decision is not recognized in Russia (*see, e.g.*, Ruling of the Arbitrazh Court for the Moscow Circuit dated 10 February 2022 No. Ф05-35725/2021).

(c) therefore, incorporating an Enforceability Caveat into the Draft Text (as an optional declaration) could (i) enhance the prospects of the Convention becoming a genuinely global instrument, rather than one effectively confined to closely integrated regional communities which share the necessary degree of trust in each other's legal systems to refrain from discussing enforceability at the stage of deciding whether the Convention applies (such as the EU, the UK and neighboring countries) and (ii) align the Convention's wording more closely with the legal usage in domestic legal systems, thereby facilitating its implementation at the domestic level.

12. That being said, the Enforceability Caveat in the Convention (if adopted) could be framed more narrowly (and therefore applied more predictably) than the language found in Article 33(1)(a) of Brussels I bis. One option would be to provide that the Convention does not apply to Concurrent Proceedings only where they are manifestly incapable, *irrespective of their outcome on the merits*, of resulting in a judgment that would be capable of recognition in the Contracting State pursuant to a treaty, domestic law or any other basis. This approach would (i) preserve the application of the Convention as the default by limiting the carve-out to clear (manifest) cases of non-recognizability, (ii) discourage parties – especially in Contracting States that are less familiar with the Brussels I bis terminology – from prematurely raising fact-specific issues (such as prospective public policy concerns), and (iii) be in line with the Draft Text's treatment of public policy in Article 21, which likewise turns on a "*manifest*" incompatibility.

Cut-off date for related actions (Article 1(3))

13. Article 1(3) of the Draft Text may require discussion for several reasons:

(a) first, it is not currently obvious why Article 1(3) only applies to related actions under Chapter III while being framed as a general provision of Chapter I. We understand that, unlike Chapter III, Chapter II (and, specifically, Article 5(2)) in fact does address the consequences of a decision being rendered in the parallel proceeding. However, from a structural viewpoint, one could expect a provision like Article 1(3) to be part of Chapter III if it is relevant only to related actions.

That being said, in our response to Question 5 below we express a concern that Article 5(2) may not belong to the Convention in terms of its scope (because it pertains to *res judicata* and not *lis pendens* and because it may be overly rigid). If Article 5(2) is removed, Article 1(3) could be retained as a general provision applying to both Chapter II and Chapter III. Alternatively, it may be best to specify the cut-off date for "*parallel proceedings*" and for "*related actions*" uniformly when setting out the definition of these terms in Article 3 (see our response to Question 2 below).

On the other hand, if Article 5(2) is retained in Chapter II for parallel proceedings, we query whether Chapter III should have a mirror provision

addressing the consequences of a decision on the merits being rendered in a related action. A stipulation of that kind could be made at least in broad terms or by reference to domestic law. Even if not strictly necessary, it could facilitate the adoption of the Convention by making its application more straightforward to generalist judges and litigants;

(b) second, Article 1(3) introduces a novel term "*decision on the merits*." One may query (i) whether this term is to be construed as a "*judgment*" within the meaning of the Judgments Convention, and (ii) whether it is meant to exclude appeals or further judicial review. In a significant number of jurisdictions including Russia, a "*decision on the merits*" is rendered by the court of first instance but neither has legal force nor is capable of being recognized or enforced abroad pending appeals. The ordinary meaning of Article 1(3) of the Draft Text would suggest that the cut-off date for related actions in Russia would be a decision of the court of first instance in this scenario – a potentially counterintuitive outcome.

In addition, the current definition of "*related actions*" (or "*parallel proceedings*") in Article 3 of the Draft Text does not seem to be limited to proceedings capable of resulting in a decision on the merits (as opposed to other types of proceedings such as interim relief or proceedings on other matters including *exequatur* applications).[5] For that reason, the reference to a "*decision on the merits*" in Article 1(3) appears to be incongruent with Article 3 (see our response to Question 2 below on this definitional issue for greater detail); and

(c) third, Article 1(3) states that Chapter III applies where "*<u>none</u> of the courts seized of related actions has issued a decision on the merits*." As follows from Article 11 of the Draft Text, there may be two or more courts seized with related actions. Depending on the degree of overlap between the related actions, the fact that <u>one</u> court has issued a decision should not necessarily prevent the courts still seized with the related actions from deciding that the remainder of those actions should proceed – in full or in part – before one of those courts (in accordance with Article 11). Considerations of judicial economy and the desirability of avoiding irreconcilable judgments may apply equally in that scenario.

This consideration may also speak in favor of removing Article 1(3) in its totality and instead discussing the cut-off time for "*related actions*" in the

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[5] Because Russian domestic rules on *lis pendens* are broadly formulated, there have been isolated cases where Russian courts purportedly applied rules on *lis pendens* to *exequatur* applications involving a foreign arbitral award (*see, e.g.*, Ruling of the Arbitrazh Court for the Volga-Vyatka Circuit dated 21 August 2019 N Ф01-3762/2019 in case No. А82-5172/2019). In the absence of further guidance in the Draft Text of which proceedings are meant to fall under the *lis pendens* regime, this problem may similarly become relevant to the application of the Convention.

definition of this term in Article 3 (potentially with a mirrored solution for "*parallel proceedings*").

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?

14. In general, we believe that the subject matter scope of the Draft Text does cover matters for which rules on parallel proceedings and related actions would be beneficial.

15. However, the precise type of Concurrent Proceedings that fall under the Convention may require clarification:

(a) currently, no guidance is provided on this issue except Article 1(3) which may be read as suggesting that the Convention only applies to merits proceedings. But this does not appear to be explicitly stated as a general principle; and

(b) in this regard, it could be useful to (i) borrow the definition of a "*judgment*" from the Judgments Convention and (ii) state that related actions and parallel proceedings must relate to a prospective judgment. Proceedings that do not result in a "*judgment*" – including proceedings for interim relief – should not fall under the Convention. One reason is that interim relief is often sought concurrently in several jurisdictions, making attempted coordination of those proceedings through approaches styled after *lis pendens* or *forum non conveniens* incompatible with legitimate litigation practice. Another reason is that the usual problems with Concurrent Proceedings (which the Convention is meant to address) do not ordinarily arise with interim relief. Finally, interim relief is often to be issued as a matter of urgency, making interim proceedings incompatible with the rules of the Draft Text that are based on a rather sophisticated assessment of the case and communication with foreign court(s). Similar considerations apply to other non-merits proceedings, including *exequatur* applications which may legitimately be made simultaneously in several jurisdictions.

16. In addition, it may be critical for the Convention to address anti-suit injunctions in a dedicated Article. As further explained under Question 1.3 below, anti-suit injunctions effectively offer a competing instrument for litigants and states to resolve the problem of Concurrent Proceedings. If this practice is overlooked by the Convention and the Contracting States are allowed to continue what has become known as a "*battle of anti-suit injunctions*" even on matters falling within the Convention's scope, this can significantly complicate its operation and run contrary to its object and purpose. For that reason, we propose to (i) define anti-suit injunctions in the Convention, and (ii) restrict their application where doing so would be incompatible with the priority among the fora set out in the Convention (or even more broadly on matters covered by the Convention).

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)?

17. We broadly agree with Article 2. However, we believe the approach of Article 2 should match the Judgments Convention except where absolutely necessary. In light of this, below, we comment on (i) the exclusion of insolvency matters, (ii) arbitration, (iii) terrorism-victims carve-out (as proposed in square brackets in the Draft Text), (iv) interim measures, (vi) anti-suit injunctions, and (v) exclusive choice of court agreements.

Insolvency and analogous matters (Article 2(1)(e))

18. We propose to delete the bracketed carve-in in Article 2(1)(e) (explaining that the insolvency exception is not meant to impact proceedings which may arise during an insolvency but are based on ordinary civil and commercial laws) and place the clarification in the explanatory report (the "**Explanatory Report**"). This would be consistent with the drafting model used for the 2005 Choice of Court Convention and the 2019 Judgments Convention. Retaining the bracketed language would also be undesirable for three further reasons.

19. First, the bracketed carve-in invites *a contrario* argument across the Hague Conference on Private International Law (HCCH) instruments: the bracketed sentence in Article 2(1)(e) adopts the same substantive distinction as the Judgments Convention[6] and the 2005 Convention:[7] In those instruments, only proceedings directly concerning insolvency are excluded (estate-administration questions such as the ranking of creditors), whereas actions based on general civil/commercial law (including debt recovery) remain within scope even if brought by the person administering the bankrupt estate. Yet the 2005 Convention and the Judgments Convention retained a simple exclusion in Article 2(2)(e), leaving this clarification to the respective explanatory reports. If the Convention on parallel proceedings incorporates that clarification into the operative text, the divergence may be argued to be intentional – undermining coherent, system-wide interpretation within the HCCH acquis. While clarifications in the Explanatory Report may partly address the issue, this solution is not ideal as it will prompt litigation on this point and may not be adopted uniformly. This is particularly so as some courts may dismiss arguments based on the Explanatory Report on the basis of, for example, Article 31 of the Vienna Convention on the Law of Treaties (the "**VCLT**") which generally requires an interpretation limited to the four corners of the Convention.

6 Garcimartín/Saumier Explanatory Report on the 2019 Judgments Convention, paras. 51–53.

7 Hartley/Dogauchi Explanatory Report on the 2005 Choice of Court Convention, paras. 56–57.

20. Second, the bracketed wording is potentially system-dependent and underinclusive:

    (a) in particular, the wording "*brought by or against a person acting as insolvency administrator*" does not map cleanly onto procedural models where claims of this type are to be brought against the estate (or the debtor acting through a representative) rather than "*against the administrator,*" or where different actors are used; and

    (b) in addition, we note that the exclusion itself in sub-paragraph (e) covers, apart from "*insolvency,*" also "*composition*" and "*resolution of financial institutions*" (and "*analogous matters*"), but the carve-in is keyed only to an "*insolvency administrator*" in "*insolvency proceedings.*" This might create an internal mismatch and invite threshold disputes about whether the relevant background process is an "*insolvency proceeding*" for purposes of the carve-in (notably where composition/resolution regimes are not characterized domestically as insolvency proceedings). It also creates an *expressio unius* risk: parties may argue that the carve-in was intentionally not extended to composition/resolution/analogous matters.

21. Third, there is an overlap with Article 2(2), which already provides a general, treaty-wide mechanism for excluded matters arising incidentally as a preliminary question. The bracketed carve-in introduces a separate insolvency-specific scope filter, which may generate confusion.

22. For these reasons, we believe that the bracketed carve-in should be deleted and any intended clarification addressed in the Explanatory Report, consistent with the approach taken in the 2005 Convention and the Judgments Convention.

Arbitration (Article 2(3))

23. The wording of Article 2(3) ("*This Convention shall not apply to arbitration and related proceedings*") tracks the 2019 Judgments Convention verbatim and is, as a starting point, appropriate.[8]

    That said, the formulation of Article 2(3) may warrant targeted clarification in light of this instrument's specific subject matter (parallel proceedings). In particular, the term "[r]*elated proceedings*" risks ambiguity in the court–arbitration setting: it may be argued to exclude ordinary merits litigation in court merely because it is factually or contractually connected to an arbitration (or because an arbitration agreement is invoked as a defence). The Explanatory Report to Article 2(3) may need to clarify that "*related proceedings*" is confined to court proceedings whose object is arbitration-

[8] *Lis pendens* involving arbitration is a distinct topic and should remain outside the Convention: the *lis pendens* problem is discussed separately in arbitration contexts, particularly in the ILA Final Report on Lis Pendens and Arbitration.

support or arbitration-supervision *(e.g.*, constitution of the tribunal; court assistance; set-aside/annulment; recognition/enforcement of awards).

Terrorism-victims carve-out (bracketed proposal in Article 2)

24. The bracketed proposal to introduce a general exclusion for "[m]*atters involving claims by or on behalf of victims of terrorism*" does not appear appropriate at the level of Article 2 since no comparable exclusion exists in the Judgments Convention. If it were introduced only in the Convention for the narrow purpose of parallel proceedings, this would create an avoidable divergence within the HCCH acquis despite the close relationship between the two instruments' subject matter.

25. If a specific Contracting State considers such an exclusion necessary for domestic policy reasons, it would be more coherent to address it through the Convention's declaration mechanism (Article 22 of the Draft Text) rather than as a baseline, Convention-wide subject-matter exclusion.

Interim/protective measures

26. As noted in our response to Question 1.2 above, we believe interim or protective measures should be carved out from the Convention.

27. However, rather than achieving this via an Article 2 exception (as currently suggested in the Draft Text in square brackets in Article 2), it could be preferable to exclude interim measures via Article 1 and the definitions in Article 3. In particular, "*parallel proceedings*" and "*related actions*" covered by the Convention (as referenced in Article 1) can be defined as only those proceedings that are capable of resulting in a "*judgment*" (by borrowing the definition from the Judgments Convention which includes the caveat on interim relief).

Anti-suit injunctions

28. The problem of anti-suit injunctions in our view cannot be overlooked by the Convention. Several solutions can be considered:

    (a) first, in Article 2, an express carve-out for proceedings whose principal object is to obtain an order restraining a party from commencing or continuing proceedings in another State (anti-suit injunctions or analogous anti-process relief). The Convention is designed to coordinate merits proceedings on civil or commercial claims, not to coordinate parallel applications that are directed at regulating (as between the parties) the conduct of foreign litigation. Treating a stand-alone anti-suit application as a "*parallel proceeding*" or "*related action*" risks circularity and procedural instability (*i.e.*, a further layer of concurrency triggered by attempts to manage concurrency). While anti-suit relief may be sought as an interim/protective measure, in some systems it may also be granted as final relief and/or rendered as a "*judgment*" in the

sense of the Judgments Convention.[9] For that reason, an interim-measures exclusion alone may not reliably exclude anti-suit proceedings;

(b) second, we believe it is critical for the Convention to address anti-suit relief on matters falling under the Convention's scope (in a distinct Article that could be inserted into Chapter I of the Convention). It is probably implicit in the Draft Text that Contracting States should not employ anti-suit injunctions to restrain proceedings pending before courts which, under the Convention, are considered to be the most appropriate forum to hear the case (as doing so would arguably be incompatible with their obligations under the Convention) or which are the only forum with the requisite connection under Article 8 of the Draft Text. However, anti-suit injunctions under domestic laws may be in alignment with the Draft Text where they are issued *in support* of the forum that enjoys priority under the Draft Text.

Further consideration of the issue is necessary – with explicit guidance to be given to domestic courts in both the Convention and the Explanatory Report. Several solutions are available: (i) the Convention may explicitly restrict anti-suit relief on matters governed by the Convention (on the basis that the Convention offers a uniform international solution to the problem of concurrence that should not be tampered with by competing domestic-law machinery), or, at least, (ii) the Convention can state that anti-suit injunctions may not be issued *where doing so would be incompatible with the Convention* (by, for example, attempting to restrain a party from proceeding with a claim before a forum that is entitled to deference under the Convention).

29. The proposed exclusion of anti-suit injunctions in Article 2 and the dedicated article on anti-suit injunctions (as proposed above) are not necessarily mutually exclusive. They are meant to address two different situations: (i) the exclusion in Article 2 would operate in cases of *concurrent anti-suit proceedings* (*i.e.,* where a party has lodged several anti-suit applications before two or more fora – especially where the underlying merits claim does not fall within the scope of the Convention), and (ii) the dedicated provision on anti-suit relief would apply where a party attempts to request anti-suit relief to restrain a party from continuing one of the concurrent merits proceedings which fall under the Convention. In other words, (i) the dedicated provision would apply even if anti-suit relief is sought in one forum, while (ii) the

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9 If the Working Group agrees to carve out anti-suit relief, an express exclusion in Article 2 may be useful because even if "*parallel proceedings*" / "*related actions*" are defined as proceedings on the merits capable of resulting in a "*judgment*" on the civil or commercial claim (as proposed under Question 1 above), some legal systems may characterize anti-suit relief as a merits decision. *See, e.g., OAO Gazprom v. The Republic of Lithuania (I)*, SCC Case No. V125/2011, Judgment of the Court of Justice of the European Union, Case C-536/13 (anti-suit injunction granted as "*specific performance*" of an arbitration agreement in the form of a merits award). Outside of arbitration (which is outside the scope of the Convention), similar results may be reached, *e.g.*, for cases where an anti-suit injunction is meant to enforce a choice-of-court agreement or an agreement with derogatory effects.

exclusion is meant to address cases where a party lodges two or more legitimate but identical anti-suit applications in several fora.

30. It could also be useful to consider whether an optional declaration on anti-suit relief is desirable – by, for example, allowing Contracting States to retain their ability to use anti-suit relief in certain cases falling under the Convention. While one could question the policy wisdom of allowing this (at least on matters where anti-suit injunctions may clash heads-on with the solutions found in the Convention), this optional declaration may be unavoidable depending on the stance of Contracting States during the further negotiations.

Exclusive choice of court agreements

31. Introducing a general Article 2 exclusion for disputes involving exclusive choice-of-court agreements does not appear advisable. The Draft Text already manages the relationship with the 2005 Convention through operational rules. In particular, Article 7(2) expressly provides that the Article 7(1) priority rule does not apply to an exclusive choice-of-court agreement and then defines that term in the treaty text.

32. The consultation paper to the Draft Text (the "**Consultation Paper**") explains that an exclusion for disputes involving exclusive choice-of-court agreements would be intended to avoid overlap with the 2005 Convention, which "*covers exclusive choice of court agreements*" and is restricted to cases where the parties have chosen only the courts of one Contracting State and have not expressly provided otherwise.[10]

33. It is true that Article 6 of the 2005 Convention already provides for the obligation of a court not chosen to suspend proceedings pending a disposition from a court selected in an exclusive choice of court agreement – which makes it unnecessary to apply Chapter II of the Draft Text to such jurisdictional conflicts involving truly identical proceedings. However, the 2005 Convention does not offer rules for *related actions* where (i) one of the related actions is based on an exclusive choice of court agreement, (ii) the other related action does not fall under that exclusive choice of court agreement (because of contractual privity or a distinct subject matter), and (iii) coordination between the two is desirable to reduce the overall litigation cost and avoid irreconcilable judgments (which are the objectives of the Convention). Therefore, while Chapter II may not be directly relevant for this type of proceedings, Chapter III may well be relevant – without necessarily contradicting the 2005 Convention. There might also be cases where Chapter II is relevant, particularly if the requirements of "*same parties*" and "*same subject matter*" are interpreted liberally (such that one of the parallel proceedings falls under Chapter II but is not affected by the exclusive choice of court agreement).[11]

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10 The Consultation Paper, para. 35.

11 This is especially so as the 2005 Convention uses narrower terminology of "*cause of action" rather than "subject matter" as the threshold for identity of claims. See* Garcimartín/Saumier Explanatory Report on the 2019 Judgments Convention, para. 272: "*These expressions* [...] *are meant to exclude the*

34. A scope-level exclusion would therefore be a rather overinclusive tool. It would remove the Convention's related-action coordination mechanisms precisely in complex scenarios where an exclusive clause may be only part of the procedural picture (*e.g.*, additional parties/claims not cleanly captured by the clause). The Consultation Paper instead correctly flags that further consideration is needed as to where and how exclusive jurisdiction agreements (and related variants) should be addressed within the Draft Text – Article 7, Article 8(2), or the "*more appropriate court*" analysis.[12]

35. We believe that the better course is not an Article 2 exclusion but rather refining – through Articles 7, 8, and/or the Explanatory Report – the treatment of exclusive clauses so as to remain complementary to the 2005 Convention and to avoid gaps in the handling of Concurrent Proceedings (outside the realm of identical claims).

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.)

36. We understand that this question goes primarily to whether the application of the Convention should require that one or more of the defendants in the proceedings are habitually resident in a Contracting State per the bracketed language in Article 1(2) of the Draft Text (the "**Habitual Residence Requirement**").

37. We believe that there are arguments both in favor and against the Habitual Residence Requirement.

38. On the one hand, one could take the view that the Habitual Residence Requirement is unnecessary in this particular Convention:

    (a) the Convention's subject matter involves judicial cooperation between nations as well as the facilitation of transnational circulation of judgments – which are issues that do not depend on the domicile of the defendants. Application of the Convention should therefore depend on whether the courts facing Concurrent Proceedings are organs of the Contracting States. To the extent that any court seized with a Concurrent Proceeding is not a court of a Contracting State, the Convention should not apply with regard to the proceedings before that court (and, for example, courts of Contracting States should not be bound to suspend proceedings in favor of that court under the Convention);

    (b) notably, the application of domestic rules on *lis pendens* does not normally depend on the litigants' domicile as these are procedural rules rather than

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requirement that the two judgments involve exactly the same 'cause of action', as is required in the HCCH 2005 Choice of [Court] *Convention. That approach was considered too restrictive in this Convention given the variety of causes of action in different States. The key element is that the 'central or essential issue' must be the same in both judgments*." As a result, the 2005 Convention seems to leave room for residual application of the Draft Text at hand to matters not covered by the 2005 Convention.

12 The Consultation Paper, para. 36.

rules affecting substantive rights of private parties. In edge cases, the Habitual Residence Requirement will also result in difficult preliminary disputes on the habitual residence of one or more of the parties – potentially leading to a spending of unnecessary judicial resources contrary to the object and purpose of the Convention; and

(c) If the Habitual Residence Requirement were retained, it could also create perceived equity and legitimacy concerns where only some defendants are habitually resident in Contracting States while other parties (including the claimant) are habitually resident in non-Contracting States. In such scenarios, the Convention's procedural effects (notably suspension) may be perceived as imposing procedural externalities (delay, cost, leverage) on parties with no meaningful connection to Contracting States. It is unlikely that any straightforward justification for this externality can be articulated, at least in cases where the defendants neither share a common interest nor are bound by a contract (*e.g.*, in a pure tort scenario involving multiple but unrelated tortfeasors) as between each other or with the claimant. In difficult cases, judges would be expected to rely on the safeguards in Articles 19–21 of the Draft Text to address the perceived inequities of these scenarios. The issue could be avoided, however, if the Convention depended solely on which *courts* are seized with the Concurrent Proceedings – regardless of the habitual residence of the *parties* involved in those proceedings.

39. On the other hand, the Habitual Residence Requirement can be seen as a relevant fairness factor. In particular, when framed as an issue of scope, emphasis on the defendant's domicile could, in effect, operate as a rule of priority requiring deference to Article 8(2)(a) in comparison to other types of connections in Article 8(2) of the Draft Text (by ensuring that this connection is present before other factors can be discussed). That could be welcomed by the Contracting States if seen to be based on traditional jurisdictional practices (where the defendant's domicile is thought to be the primary connecting factor for the exercise of general jurisdiction). However, we note that a similar requirement is not found in the Judgments Convention and the 2005 Convention even though the Draft Text is an offspring of the same HCCH endeavor – which is why the need for its inclusion only into the Convention at hand is not presently manifest (and is not explained in the Consultation Paper).

40. In any event, the precise goals of the Habitual Residence Requirement (if it is retained) are currently rather obscure. They may benefit from further clarification in the Draft Text and the Explanatory Report:

(a) if the purpose is to ensure that the case is sufficiently international rather than confined to one jurisdiction, that could be welcome by at least some Contracting States (which is why Article 17 was inserted into the Judgments Convention). But this goal of Article 1(2) of the Draft Text is not obvious from its current language. For example, in that case, the necessary international component could be found in the fact that the claimant comes from another

Contracting State, but Article 1(2) only mentions defendants. In addition, it would not be obvious why Article 1(2) refers to Contracting States rather than different states (which would supply the necessary internationality to the case); and

(b) if, on the other hand, the goal is to ensure *fairness for the parties* (to make sure that the application of the Convention is foreseeable to defendants along the lines of Article 1 CISG), it is not clear why the emphasis is put on the defendant. The claimant's (not the defendant's) case will be subjected to delays as a result of the application of the Convention. Therefore, relevant fairness factors would seem to require analysis of whether the claimant (and not just the defendant) could foresee that its claim would be suspended by reference to the Convention.

41. In light of this, a compromise solution may be in order – for example, the Habitual Residence Requirement could be framed as an optional declaration rather than as a general scope condition. In any event, the language of the Habitual Residence Requirement would benefit from a rewording or a clarification.

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.

42. The practical usefulness of the Convention's definitions will depend on whether they enable parties and courts to (i) identify potentially duplicative cross-border litigation early, and (ii) trigger coordination mechanisms without extensive satellite litigation over categorization. On that metric, the current division between "*parallel proceedings*" and "*related actions*" seems to present a risk: it may elevate formal identity concepts (which translate poorly across systems and invite tactical pleading) over the more functional question of whether proceedings are sufficiently connected to justify coordination.

43. Below, we elaborate on (i) how parties and courts may use the definitions, (ii) potential ways to streamline or clarify the existing definitions and (iii) our thoughts on a potential broader model that disposes of the distinction between parallel proceedings and related actions.

How parties and courts are likely to use the definitions

44. In practice, parties will treat the definitions as strategic gateways. Where the consequences attached to "*parallel proceedings*" are more constraining than those attached to "*related actions*," parties can be expected to draft pleadings and structure parties/remedies to fall on the preferred side of the line (*e.g.*, adding affiliates, framing claims differently, seeking declaratory relief in one forum and coercive relief in another). This would appear to be a rational response to a regime that conditions procedural effects on threshold categories.

45. Courts, on the other hand, will often need to decide whether an action is a "*parallel proceeding*" or a "*related action*" early, based on incomplete records and under time pressure. That makes it important that the key terms be capable of autonomous and predictable interpretation, rather than inviting courts to import domestic doctrines or inviting overly nuanced litigation.

Potential ways to streamline and clarify the existing definitions

46. We expect that the main friction point will involve the "*parallel proceedings*" formulation in Article 3(1)(a) of the Draft Text (and especially the requirements of "*same parties*" and "*same subject matter*"), which we understand is broader than the strict triple identity test used in domestic systems for the purposes of *res judicata* or otherwise. This may lead to several issues:

    (a) the term "*same subject matter*" may be read as collapsing (or substituting for) two elements commonly treated separately in "*triple identity*" analysis, namely (i) identity of the object / relief sought, and (ii) identity of the cause of action (the grounds on which a claim is based).

    If the term "*same subject matter*" is interpreted differently across jurisdictions – some reading it as a two-prong test (parties + object), others as implicitly incorporating grounds as well – the Convention's threshold may fracture in application. A concrete illustration is the Russian Code of Commercial Procedure which frames the *lis pendens* rule in "*triple identity*" terms by referring to (i) the same persons, (ii) same "*subject matter*" (understood in Russia as the relief sought), and (iii) same "*grounds*" (*i.e.*, the facts relied upon).[13]

    Russian courts and practitioners may therefore either (i) be reluctant to treat identity of only parties and "*subject matter*" as sufficient where the grounds differ, or, conversely, (ii) mistakenly infer from the "*same subject matter*" language in the Draft Text that the Convention endorses a two-prong approach (requiring only identity of the relief sought and of the parties – regardless of the underlying facts).

    We understand that the "*subject matter*" language mirrors Article 7(1)(f) and Article 7(2) of the Judgments Convention and was meant to replace domestic triple identity tests with a uniform approach focused on the central issue in dispute.[14] However, because this intention is not obvious from the

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13 Arbitrazh (Commercial) Procedure Code, Article 252(1): "*An arbitrazh (commercial) court in the Russian Federation shall leave a claim without consideration under the rules of Chapter 17 of this Code if a case involving a dispute between the same parties, concerning the same subject matter and on the same grounds, is pending before a foreign court, provided that consideration of this case does not fall within the exclusive jurisdiction of an arbitrazh court in the Russian Federation in accordance with Articles 248 and 248.1 of this Code.*"

14 Garcimartín/Saumier Explanatory Report on the 2019 Judgments Convention, para. 272: "*These expressions* [...] *are meant to exclude the requirement that the two judgments involve exactly the same 'cause of action', as is required in the HCCH 2005 Choice of* [Court] *Convention. That approach was*

Convention's language, it could benefit from a clarification. Despite the risks of inviting an *a contrario* interpretation compared to the Judgments Convention, we believe it would be useful for the Convention to state, for the avoidance of doubt, that proceedings shall be deemed to have the same "*subject matter*" where they, for example, focus on the same central issue or a common nucleus of operative facts (regardless of relief sought). This further clarification may be in order particularly as the issue of identity is much more directly implicated by the Convention than the Judgments Convention (where this is a tangential question relevant to only a handful of its provisions); and

(b) the current definition of "*same parties*" offers no guidance on the familiar problem of privies or related parties (and whether actions involving such parties fall under Chapter III or Chapter II of the Draft Text).

Because the Convention will require uniform interpretation among Contracting States (Article 23 of the Draft Text), the Draft Text could benefit from language alluding to how the issue of "*same parties*" should be approached where there are successors, subrogation, assignments, or closely aligned entities. Otherwise, we expect that countries will continue to employ domestic law grounds to establish the identity of parties, watering down the certainty of application pursued by Chapter III.

47. As regards the definition of "*related actions*" (Article 3(1)(b) of the Draft Text), the current drafting may also create practical difficulties:

(a) on the one hand, we agree that it is sensible not to borrow established terminology from particular domestic traditions, in order to reduce the risk of a non-autonomous interpretation. On the other hand, introducing open-textured notions such as "*substantially the same*" and "*connected to each other*" (which are not known to most domestic legal systems), without clearer anchors, may reduce predictability and generate threshold disputes at the classification stage; and

(b) in light of this, and considering that Chapter III is designed to operate through a flexible (discretionary) approach, we believe that the definition of "*related actions*" could be simpler and could be more explicitly aligned with Chapter III's objectives. In particular, "*related actions*" could be defined as proceedings whose parallel conduct in different States – due to a material overlap in the matters to be proved and/or in the evidentiary record – creates a real risk of procedural inefficiency and/or inconsistent (irreconcilable) outcomes. This would reduce reliance on formal claim characterization and make it clear to courts that the inquiry is functional and not dogmatic (for example, by making it unnecessary to debate which parties are "*substantially*

considered too restrictive in this Convention given the variety of causes of action in different States. The key element is that the 'central or essential issue' must be the same in both judgments."

the same" in a manner divorced from the pragmatic considerations of procedural efficiency).

48. If the current definition of "*related actions*" is retained, it could be reasonable for Article 3(1)(b) to state expressly that at least two (or all three) factors should be present simultaneously for the Convention to apply. This would eliminate the possibility (currently arising from Article 3(1)(b)(iii)) that cases are connected only by a common issue of law (which could result in a wide-ranging application of the Convention even where the parties and underlying facts are distinct). If the current language of Article 3(1)(b) already assumes that all three factors must be present, we propose to make this explicit by using the word "*simultaneously*" before "*involve*" in Article 3(1)(b).

49. In addition, as noted in our response to Question 1.1 above, it may be useful to state in the definitions of both "*parallel proceedings*" and "*related actions*" that (i) these only include proceedings that are capable of yielding a "*judgment*" (borrowing the definition from the Judgments Convention), thus excluding non-merits proceedings (which appear to be currently captured by Article 3), and (ii) clarifying the cut-off time after which proceedings are deemed complete and therefore are no longer subject to the Convention (*e.g.,* at such time as they become capable of being recognized and enforced abroad or the "*judgment*" enters into force pursuant to *lex fori*). The Enforceability Caveat suggested in our response to Question 1.1 above may also be inserted into the definitions as a workable alternative to its inclusion in Article 1 or respective Articles of Chapters II–III (as proposed above).

Potential alternative model not focused on "parallel proceedings" as the organizing concept

50. Even if clarified, we fear that a strict "*parallel proceedings*" category may still capture only a minority of the concurrency problem in transnational commercial litigation. True mirror-image proceedings are comparatively uncommon. The more typical scenario might involve partially overlapping parties and claims arising from a shared factual nucleus. If the Convention is architected around "*pure parallelism*," it risks (i) under-inclusion of the cases that most need coordination, while (ii) increasing satellite litigation about whether the "*parallel*" gateway is satisfied.

51. While refinements to the notion of "*parallel proceedings*" (including a clarification that the term "*subject matter*" may include common nucleus of operative facts rather than a full-fledged identity) may partly resolve the problem, we share the concern raised in existing literature on the Draft Text[15] on whether strict "*parallel proceedings*" (inspired by the rigid doctrine of *lis pendens*) (i) should function as the conceptual anchor of the instrument, or (ii) should operate as a subset/example within a broader, functionally oriented relatedness inquiry (thus establishing a

[15] Paul Herrup & Ronald A. Brand, A Hague Parallel Proceedings Convention: Architecture and Features, Chicago Journal of International Law Online, Winter 2023, Vol. 2 No. 1, 10–11.

uniform regime of "*concurrent proceedings*" including both pure parallel cases and related actions).

52. To improve operability and reduce manipulation, one could define the more functional term "*concurrent proceedings*" in a manner that focuses on the underlying factual matrix, not on formal labels attached to claims:

    (a) first, as noted in existing literature on the Convention,[16] a workable model could be the structure of the European Court of Human Rights' *ne bis in idem* case law (often discussed in "*double liability*" contexts): transposed to civil/commercial coordination, the central question becomes (i) whether the proceedings are grounded in identical or substantially the same predicate facts, and (ii) whether those facts meaningfully connect the parties' rights/obligations such that there is a real risk of inconsistent or irreconcilable outcomes;

    (b) second, an alternative approach could be to take inspiration from well-established tests (whether in arbitration or otherwise) to consolidate multiple proceedings. These tests are also guided primarily by considerations of judicial efficiency and the need of avoiding irreconcilable judgments. As these considerations are at the core of the Convention's objectives (see our response to Question 13 below), they may be used as a starting point for a functionally oriented definition of "*concurrent proceedings*"; and

    (c) third, it could also be useful to consider case law in arbitration, including investment arbitration. In the context of fork-in-the-road provisions, arbitral case law has, for example, developed the well-known *Pantechniki* formulation of the legal test for the identity of claims – which, unlike traditional cases focused on triple identity, is centered around the notion of "*fundamental basis*" for a claim.[17]

53. Operationally, this fact-centered approach is potentially attractive because it (i) is empirical (courts can assess it early from pleadings and key documents), (ii) is harder to game (removing the incentive to litigate edge cases and whether they fall under "*related actions*" or "*parallel proceedings*" – by subjecting them all to a uniform regime combining the approach of Chapter II and Chapter III), and (iii) streamlines the application of the Convention by generalist judges and litigants and ultimately makes it more attractive for global adoption (as the Convention would not involve domestic legal taxonomies and would be focused on facts).

54. A disadvantage of the alternative approach compared to the existing Draft Text is that it may appear less certain and less well-known to some legal systems (being less clearly modeled either after *lis pendens* or *forum non conveniens* than current

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16 Ibid.

17 *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, paras. 61–67.

Chapter II and Chapter III respectively). However, as further discussed below in our response to Question 13, it could potentially achieve the objectives of the Convention in a more cost-effective manner – by (i) minimizing the litigation cost on the very basic question of whether the Convention applies, and by (ii) allowing courts to conduct a more direct, fact-specific inquiry into the efficiency of a suspension in favor of a foreign court's proceeding.

Question 3 on when a court is deemed to be seized

What are your views on Article 4?

55. We believe that Article 4 takes the correct route and offers a workable solution to the problem of divergent national traditions as to the time when a court is deemed to be seized of a matter.

56. However, several nuances may require discussion:

    (a) first, we believe it could be undesirable to confine Article 4 only to parallel proceedings (as proposed currently in brackets by reference to Chapter II). The question of whether a court is deemed to be seized of a related action could arise under Chapter III (albeit for a purpose other than determining the "*first in time*" court). This is especially so as provisions of Chapter III also use the term "*seized*" (thus potentially giving rise to a controversy as to whether a court is "*seized*" of a related action). An explicit reference only to Chapter II in Article 4 could produce an unwanted *a contrario* interpretation. Notably, Article 32 of Brussels I bis (setting out a similar provision) applies both to parallel proceedings in the strict sense and to related actions;[18]

    (b) second, we understand that Article 4(b) – which deems proceedings commenced upon service of process on the defendant – (i) mirrors the approach in Brussels I bis and (ii) is intended to accommodate differences in domestic procedural law (and avoid disadvantaging litigants in jurisdictions where service must occur before a claim can be lodged with the court). However, this approach raises uncertainty where the defendant is served but the initiating document is never filed with the court. More broadly, allowing multiple commencement points may be unfamiliar to some Contracting States and could complicate the Convention's operation by generating ancillary disputes about when foreign proceedings were commenced. For these reasons, we query whether Article 4 should instead adopt the simpler rule in Article 4(a), under which proceedings commence when the initiating document is filed with the court; and

    (c) third, if flexibility on commencement points is retained, it may be useful to clarify the operation of Article 4(b) by specifying the cases in which the reference point is the authority responsible for service rather than the defendant directly. This can be achieved, for example, by stating that a court is deemed to be seized when the document instituting proceedings "*is served on the defendant directly or, if service has to be made through an authority responsible for service according to the law of the relevant*

[18] *See* Richard Fentiman, commentary to Article 32 (When a court is seized), in U. Magnus & P. Mankowski (eds), Brussels Ibis Regulation (ECPIL Commentary, vol. I, 2023), p. 741, para. 1., noting that "*Arts. 29 and 30 depend upon knowing which court is first seized*" and that "*Article 32 provides a common, community definition of seisin for that purpose*."

jurisdiction, when it is received by the authority responsible for service" (the proposed clarification is underlined); and

(d) fourth, it may be reasonable to stipulate the precise moment in time when a document is deemed to be lodged with the court or considered to be served for the purposes of Article 4. While it is probably difficult to achieve uniformity on this point, a reference to domestic procedural laws could simplify the operation of the Convention. Otherwise, without an explicit *renvoi* to domestic law, Article 23 of the Draft Text may mandate courts to determine an autonomous meaning of the timing that is not dependent on domestic laws (which could be a difficult endeavor).

Question 4 on Article 5 obligations

What are your views on Article 5?

57. Article 5 is a central operational provision of Chapter II. It usefully translates the "*must suspend*" architecture into a workable sequence. As drafted, however, Article 5 could benefit from targeted refinements to (i) improve predictability for generalist courts, (ii) reduce incentives for tactical behavior, and (iii) avoid turning the Chapter II mechanism into a *de facto* recognition/enforcement inquiry.

58. Below, we (i) elaborate on these refinements separately with regard to each paragraph of Article 5 and then (ii) discuss a broader feasibility point as to whether a rigid obligation to suspend proceedings is desirable in an international setting (as opposed to a softer obligation akin to Chapter III).

Article 5(1): trigger and available procedural forms

59. We generally support Article 5(1) as aligned with the object and purpose of the Draft Text, but propose to discuss whether it is necessary to clarify three points.

60. First, the term "*suspension*" used in Article 5(1) (and elsewhere in the Draft Text) may benefit from a definition. In particular, we query whether Article 5(1) necessarily requires that the Court (i) must stay the proceedings (without undertaking any further procedural steps), or (ii) simply refrain from rendering a judgment. The former option may be sensible from the viewpoint of reducing the costs of litigation (as it would prevent any further litigation such as examination of witnesses during the pendency of parallel proceedings). However, the latter option would preserve greater flexibility to states – allowing them to develop the specific manner of compliance in their domestic law. If the more rigid solution is utilized (requiring a stay of proceedings), we also query whether an exception should be foreseen for cases where a court feels that certain actions (apart from issuing a judgment) must be taken notwithstanding the pendency of the foreign proceeding. The court may, for example, reasonably decide to (i) examine a local witness who may perish (or take any other urgent evidentiary steps) or otherwise (ii) manage the risk that a foreign court may not be able to render a judgment within a reasonable time (which will ultimately mandate a resumption per Article 5(3)) – by, for example, proceeding with certain parts of the case (if the court feels that the duplicative cost of doing so is justified by the risk of delay if the proceedings later have to be resumed).

61. Second, in addition to "*suspension*," the Convention should accommodate functionally equivalent procedural tools used in different domestic traditions. This includes the option to dismiss[19] or, in Russian procedural terminology, to "*leave the claim without consideration*."[20] This could (i) avoid forcing Contracting States into

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19 First note to Article 5 of the Draft Text.

20 Arbitrazh (Commercial) Procedure Code, Article 252(1): "*An arbitrazh (commercial) court in the Russian Federation shall leave a claim without consideration under the rules of Chapter 17 of this Code if a case involving a dispute between the same parties, concerning the same subject matter and on the same grounds, is pending before a foreign court, provided that consideration of this case does not fall within*

an unfamiliar procedural form, and (ii) remain consistent with the Convention's goals. While this usually follows from domestic law, it may also be reasonable, to make the Convention accessible to a general audience, to clarify that "*dismissal*" in the Convention means dismissal without prejudice to a subsequent refiling (if the foreign proceedings do not, in fact, result in a merits judgment capable of producing practical effects in the forum or if they do not dispose of the dispute for any other reason).

62. Third, the phrase "*as soon as it is informed*" and the bracketed possibility of information coming from an "*other relevant person*" may invite satellite disputes as to whether the duty to suspend was triggered and by whom. To improve operability, the Draft Text (or the Explanatory Report) may need to clarify minimum content for a notification sufficient to trigger Article 5(1) (*e.g.*, by identifying the foreign court, the parties, the relief sought, and evidence of seisin under Article 4). Article 5(1) may also need to either (i) confine notification to the parties (and the Article 16 mechanism), or (ii) narrowly define "*other relevant person*" to prevent strategic or unreliable third-party notifications.

Article 5(2): dismissal after a foreign judgment and the risk of importing recognition/enforcement questions

63. Article 5(2) raises a more fundamental issue. By conditioning mandatory dismissal on whether the foreign judgment is "*capable of recognition and, where applicable, of enforcement*," the provision risks moving beyond coordination of Concurrent Proceedings (the realm of *lis pendens*) into a regime governing the effects of judgments. This can generate significant complexity, particularly (i) in systems where recognition requires fact-specific inquiries (which would normally be undertaken in a separate proceeding), or (ii) where finality of a foreign judgment is tied to appellate review under local law (because of which a court may wish to stay seized with a parallel proceeding pending appeals, cassation, or other types of review in the foreign jurisdiction – even though the foreign judgment may already be capable of recognition abroad).

64. In this respect, Article 5(2) may be perceived as (i) overly rigid (mandatory dismissal), and (ii) difficult to administer (potential "*mini-recognition*" litigation within the Chapter II process).

65. More fundamentally, once a merits judgment has been rendered by one of the courts, the situation is no longer one of Concurrent Proceedings (*lis pendens*) in the strict sense. The remaining issues concern the principle of *res judicata* which is typically governed by domestic law and applicable international instruments (including, where relevant, the Judgments Convention) and which is arguably outside the scope of the Convention.

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the exclusive jurisdiction of an arbitrazh court in the Russian Federation in accordance with Articles 248 and 248.1 of this Code."

66. A further problem is that presently, "*parallel proceedings*" in the Draft Text are defined broader than the strict triple identity test which may be used for the purposes of *res judicata*. Against that backdrop, it is unclear why a court would have to dismiss a parallel action merely because another court adjudicated its own case where the two claims are not identical but merely relate to the same parties and the same subject matter understood as the core factual issue in dispute. For example, if Proceeding A is concerned with recovery of principal debt and Proceeding B is concerned with recovery of interest on top of the same debt, the two proceedings may well constitute "*parallel proceedings*" using the current definition of this term in Article 3. But in that scenario, if Proceeding B is suspended under Article 5(1), the court would normally have no basis to dismiss Proceeding B pursuant to Article 5(2) once Proceeding A is complete. Rather, it would need to award interest while being careful not to contradict the judgment resulting from Proceeding A (assuming it is capable of being recognized in the jurisdiction).

67. In this regard, the term "*dismiss*" in Article 5(2) may also be misleading. Elsewhere, this term is used in the Convention to discuss temporary dismissal while a Concurrent Proceeding is pending. However, in the context of Article 5(2), one would assume that the dismissal would normally need to be "*with prejudice*" to a re-filing of the same claim, particularly because Article 5(2) deals with the existence of a binding foreign judgment on the same subject matter.

68. The Draft Text itself notes that further consideration of recognition and enforcement issues is required, which supports the view that Article 5(2) should be approached cautiously.

69. We suggest that Article 5(2) be reconsidered along one of the following lines:

    (a) Option A (retain, but narrow the operational burden): clarify that dismissal applies only if (i) the court does not find it efficient to continue a stay pending appeals or other types of review abroad (or because recognition proceedings are already pending before forum courts and the court finds it efficient to await their outcome to apply Article 5(2)) and (ii) the foreign proceeding has fully disposed of the claim at hand (such that no judgment can be issued without contradicting the foreign judgment). In addition, some jurisdictions may wish to state that the assessment here is only whether the foreign judgment is not manifestly incapable of recognition/enforcement in the State of the stayed court (a high threshold), thereby avoiding full recognition analysis at the dismissal stage (in which case the dismissal would probably need to be without prejudice in case the judgment is later refused enforcement in the dedicated recognition proceedings);

    (b) Option B (remove from the Convention): leave the post-judgment effect of the foreign decision to national law, confining the Convention's role to managing Concurrent Proceedings up to the point when a merits judgment is rendered. This option would be most closely aligned with the Convention's goal of dealing with *lis pendens* rather than *res judicata*; and

(c) Option C (retain but reduce to a *renvoi*): provide that, where one of the concurrent proceedings result in a merits judgment, the procedural consequences for the stayed proceedings (including dismissal, discontinuance, or other disposal) are governed by (i) the law of the forum and/or (ii) any applicable international instrument on recognition and enforcement. The Convention should not itself require an autonomous determination of "*capability of recognition*" as part of Chapter II.

70. Finally, Article 5(2) is closely connected to the Enforceability Caveat discussed under Question 1 above. If it is manifest from the outset (*i.e.*, when a court considers an application under the Convention, or becomes aware of a Concurrent Proceeding)[21] that a foreign proceeding cannot result in a judgment capable of recognition in the forum, mandatory suspension under Article 5(1) followed by (potential) resumption under Article 5(3) risks wasting judicial resources and incentivizing dilatory tactics. This reinforces the case for an express *ex ante* enforceability filter, whether placed in Article 1 or operationalized through Article 5 (as proposed in our response to Question 1.1 above).

71. We also note that the current interaction between Articles 5(2) and 5(3) (along with the narrow formulation of Article 5(2)) risks creating a "*limbo*" scenario: if a foreign merits judgment is rendered but is not capable of recognition/enforcement in the forum, the Draft Text does not explicitly state that the stayed court should be able to proceed with the case (or take other appropriate steps under domestic law) once it becomes clear that the foreign judgment is not recognized under *lex fori*.

Article 5(3): resumption test

72. Article 5(3) is presently bracketed and, in its current form, may be overly casuistic. In practice, there will be cases where it is apparent at an early stage that the foreign proceedings will not yield a merits judgment within a reasonable period (for example, due to procedural impasse, prolonged stays, or structural delay). In such circumstances, requiring the stayed court to suspend first and only later "*resume*" the proceedings may be inefficient and can unfairly prejudice the claimant.

73. Two adjustments could improve workability:

(a) first, it may be desirable to introduce an efficiency-based exception at the suspension stage (Article 5(1)) or, alternatively, formulate Article 5(3) more broadly so that it both (i) allows resumption and (ii) operates as an exception to Article 5(1); and

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21 There can be cases where the prospects of enforcement change after this point in time (if, for example, the relevant Contracting States become party to a recognition treaty or if new domestic-law grounds for recognition are adopted). A natural solution to this problem would presumably involve the court's reconsideration of the issue of suspension (including a renewed analysis of whether the Convention applies), either upon the relevant party's renewed application or when the court becomes aware of the relevant circumstances and raises the matter *sua sponte*. If the Enforceability Caveat is inserted, this type of temporal aspects may benefit from a clarification in the Explanatory Report.

(b) second, to reduce divergent domestic readings, it could be useful to clarify the terminology of "*reasonable time*" through a list of objective factors (complexity, stage of proceedings, foreseeable procedural steps, party-caused delay, pending jurisdictional challenges/appeals, etc.), potentially in the Explanatory Report (or in the Convention itself but using softer non-exhaustive language).

74. It may also be appropriate to consider whether resumption should be possible *ex officio* (not solely "*on request of a party*"), at least where necessary to avoid a denial of justice.

Broader feasibility point: mandatory suspension in a global instrument

75. A final issue is whether a strict obligation to suspend (as opposed to a more flexible approach) will be politically and practically acceptable beyond closely integrated regional frameworks (or similar legal systems). Mandatory deference presupposes a degree of mutual trust that may not exist uniformly across a global set of Contracting States. For that reason, in our response to Question 2 we discuss an alternative model that could accord greater deference to the suspending court's assessment of whether suspension is procedurally useful in the circumstances.

76. In summary, we support Article 5's overall structure, but recommend: (i) accommodating dismissal/striking out without prejudice as an alternative to suspension in Article 5(1) (with appropriate protections), (ii) revisiting Article 5(2) to avoid importing recognition/enforcement disputes into the Chapter II mechanism, and (iii) broadening and clarifying Article 5(3) (and/or adding an early efficiency exception) to address cases where a foreign merits determination within a reasonable time is clearly unrealistic.

Question 5 on priority jurisdiction/connection

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

77. We understand that the Working Group has approached Articles 6–8 (which are currently meant to apply only to parallel proceedings and not related actions) taking inspiration from the "*jurisdictional filters*" used in the Judgments Convention. We believe this approach may benefit from further discussion.

78. Below, we set out our views (i) on terminology used in these provisions, (ii) on whether jurisdictional filters are in fact warranted given the different purposes of the Convention and the Judgments Convention, (iii) on whether jurisdictional filters should also extend to related actions, and (iv) on the contents of Article 6–8 should the existing approach be retained.

Terminology

79. As the Draft Text is not concerned with grounds for direct jurisdiction, the terminology of "*connection*" rather than "*jurisdiction*" seems preferable in order to enhance the attractiveness of the Convention to states that have broader grounds for the exercise of direct jurisdiction than Articles 6–8 (including Russia).[22]

80. This way, the Convention cannot be read as an implied condemnation of other jurisdictional bases or as an implied endorsement of the jurisdictional bases listed in Articles 6–8 in terms of direct jurisdiction (despite this being outside the scope of the Convention).

Whether jurisdictional filters are necessary in the Draft Text

81. Apart from terminology, it could be questioned whether Articles 6–8 are necessary in the Convention (unlike the Judgments Convention) considering that they are likely to significantly complicate its operation.

82. An alternative way to filter out Concurrent Proceedings based on exorbitant jurisdictional grounds (which we understand is amongst the primary goals of Articles 6–8) would be to rely on the Enforceability Caveat (as outlined above in Question 1). In considering whether a judgment to be issued in a Concurrent Proceeding would be manifestly incapable of recognition in a particular state, the state would be entitled to consider the jurisdictional basis upon which the court in a Concurrent Proceeding is seized with the matter. If that jurisdictional basis is not recognized in the forum state, the Convention will not apply because the ultimate

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[22] Arbitrazh (Commercial) Procedure Code, Article 247: "*Arbitrazh (commercial) courts in the Russian Federation consider cases involving economic disputes and other cases related to the conduct of entrepreneurial and other economic activity, with the participation of foreign organizations, international organizations, foreign citizens, and stateless persons engaged in entrepreneurial and other economic activity (hereinafter 'foreign persons'), where* [...] *there is a close connection between the disputed legal relationship and the territory of the Russian Federation*."

judgment will be manifestly not subject to recognition and enforcement in that jurisdiction.

83. Apart from streamlining the application of the Convention, removal of jurisdictional filters from the Draft Text can also expand the practical application of the Convention. Without jurisdictional filters, states will be entitled to decide for themselves whether they are willing to apply the Convention to Concurrent Proceedings initiated on the basis of exorbitant grounds for direct jurisdiction. They will also be entitled to recognize further jurisdictional factors not listed in Articles 6–8. This approach would also eliminate the need to reach compromise at the global level on difficult issues such as the proper jurisdictional filter for claims labeled as unjust enrichment (see our response to Question 6 below).

Whether jurisdictional filters should apply to related actions

84. It could also be questioned whether the jurisdictional filters (if they are retained in the Draft Text) should apply only to (i) parallel proceedings in the strict sense (which is the current approach of the Draft Text), or also to (ii) related actions (Chapter III).

85. While the Draft Text does not impose a demanding *lis pendens*-style obligation on states with regard to related actions, Chapter III does require states to consider whether related actions should be heard in one forum (in full or in part). At least some Contracting States to the Convention may be unwilling to defer to the courts seized of a related action on exorbitant grounds of direct jurisdiction either (i) for reasons of principle, or (ii) because of the perceived unfairness of doing so for the parties (if, for example, one or more parties do not have minimum contacts with the jurisdiction seized of a related action pursuant to domestic notions of due process). For that reason, the policy justification for having jurisdictional filters in Chapter II at least partially applies in the context of related actions governed by Chapter III.

86. Although Chapter III does implicitly enable courts to consider this question when applying the Article 11(2) factors,[23] the lack of explicit provisions on jurisdictional filters in Chapter III may complicate this analysis and may give rise to an *a contrario* argument by private litigants. In addition, if jurisdictional bases are treated as merely *one of the factors* in the context of related actions, that could be interpreted as requiring courts to assess other factors even though a given jurisdiction may find it clearly unacceptable to defer to a related action pending before a court that lacks proper connection to the parties or the subject matter of the dispute.

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[23] The Consultation Paper, para 62, explaining that Chapter III establishes a flexible framework in which courts determine, by reference to the non-exhaustive Article 11(2) "proper administration of justice" factors, whether a single court should adjudicate and which court is the more appropriate forum; and noting that, unlike Chapter II (Article 8(2)), the related actions framework does not impose a jurisdiction/connection gateway and that concerns about the relative strength of each court's connection can be addressed within the "more appropriate court" factors.

87. In any event, if jurisdictional filters are retained solely in Chapter II, the Article 11 factors may need to explicitly refer to jurisdiction/connection as one of the factors for determining the most appropriate forum for a related action.

Comments on the content of Articles 6–8

88. If Articles 6 and 7 are retained, we believe their content should match the approach of the Judgments Convention and the 2005 Convention.

89. In particular, we believe that (i) the approach of Article 6 to residential leases should be the same as that of the Judgments Convention, and (ii) the approach of Article 7 to the formal validity of choice of court agreements should match the requirements of the 2005 Convention (with permissive language enabling states to adopt more liberal requirements as to form).

90. On Article 8(1), and as noted in response to Question 4 above, we query whether the current approach that obliges courts to suspend proceedings in the event of parallel proceedings (compared to a much softer obligation for related actions) is the preferable way forward to ensure global acceptance of the Convention and to achieve its goal of judicial economy:

    (a) although the duty to suspend parallel proceedings in favor of the court first seized is traditional in many jurisdictions (including the Brussels regime in the EU), it is difficult to discern a utilitarian justification for why it is efficient. It may well be the case that the court first seized (or the court that has an Article 8(2) connection, if other courts do not have such a connection), when seen through the lens of the Article 10 factors, is clearly less appropriate in terms of judicial economy and comparative cost efficiency to resolve the case. In that scenario, the only policy justification for Article 8(1) is that it preserves the jurisdiction of the court first seized for categorical reasons rather than because of judicial economy. However, when seen through that lens, Article 8(1) could function as regulating grounds for direct jurisdiction (effectively mandating that only courts seized with cases based on grounds listed in Article 8(2) may proceed to adjudicate the case); and

    (b) on the other hand, an advantage of the current approach is that it may appeal to civil law jurisdictions which are used to the formal application of the *lis pendens* principle. The current approach is also likely to contribute to the certainty of application of the Convention compared to a more open-ended factors-based inquiry under Article 10. Nonetheless, further discussion as to whether Article 10 efficiency considerations should play a role (at least on a "*manifest*" or *prima facie* basis) when applying Article 8(1) may be in order if jurisdictional filters are retained.

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

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

91. As the list is broadly analogous to the Judgments Convention, in general, we believe the jurisdictional filters listed in Article 8(2) are appropriately selected.

92. Below, we (i) address the questions raised in the Draft Text with regard to specific jurisdictional filters, and then (ii) discuss the problem of multiple claims and multiple parties (raised in square brackets in Article 8(2)) and the issue of counterclaims.

Questions on specific jurisdictional filters

93. We expect states to have significant concerns with the current language of Article 8(2)(g). This provision (i) expands the mirrored jurisdictional filter found in Article 5(j) of the Judgments Convention (referring not only to tangible property but also to "*intangible property*"), and (ii) refers (in square brackets) to claims based on unjust enrichment and not only tort law.

94. In this regard, we note that (i) purely economic delicts not involving harm to tangible property, as well as unjust enrichment,[24] are areas of law where uniformity is notoriously difficult to achieve, and (ii) these jurisdictional filters, if adopted, can have wide-ranging consequences, allowing states to justify exorbitant grounds for the exercise of jurisdiction under domestic law and/or prompting manipulative tactics by litigants (seeking to reframe their claims as delicts with regard to non-tangible property or as unjust enrichment to access a more favorable court and suspend proceedings in the more "*natural*" forum). For that reason, like the Judgments Convention, it appears preferable to confine Article 8(2)(g) to territorial torts involving death/physical injury and damage to or loss of tangible property – which is a well-accepted ground for the exercise of jurisdiction.

95. On further language suggested in square brackets, we believe an approach consistent with the Judgments Convention should be preferred. In particular, no further jurisdictional filters should be foreseen in Article 8(2)(l) (naturally without foreclosing the possibility for states to recognize them under domestic law). It is difficult to see any policy rationale for expanding or revising the jurisdictional filters only for the purposes of parallel proceedings, considering that (i) the objectives of the Judgments Convention and Chapter II of the Draft Text largely overlap (as follows, *inter alia,* from Article 7(2) of the Judgments Convention), and (ii) Chapter II of the Draft Text can be seen as a complementary instrument aimed at preventing

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[24] We note that the Working Group considered a broader proposal aimed at gain/profit-based claims (including restitution/account claims against trustees or fiduciaries), did not reach consensus on that proposal as drafted, and instead placed "*unjust enrichment*" in square brackets within Article 8(2)(g) for further consideration as a more familiar proxy in many legal systems (Prel. Doc. No 2A of December 2025, Annex, para. 13). Notwithstanding that rationale, we consider that adding unjust enrichment would materially expand the priority-connection gateway in ways that are difficult to harmonize and easy to plead around, and would therefore increase tactical behavior and threshold litigation.

a collision of judgments at the stage of enforcement under the Judgments Convention.

96. Against this backdrop, the only plausible rationale to expand or refine the jurisdictional filters in the Draft Text would be incremental development of private international law (by expanding the mutual trust of states in each other's legal systems compared to the *status quo* negotiated via the Judgments Convention). However, an attempt to do so could come with significant costs, including (i) the reduction of alignment between the instruments produced by the HCCH, (ii) the diminishing appeal of the Convention to states parties to the Judgments Convention (as they may take issue with incremental improvements laid out in the Convention), and (iii) where new elaborations in Article 8(2) are intended to clarify the operation of the existing rules of the Judgments Convention, they may prompt *a contrario* arguments by litigants using the Judgments Convention in the context of recognition and enforcement (thus generating further litigation on threshold questions).

97. In addition, the Convention may need to address jurisdictional issues involving foreign States. While the preservation of State immunities in Article 2(7) is welcome, it is open to question whether the jurisdictional filters in Article 8(2) should apply in the same way to sovereign States. Although this may be an acceptable starting point, some Contracting States may seek additional nuance – an approach reflected in the work leading to the Judgments Convention, which ultimately permits Contracting States to make an optional declaration on this issue.

The problem of multiple claims and parties (consolidated proceedings), as well as of counterclaims

98. As the notes to Article 8(2) in the Draft Text recognize, parallel proceedings may well involve multiple claims and multiple parties, only some of which fall under Article 8 (and Chapter II more broadly). The reason is that the various claims heard by a court may relate to different transactions or occurrences but may still be heard in one proceeding based on non-uniform grounds found in domestic law.

99. In this regard, we believe the Draft Text has to expressly consider this scenario both (i) when developing the jurisdictional filters in Article 8(2) and (ii) more broadly in other provisions of the Convention. The issue is not unique to Article 8(2) because questions on the application of the Convention to consolidated proceedings may arise also (i) at the stage of applying the definition of "*parallel proceedings*" (for example, to decide if a proceeding involving several claims is on the "*same subject matter*" as a foreign proceeding involving only one claim) and (ii) at the stage of suspending the proceedings pursuant to Article 8(1) (for example, to decide whether the court must stay the entirety of the proceedings or may proceed with non-overlapping matters).

100. A workable approach could be for the Convention to always refer to "*claims*" and not "*proceedings*" (including at the level of definitions). In particular, it may be

reasonable for Chapter II to require suspension of parallel claims and not proceedings. In that case, where a court is hearing multiple claims in one consolidated proceeding, the court would be able to de-consolidate the proceeding and proceed with adjudicating claims that do not fall within the definition of "*parallel claims*" (provided that there are no bases to treat them as "*related actions*" pursuant to Chapter III). This would also leave the door open for states to use another solution under domestic law to address the problem of multiple claims and parties (always with a view to ensuring that the court does not proceed with adjudicating a parallel claim in breach of the Convention). This approach will also prevent litigants from evading the requirements of the Convention by bringing forward multiple claims in one proceeding or joining further parties to their proceedings to later argue that their proceeding is not between "*the same parties*" or on "*the same subject matter*" as a parallel proceeding pending before a foreign court.

101. Conversely, if the current approach is retained – so that Articles 9 *et seq*. are triggered by a "*proceeding*" rather than a "*claim*"– the Convention should clarify how Article 8(2) applies to proceedings involving multiple claims, particularly because Article 8(2) appears to be an outlier in referring to "*claims*" rather than "*proceedings*."

102. A separate issue that may warrant further consideration is the treatment of counterclaims:

(a) first, it may be useful to introduce a Convention-wide definition of a counterclaim. That would (i) make sure that the notion is understood autonomously from domestic concepts, and (ii) offer guidance on the question of whether the same rules should apply, for example, to a notice of set-off (which, depending on applicable law, may have the same effect of requiring a court to adjudicate the merits of a distinct substantive claim in the same proceeding);

(b) second, difficult questions may also arise with regard to cross-claims or third-party claims (which are not usually treated as counterclaims in domestic laws). Because these tools are widely used in some domestic legal systems, the Draft Text (or at least the Explanatory Report) would be ill-advised to overlook the problem of concurrence where one claim is raised as a cross-claim or a third-party claim and the other claim is raised as a distinct claim or a counterclaim (but the claims meet the requirements of either Chapter II or Chapter III of the Convention); and

(c) third, we query whether Article 8(2) should address counterclaims in greater detail given the nature of Concurrent Proceedings. In particular, the Convention could provide that a court seized of the main claim has priority to hear a counterclaim arising out of the same transaction or occurrence. An alternative would be for the Draft Text to provide that counterclaims are to be treated like any other claim, subject to Article 8(2) on an equal footing.

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 seized on the basis of one of these? Why or why not?

103. Please refer to our response to Question 6.1 above.

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

104. No.

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?

105. Article 9 performs an important "*tie-breaker*" function in the Draft Text. The decision to anchor the determination in a structured factor set (Article 10) and to facilitate judicial communication (Article 16) is in our view directionally sound.

106. That said, Article 9 is also the provision most likely to generate satellite litigation and thus must be designed to be administrable by generalist courts on a *prima facie* record and under time pressure. In particular, the Convention should avoid (i) inviting extensive, merits-adjacent evidentiary disputes at the allocation stage, and (ii) requiring courts to undertake a *de facto* recognition/enforcement analysis under the guise of "*appropriateness.*"

107. A further design constraint is global acceptability. In its current form, the Draft Text risks being perceived as enabling a court in one Contracting State to become procedurally bound by another Contracting State court's determination that proceedings should be suspended (or that another court is the "*more appropriate*" forum). States may view this as an unacceptable constraint on domestic procedural autonomy (or as requiring a level of mutual trust that is realistic only within closely integrated regional frameworks). In some jurisdictions, this type of deference to a foreign sovereign – even when structured through a treaty – may also raise constitutional concerns. As a result, if Article 9 is framed in a way that requires courts to follow foreign "*appropriateness*" determinations, participation may be limited, or States may be driven to rely excessively on the safeguards provisions, undermining predictability.

108. Having this in mind, below we (i) elaborate on our views on Approach 1 and Approach 2 suggested in the Draft Text, (ii) discuss concerns common to both approaches, and then (iii) put forward a third, alternative approach to the problem.

Views on Approach 1 (determination by the court first seized)

109. The key strength of Approach 1 is that it offers a comparatively clear procedural sequence and, in principle, concentrates the "*allocation*" decision in one forum, which may reduce the risk of contradictory determinations on forum allocation.

110. However, the following aspects of Approach 1 may be a source of concern:

(a) it risks over-privileging the court first seized even where, on an Article 10 analysis, the first seized court is plainly not the better forum. As a result, it may increase incentives for tactical "*race to file*" behavior and "*torpedo*" proceedings. This is especially so as the court first seized may have structural incentives to consider itself the most appropriate forum to proceed with the

case (due to forum bias or jurisdiction-specific factors such as judges' incentives to maximize their workload, if any);

(b) as noted above, in a global instrument, this approach also raises acceptability concerns to the extent that it requires other Contracting State courts to take procedural steps because a foreign court has determined that it is the "*more appropriate court*"; and

(c) it is not obvious that the obligation in Article 9(2) for all other courts to suspend proceedings pending the determination of the most appropriate forum by the court first seized is procedurally efficient. If the court first seized ultimately determines (potentially after a prolonged period of time) that it is not the most appropriate court, this may result in a waste of procedural resources. Pending the Article 9 determination, courts should at least be permitted to take non-dispositive, efficiency-preserving steps (*e.g.*, case management directions, timetabling, preservation of evidence, and procedural measures necessary to avoid prejudice), while generally refraining from dispositive merits steps that would pre-empt the allocation outcome.

Views on Approach 2 (determination by courts other than the court first seized)

111. The key strengths of Approach 2 are as follows:

(a) it avoids (or materially reduces) the most politically sensitive feature of Approach 1: binding procedural consequences in one Contracting State triggered by another Contracting State court's "*more appropriate court*" determination; and

(b) it preserves domestic procedural autonomy while still requiring an initial suspension sequence, making it more plausible as a global regime rather than one limited to highly integrated regional contexts.

112. However, the following aspects of Approach 2 may be a source of concern:

(a) it risks greater uncertainty if resumption standards are not sufficiently strict;

(b) it may permit duplicative allocation litigation unless the Convention adopts a high threshold for resumption. For this reason, the current goals of Approach 2 may be best suited by a "*clearly more appropriate court*" standard (rather than "*more appropriate*") for any resumption/override determination based on the Article 10 factors. The Explanatory Report may clarify that the word "*clearly*" is intended to raise the relevant legal standard and serves the same goal as the word "*manifestly*" in Article 21 (the public policy safeguard).[25] This may reduce re-litigation and encourages deference to the initial suspension sequence except where the Article 10 balance is clearly one-sided; and

[25] In light of this, for consistency, it could also be reasonable to use the word "*manifestly*" rather than "*clearly*" when referring to the more appropriate court in this context.

(c) Approach 2 does not currently seem to permit the court first seized to determine that it is not the appropriate court and defer to another court – thus resulting in a gap compared to Approach 1. If Approach 2 is adopted, it should be made explicit that the court first seized may (and, where appropriate, should) suspend in favor of a subsequently seized court where, on the Article 10 factors, the subsequently seized court is (clearly) more appropriate. Without such a mechanism, Approach 2 risks addressing only the scenario in which later courts displace the first seized court, while leaving insufficient treaty guidance for the converse situation where the first seized court itself concludes it is not the best forum.

Key drafting objective common to both approaches

113. Whichever approach is selected, we believe Article 9 may need to be calibrated to confine the allocation decision to a pragmatic, efficiency-oriented inquiry based on the Article 10 factors, without becoming a mini-trial on the merits or a proxy recognition/enforcement proceeding. In particular, the enforceability factor should be applied only as a light-touch, prima facie ("*manifestly*") screen at the Article 9 stage (*i.e.*, to identify cases where a prospective judgment is manifestly incapable of recognition/enforcement in the relevant state(s) regardless of outcome). A fuller recognition/enforcement analysis should remain governed by domestic law and applicable instruments at the stage when recognition/enforcement is actually sought.

114. It may also be wise to strengthen the "*expeditious*" requirement in Article 9(6) (which is the same as Article 9(3) in Approach 2) by clarifying (in the text or in the Explanatory Report) that the Article 9 determination should be made promptly on the basis of the pleadings and core documents, and that Article 16 communications are intended to support (not delay) a timely allocation.

115. More fundamentally, both approaches retain an initial priority logic in favor of the court first seized (through a default expectation of suspension by later seized courts), while simultaneously recognizing – through resumption/override mechanisms – that a later seized court may in fact be the more appropriate forum. This combination can produce avoidable formalism and costs: if a subsequently seized court can already conclude, on a *prima facie* Article 10 assessment, that suspension is not warranted, a mandatory "*suspend now, resume immediately*" loop adds procedure without improving coordination. At a minimum, Article 9 should not require formal suspension where the subsequently seized court is clearly more appropriate on a *prima facie* record. That would also appear to be consistent with domestic practice and the (likely) expectations of Contracting States.[26]

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[26] For example, Russian courts routinely consider the possibility of delay (as well as the need to resolve the case within a reasonable time to avoid a denial of justice) already when deciding on suspension applications (rather than only when considering a resumption). *See, e.g.*, Ruling of the Federal Arbitrazh Court for the Central Circuit dated 2 December 2008 No. Ф10-2262/08(5); Ruling of the Federal Arbitrazh Court for the Moscow Circuit dated 17 May 2012 in case No. А40-85393/11-5-546 ("*The*

Suggestion of a third approach

116. Accordingly, consideration may need to be given to an alternative, more flexible model in which each seized court is able, at the suspension stage, to unilaterally decide whether to continue proceedings by reference to the Article 10 factors, without categorical priority for the first seized court. In doing so, the courts may still be encouraged to engage in communication pursuant to Article 16.

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

117. Due to structural reasons and because of practical incentives faced by both judges and parties, we do not expect the two approaches to yield a meaningful practical difference between them. In practice, each court may take its own fitness to adjudicate the dispute as the starting point for its analysis. As a result, courts outside of closely-knit regional communities may not easily defer to the court first seized – instead looking into whether it is efficient in the circumstances to defer to the findings of another court (*e.g.*, by flexibly reading the Article 9 procedure). One reason is that judges often have little incentives to consider issues of cross-border efficiency and may each be primarily concerned with efficiency at the domestic level. Where, however, a court feels that it would be difficult for it to resolve the case (particularly because the evidence is located abroad, or foreign law applies, etc.), the court is likely to suspend proceedings in favor of the best positioned court regardless of the approach to Article 9 that is chosen in the Convention.

118. We also understand that both approaches are currently meant to be party-driven. This may be beneficial as parties are often best positioned to assess whether the proceedings are in fact parallel and whether an application to suspend one of the proceedings would contribute to procedural efficiency. However, this also comes with disadvantages, particularly as (i) if Article 9 is engaged only upon application, parties may delay or refrain from applying for strategic reasons, and (ii) the party-driven approach may dilute the idea which Chapter II seems to be currently based on, namely the principle of *lis pendens* (which is normally triggered *ex officio*[27] as an instrument of judicial cooperation and prevention of encroachments on another sovereign's jurisdiction[28] rather than solely an instrument of efficiency). Therefore, a fully party-driven approach may not be fully coherent with the underlying idea of Chapter II.

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length of time taken by the foreign court to consider the case may result in a violation of the reasonable time requirement for the examination of the present case").

27 Richard Fentiman, commentary on Article 29 (Actions on the same matter), in U. Magnus & P. Mankowski (eds.), Brussels Ibis Regulation (ECPIL Commentary, vol. I, 2023), p. 718, para. 4, explaining that the stay (or dismissal) "*does not depend upon the defendant's application*" – rather, the second court must "*of its own motion*" stay its proceedings and, where applicable, decline jurisdiction.

28 Matthias Lehmann, 'Incremental international law-making: The Hague Jurisdiction Project in context' (2023) 19(1) Journal of Private International Law 25, 29 (describing concurrent proceedings as "*a plague to the international community, as they may lead to conflicts between judiciaries or outright judicial wars*").

119. If, on the other hand, the suspension is *ex officio* once the court is informed, the Convention may need to specify minimum content of the information required to trigger the duty to suspend (to prevent tactical or unreliable notifications). In either case, time limits should run from an objective, court-specific event (*e.g.*, when that court is informed of sufficient particulars and/or becomes seized). This reduces threshold disputes and avoids multi-forum timing pathologies (including scenarios where an additional court becomes seized after key milestones have already occurred elsewhere).

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

120. On balance, we prefer Approach 2 as between the two options currently presented. As noted above, we believe that a worldwide convention should be cautious about mechanisms that require a Contracting State's court to take procedural steps because another Contracting State court has determined it is the "*more appropriate court*" (which is in line with Approach 2).

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)?

121. Article 10 provides an appropriate and largely comprehensive factor set for determining the "*more appropriate court*" in the residual category of parallel proceedings not resolved by Articles 6–8.

122. We consider that the factors in Article 10 appropriately balance (i) practical litigation convenience (including accessing or preserving evidence), (ii) legal-system considerations relevant to the efficient adjudication of the merits (applicable law), (iii) procedural economy (stage of proceedings and delay risks), (iv) systemic completeness (capacity to deliver a more complete resolution), and (v) cross-border effectiveness (recognition and enforcement prospects).

123. That said, two refinements may improve predictability and reduce the risk of satellite litigation:

(a) Article 10(a): on the bracketed choice between "*the burdens of litigation on the parties*" and "*the convenience of the parties*,", we believe "*burdens of litigation*" might capture a fuller spectrum of practical impediments (cost, distance, language/translation, and the parties' ability to participate effectively). The reference to the parties' habitual residence is a sensible indicator of convenience, but should not be treated as a determinative connecting factor (which could be clarified in the Explanatory Report);

(b) Article 10(f) (recognition and enforcement in the other seized court's state): while this factor is appropriate, it should be operationalized as a light-touch, *prima facie* screen and not as a full recognition/enforcement inquiry. The purpose of the Convention is coordination of concurrent proceedings, not the adjudication of recognition and enforcement questions. As suggested in our response to Question 7, the Draft Text or the Explanatory Report may need to make clear that Article 10(f) is concerned with whether a prospective judgment is manifestly incapable of recognition and enforcement in the Contracting State of the other seized court(s) regardless of outcome, rather than requiring a detailed assessment of fact-specific recognition defenses.

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

124. In practice, Article 10's workability will depend less on the substantive suitability of the factors (which is generally sound) and more on whether the "*more appropriate court*" determination is administrable expeditiously, on a *prima facie* record, and without transforming the allocation stage into a mini-trial.

125. Several practical points may be decisive:

(a) time, record, and methodological discipline (including interpretive variability). A multi-factor inquiry predictably generates incentives for over-pleading and over-proving, particularly where parties perceive strategic advantage in prolonging the allocation phase. To counter this dynamic, the Convention should be understood – ideally with explicit support in the Explanatory Report – as permitting the court to determine the Article 10 question promptly by reference to only some (or even one) of the factors listed, without requiring a comprehensive assessment of each. In addition, courts should be permitted to decide on the basis of pleadings and core documents, focusing on objectively verifiable, logistics-centered circumstances (*e.g.*, the location of witnesses and documents, anticipated translation burdens, the procedural posture of each case, and whether either forum is structurally positioned to deliver a comprehensive resolution).

Relatedly, several formulations in Article 10 are necessarily open-textured and will require autonomous interpretation in light of Article 23, which will generate litigation costs. In many Contracting States – particularly those without an established doctrine functionally analogous to *forum non conveniens* – courts may have limited experience in operationalizing multi-factor "*appropriateness*" inquiries. This increases the risk of divergent outcomes and, in the worst case, a drift toward lex forism. For this reason, soft law guidance discussing key practical scenarios would be a beneficial companion to the Convention; and

(b) dependence on reliable cross-border information and the role of Article 16. Several Article 10 factors (notably the stage of proceedings, delay risks, and prospects of a more complete resolution) are difficult to assess without accurate information about the foreign proceeding. Article 10 itself envisages that courts may exchange information through the communication mechanism established pursuant to Article 16. As discussed in greater detail under Question 11 below, in practice, Article 16 communications will be most useful if they are used to exchange neutral procedural information (*e.g.*, case posture, timetables, procedural steps completed/pending) rather than to engage in substantive debate on merits or on the "*quality*" of justice in either forum. Clarifying this orientation in the Convention or in its Explanatory Report would promote consistent practice and avoid politicization.

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

126. The Article 10 list is adequate. However, the following targeted additions or clarifications could improve the Convention's operation while remaining consistent with its objectives:

(a) stage, limitation/prescription, and delay. We support the inclusion of the bracketed references in Article 10(d) to (i) any applicable limitation or

prescription periods and (ii) the possibility of significant delay in one or more courts. These elements may be critical to prevent the allocation mechanism from causing time-bar prejudice and to ensure that the "*more appropriate court*" determination remains aligned with procedural economy. The Explanatory Report could provide objective guidance on how to assess "*significant delay*" thereby reducing divergent domestic readings;

(b) a "*no clear winner*" outcome. In some cases, the Article 10 factors may not meaningfully distinguish between fora. In such situations, the Convention should avoid incentivizing repeated re-litigation of the allocation question. The Draft Text (or the Explanatory Report) could therefore clarify that where the Article 10 factors are genuinely evenly balanced, courts may give effect to procedural economy by maintaining the existing suspension sequence under Article 9 (as applicable) rather than forcing a finely balanced "*appropriateness*" determination. It may also be desirable to clarify the extent to which Article 10 assessment may be re-litigated or should be final (unless, for example, significant new circumstances emerge); and

(c) express emphasis on logistical, non-merits considerations. To preserve administrability, the Explanatory Report should underscore that the Article 10 inquiry is directed to practical and procedural efficiency, not to comparative judgments about substantive outcomes or the relative quality of justice between Contracting States' legal systems.

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.

127. The Chapter II framework is likely to be appealing to states that are used to the doctrine of *lis pendens* (which includes Russia[29]). However, as noted in our responses to Questions 1 and 2 above, if Chapter II is interpreted conservatively as applying only to cases meeting the traditional triple identity test, it is unlikely to be used in practice extensively except by paying lip service to its provisions.

128. For example, the Russian Commercial Procedure Code currently contains a provision which, akin to Chapter II of the Draft Text, requires a suspension of an action pending before a Russian court if a foreign court is first seized with an identical claim.[30] However, in practice, this provision is mostly used by analogy to enforce choice of court agreements providing that the claim must be heard by a different court (because Russian statutes do not contain an explicit provision on this issue).[31] Outside of this scenario, Russian courts rarely dismiss proceedings in favor of a parallel action abroad – which seems to be caused by the Russian courts' conservative application of the triple identity test.[32] The (few) cases that do result in a dismissal due to *lis pendens* often boil down either (i) to an abuse of process by the claimant (where, for example, a shareholder in a corporation may attempt to relitigate a derivative lawsuit which another shareholder had previously lost with *res judicata* effect on behalf of the corporation),[33] or (ii) to cases involving uncertainty in the most effective forum which prompts the claimant to file identical lawsuits in several jurisdictions to hedge against this uncertainty,[34] often in the context of

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29 HCCH Permanent Bureau, Comparative Note on *lis pendens* in the Recognition and Enforcement of Foreign Judgments (October 2015), Part B (Comparative Table of Laws and Practices), p. 25 (Russian Federation). *See also* I.V. Getman-Pavlova and M.A. Filatova, 'Printsip lis pendens v mezhdunarodnom grazhdanskom protsesse: problemy identichnosti iskov i storon' [Lis Pendens Principle in International Civil Procedure: Actions and Parties Identity Issues], *Herald of Civil Procedure* (Vestnik grazhdanskogo protsessa), 2018, no 2, 239–263 (in Russian).

30 Arbitrazh (Commercial) Procedure Code, Article 252(1): "*An arbitrazh (commercial) court in the Russian Federation shall leave a claim without consideration under the rules of Chapter 17 of this Code if a case involving a dispute between the same parties, concerning the same subject matter and on the same grounds, is pending before a foreign court, provided that consideration of this case does not fall within the exclusive jurisdiction of an arbitrazh court in the Russian Federation in accordance with Articles 248 and 248.1 of this Code*."

31 *See, e.g.*, Ruling of the Arbitrazh Court for the North-Western Circuit dated 17 October 2025 No. Ф07-9868/2025.

32 For example, an action to reduce the price and an action to recover damages arising out of the same transaction and based on the same facts were deemed to be different claims for the purposes of *lis pendens* (Ruling of the Arbitrazh Court for the West Siberian Circuit dated 08 April 2024 No. Ф04-1428/2024).

33 *See, e.g.*, Ruling of the Arbitrazh Court for the Moscow Circuit dated 14 April 2021 No. Ф05-9796/2021.

34 *See, e.g.*, Ruling of the Arbitrazh Court for the Moscow Circuit dated 24 September 2018 No. Ф05-16522/2018.

cross-border bankruptcy.[35] Where the Concurrent Proceedings are not identical, Russian courts and litigants usually treat them as related actions subject to a discretionary regime of suspension (as further explained in our answer to Question 10 below), which leaves little room for the application of a strict *lis pendens* in Russia.

129. In this regard, we generally welcome the definitional approach in Article 3 not to reproduce the strict triple identity test when it comes to "*parallel proceedings*." However, as noted in our response to Question 2 above, we query whether the current definition is sufficiently clear for the courts to understand what the Convention means by the "*same parties*" or "*same subject matter*." Given that these notions are at the very core of the Convention's applicability, further explicit provisions on the issue would in our view be critical to the effectiveness of the framework for parallel proceedings. Without such further stipulations, we expect that, despite Article 23, courts will effectively continue using their domestic *lis pendens* frameworks and their existing case law on the identity of parties, causes of action and relief sought. As domestic case law is non-uniform (with some jurisdictions such as the U.S. being much more liberal[36] to each prong than others such as Russia[37]), this will create the risk that, despite the sophisticated nature of the rules found in Chapter III, the Convention may not achieve a measurable impact on the actual state of affairs (apart from creating an additional layer of legitimacy for the courts to consider the issue of cross-border efficiency – which is welcome in itself but may not be enough to maximize the benefits of the Convention).

130. Assuming domestic practice adopts a more functional approach to the "*same subject matter*" (as set out in the Explanatory Report to the Judgments

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35 *See, e.g.*, Ruling of the Arbitrazh Court for the North-Western Circuit dated 20 September 2007 in case No. A56-14945/2004.

36 *See Taylor v. Sturgell*, 553 U.S. 880, 893–95 (2008) (holding that preclusion against a non-party to the earlier action may be allowed in six situations: when the non-party agreed to be bound by the earlier judgment, when a substantive relationship justifies preclusion, when the non-party's interests were adequately represented by a party to the earlier action, when the non-party assumed control over a lawsuit, when the non-party sought to avoid the application of preclusion by litigating through a proxy, or in special statutory schemes that are otherwise consistent with due process).

See also In re Regina Bozic, No. 17-70614 (9th Cir. Apr. 25, 2018), p. 6 (first-to-file doctrine applies in domestic cases where two cases involve "*substantially similar issues and parties*"). For the broadly "*transactional*" definition of the "*same claim*" (including different theories and remedies), *see* Restatement (Second) of Judgments §§ 24 (1982), quoted and applied in *Lighthouse Landings, Inc. v. Connecticut Light & Power Co.*, No. 17976 (Conn. Jan. 5, 2011) ("*Because the operative effect of the principle of claim preclusion or merger is to preclude relitigation of the 'original claim,' it is crucial to define the dimensions of that 'original claim.' The Restatement (Second), Judgments provides, in § 24, that 'the claim [that is] extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage*.'").

37 HCCH Permanent Bureau, Comparative Note on *lis pendens* in the Recognition and Enforcement of Foreign Judgments (October 2015), Part B (Comparative Table of Laws and Practices), p. 25 (Russian Federation). *See also* I.V. Getman-Pavlova and M.A. Filatova, *Op. cit*. *See also* our response to Question 10 below for specific examples from Russian case law.

Convention),[38] the precise line between "*parallel proceedings*" and "*related actions*" may be blurred. Are, for example, a proceeding aimed at the recovery of principal debt and a proceeding aimed at the recovery of default interest on top of that debt to be treated as parallel proceedings or as related actions? The current definitions in Article 3 may suggest that these are parallel proceedings. But some of the rules in Chapter II seem to assume that parallel proceedings involve greater identity between two claims (which is presumably why Article 5(2) requires dismissal upon completion of the foreign parallel proceeding). If Chapter II is meant to deal not only with identical claims but also with claims dealing with the same fundamental basis (thus extending, for example, to cases involving a different request for relief based on identical or nearly identical facts), one could wonder if it is useful to differentiate between "*parallel proceedings*" and "*related actions*" in the first place. At the very least, this distinction may require further definitional clarity or illustrations on how to deal with edge cases in the Explanatory Report. Otherwise, the choice between Chapter II and Chapter III will likely be made by domestic courts by importing their domestic notions, reducing predictability of the Convention's application.

131. Finally, as noted above, in terms of the substance of the Chapter II framework, it is not currently self-evident that its rules will always contribute to the overall efficiency of the proceedings. It appears that Chapter II is currently based on both the notions of efficiency and the goal of preserving jurisdiction of the court first seized (or of promoting certain bases for direct jurisdiction – via the jurisdictional filters in Article 8(2)). However, there is arguably little basis to assume that the court first seized or the court with an Article 8(2) connection would necessarily dispose of the case more effectively compared to other courts. That being said, the existing approach does come with the appeal of greater certainty in choice of courts and may be more acceptable to jurisdictions whose courts are less used to a direct efficiency analysis for reasons of principle.

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38 Garcimartín/Saumier Explanatory Report on the 2019 Judgments Convention, para. 272: "*These expressions* [...] *are meant to exclude the requirement that the two judgments involve exactly the same 'cause of action', as is required in the HCCH 2005 Choice of* [Court] *Convention. That approach was considered too restrictive in this Convention given the variety of causes of action in different States. The key element is that the 'central or essential issue' must be the same in both judgments*."

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.

132. As noted under Questions 1.1 and 9 above, the legal framework for "*related actions*" (Chapter III of the Draft Text) is likely to have practical significance because, if the requirements for "*parallel proceedings*" are construed strictly, a major portion of Concurrent Proceedings will fall under the "*related actions*" framework.

133. In light of this, we elaborate below on (i) the extent to which discretionary provisions of Chapter III are likely to find practical application, and (ii) options to maximize the use of Chapter III in countries that are not used to the doctrine of *forum non conveniens*.

Likely practical application of Chapter III on related actions

134. Discretionary provisions allowing a court to suspend proceedings pending the resolution of a related action by a foreign court (intended to achieve broadly the same goal as Chapter III) are already foreseen by a significant number of domestic legal systems.[39] However, in our experience, these discretionary provisions are often underutilized.

135. For example, the Russian Commercial Procedure Code provides that a Russian court may[40] suspend proceedings pending resolution of a related action by a foreign court, provided that the findings made by that court are likely to influence the outcome of the case.[41]

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39 *See, e.g.*, Brussels I bis, Article 30(1).

40 This language is construed in Russia as indicating judicial discretion. *See, e.g.,* Ruling of the Eighth Arbitrazh Appellate Court dated 21.06.2024 No. 08АП-2574/2024 ("*As stated in Ruling of the Constitutional Court of the Russian Federation No. 1236-O dated 28 May 2020, Article 144(5) of the Commercial Procedure Code of the Russian Federation – which establishes the court's right (rather than obligation) to stay proceedings in a case where an international court or a court of a foreign state is considering another case whose decision may be relevant to the consideration of the present case – follows from the principle of the autonomy and independence of the judicial branch. When deciding whether it is necessary to stay proceedings in a case, the court assesses all the circumstances of the case in their totality, proceeding from the objectives of proceedings in arbitrazh courts, including the objective of ensuring a fair public hearing within a reasonable time by an independent and impartial court, and from its duty to render a lawful and reasoned decision*").

41 Arbitrazh (Commercial) Procedure Code, Article 144(5): "*An arbitrazh (commercial) court is entitled to stay the proceedings* [...] *if another case is being examined by an international court or by a court of a foreign state, where the decision in that other case may be relevant to the consideration of the present case.*"

136. However, a stay under this provision has been granted only in a handful of cases:[42]

(a) most of these cases relate to issues that a court would have difficulties deciding on its own. For example, Russian courts consider suspending proceedings where a foreign court is seized with a corporate dispute that affects the authority of a representative of a foreign legal entity (to the extent that the findings of the courts at the legal entity's domicile may later be used by the Russian court to determine the authority of that representative);[43] and

(b) outside of scenarios where a Russian court is ill-equipped to resolve the underlying controversy, Russian courts ordinarily refuse to defer to a foreign court even in the face of substantial overlap.[44] For example, Russian courts

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42 A significant number of these relate to regional or international specialized courts rather than foreign courts. *See, e.g.,* Ruling of the Federal Arbitrazh Court for the North-Western Circuit dated 18 October 2010 in case No. А46-6333/2010 ("*the courts – taking into account that staying proceedings in a case pursuant to Article 144 of the Arbitrazh Procedure Code of the Russian Federation is a right (discretion) of the court – having found that the outcome of the CIS Economic Court's consideration of case No. 01-1-Е/2-10 may be relevant to the present case, lawfully stayed the proceedings in the case*").

43 *See, e.g.*, Ruling of the Federal Arbitrazh (Commercial) Court for the Moscow Circuit dated 26 February 2013 in case No. А41-10517/12 ("*Until the competent court of the Republic of Cyprus determines who are the acting directors, the secretary and the shareholders of the Company, and who is authorized to represent its interests, including before the courts of foreign states, no statement of claim filed by the Company may be examined on the merits by an arbitrazh (commercial) court of the Russian Federation, due to the impossibility of confirming – by proper documents from the Company's country of incorporation – the authority of its representatives*"); Ruling of the Federal Arbitrazh Court for the North-Western Circuit of Russia dated 14 July 2011 in case No. А56-58444/2010 (reversing lower court rulings that failed to apply BVI corporate law when deciding the dispute and saying, *inter alia*, that "*a competent court of the British Virgin Islands is hearing a claim brought by a shareholder of the Company – Svoboda Corporation – seeking to have the resolution dated 06 August 2010 declared invalid. Article 144(5) of the Arbitrazh Procedure Code of the Russian Federation provides that an arbitrazh court is entitled to stay proceedings in a case if a court of a foreign state is considering another case whose decision may be relevant to the examination of the present case. The courts of first instance and appellate instance did not make use of this power*"); *see also* Ruling of the Ninth Arbitrazh Appellate Court dated 19 February 2013 No. 09АП-4053/2013.

44 *See, e.g.*, Ruling of the Eighteenth Arbitrazh (Commercial) Appellate Court dated 21 October 2021 No. 18АП-14497/2021 in case No. А47-2707/2021 ("*When staying the proceedings in the case, the court of first instance stated that* [...] [the foreign proceeding] *would give rise to issue estoppel for the present case in terms of determining whether the disputed equipment meets the quality requirements for the goods supplied*. [However] [t]*he court of first instance did not substantiate why it was impossible to consider the claim filed by PJSC "Kuvandyk Plant of Lifting-and-Transport Equipment 'Dolina'" on the basis of the evidence available in the case, taking into account the objections submitted by JSC "Olsa". The representative of JSC "Olsa," A.I. Stelmakh, who participated in the hearing before the appellate court, also confirmed that no court-ordered expert examination had been appointed in* [the case pending before the foreign court]. *Thus, the examination of* [...] *claims in both cases is carried out on the basis of the courts' review of the written evidence submitted by the parties, which the Arbitrazh Court of the Orenburg Region is able to do independently*"); Ruling of the Seventeenth Arbitrazh Appellate Court dated 3 August 2023 No. 17АП-7573/2023-АК ("*circumstances to be proven in the present case may be established by the court regardless of the outcome of the case referred to by the applicant* [...] [therefore] *the outcome of that case before a court of a foreign state is not of material significance for resolving the dispute in the present case*"); Ruling of the Ninth Arbitrazh Appellate Court dated 8 July 2020 No. 09АП-15732/2020 ("*The court finds no circumstances indicating that it is impossible to consider this case before the matters pending before the Commercial Court of the Sumy Region are resolved. The parties are not deprived of the opportunity to apply later for reconsideration of the case on the basis of newly discovered circumstances, should they consider*

normally refuse to stay proceedings aimed at enforcing a security interest in a collateral due to an event of default, even where a foreign court is seized with the logically antecedent question of whether an event of default has in fact occurred.[45] The same is generally true for cases where foreign courts are seized with actions involving the invalidity or termination of an underlying contract on which the Russian claim is based.[46] In cases of this kind, which merely involve overlapping evidence, Russian courts tend to find that they have jurisdiction to make their own findings on common issues notwithstanding the risk of irreconcilable judgments on adjacent issues (but at times express readiness to revise the Russian judgment in case foreign proceedings lead to substantial new evidence that could not be revealed prior to the Russian judgment).[47]

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that the decision of the Commercial Court of the Sumy Region will be significant for the relationships at issue").

45 *See, e.g.*, Ruling of the Federal Arbitrazh Court for the North-Western Circuit dated 30 November 2012 in case No. А56-31930/2011 ("*The fact that the Harju County Court of the Republic of Estonia, in case No. 2-11-34349, is considering a claim filed by PIL against BAP Holding OU seeking to have the Loan Agreement declared invalid does not prevent the court of first instance, when resolving the present dispute – concerning recovery of indebtedness under the Loan Agreement and foreclosure on the property pledged under the Mortgage Agreement – from examining the issue of the validity of the Loan Agreement*"); Ruling of the Federal Arbitrazh Court for the Moscow Circuit dated 6 May 2011 No. КГ-А40/4291-11 ("*the parties' agreement contained in clause 16.2 of the loan agreement on the applicable law and on referring disputes arising out of the loan agreement to a foreign court does not create obstacles to the consideration by a Russian arbitrazh court – subject to the rules on jurisdiction (competence) – of an independent claim for foreclosure*"); Ruling of the Federal Arbitrazh Court for the North-Western Circuit dated 26 April 2010 in case No. А21-2717/2009.

But see Ruling of the Thirteenth Arbitrazh Appellate Court dated 26 December 2017 No. 13АП-31392/2017 ("*When staying the proceedings in the case, the court essentially proceeded from the view that it was impossible to resolve the dispute between the parties in the present case until the dispute concerning the determination of the amount of the creditor's (mBank S.A.) claims against the debtor (Sevpromresurs LLC) under the secured obligation was examined – disputes in respect of which the parties had agreed to resolve disagreements exclusively in the courts of the Republic of Poland*").

46 Courts tend to refuse to stay the Russian proceeding in these cases – often with rather cursory reasoning. *See, e.g.*, Ruling of the Arbitrazh Court for the North-Western Circuit dated 30 November 2012 in case No. А56-31930/2011 ("*The institution of separate proceedings on a claim challenging the contract, in and of itself, does not mean that it is impossible to consider the case for recovery under the contract in the courts of first instance, appellate, cassation, and supervisory review; therefore, it should not entail a stay of the proceedings*"); Ruling of the Federal Arbitrazh Court for the North-Western Circuit dated 5 July 2010 in case No. А56-2909/2008 ("*Having heard the motion filed and the views of the persons participating in the case, the court of cassation finds no grounds to stay the proceedings in the case*. [...] *In the present case, the subject matter of the claim is the invalidation of the agreement dated 19 April 2006, for the non-performance of which the Company has brought a claim for damages before a* [foreign] *court*"); Ruling of the Federal Arbitrazh Court for the Volga-Vyatka Circuit dated 30 January 2012 in case No. А31-9298/2009 ("*The court found that the contract dated 01 December 2007 No. 006.07.В. had not been performed by the parties due to disputes that arose. PU.MA S.r.l. filed a claim with the Court of Padua (Italy) seeking termination of the said contract in connection with the Company's failure to perform its terms. The appellate court found that the case to be examined by the Court of Padua has a different subject matter and different grounds for the claim. Accordingly, the decision rendered in that case will not be relevant to the consideration of the present dispute*"). *But see* Ruling of the Thirteenth Arbitrazh Appellate Court dated 15 July 2014 in case No. А56-78224/2013; Ruling of the Ninth Arbitrazh Appellate Court dated 9 April 2010 No. 09АП-7334/2010-ГК.

47 *See, e.g.*, Ruling of the Thirteenth Arbitrazh Appellate Court dated 15 June 2021 No. 13АП-3036/2021 ("*the granting of the claim by the Vilnius Regional Court of the Republic of Lithuania* [on invalidation of

137. Therefore, existing rules intended to coordinate related actions do not appear to be very appealing to domestic courts as a matter of practice. However, if provisions on related actions are incorporated into an international treaty (such as the Convention), it is possible that judges will have an additional reason to consider cross-border efficiency because the Convention may offer an additional justification for them to legitimately do so. Countries with significant ties to each other and with similar legal systems are the most likely to utilize this framework.

Potential additions to Chapter III

138. To maximize the room for practical application of Chapter III at the global level, a number of additions may be worth considering:

(a) an option to stay proceedings pending the determination of relevant issues in a foreign related action. We observe that Chapter III – as it currently stands – seems to be based almost entirely on the notion of *forum non conveniens*. Under Articles 12 and 13 of the Draft Text, a court effectively has to give up its jurisdiction over related actions in full or in part if it finds that the related actions are best considered in another forum. This may reduce the appeal of Chapter III to countries that are not used to the idea that their courts may decline to exercise jurisdiction as a matter of discretion (let alone in favor of a foreign sovereign). In some countries, the current mechanism of Articles 12 and 13 may also trigger constitutional concerns, as the exercise of jurisdiction (once established) may be seen as a mandatory element of access to justice for categorical reasons.[48]

We expect that some courts would prefer to remain seized with the related actions but may be willing to await certain *findings* to be made by a foreign court which can later be taken into account to the extent permitted by the law of the forum and any applicable instrument on recognition and enforcement (on the basis of issue estoppel or otherwise).[49] This possibility, however, appears to be lacking from the Draft Text, with the exception of the note to Article 14 (noting a "*possible third scenario in which one of the courts initially seized has suspended proceedings pending a determination in another court seized of only part of the proceedings before it, after which the*

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an assignment agreement underlying the claimant's claim before the Russian court] *may constitute newly discovered circumstances and a basis for reviewing the court ruling on inclusion of the creditor's claim in the register of creditors' claims in accordance with the procedure provided for in Chapter 37 of the Arbitrazh Procedure Code of the Russian Federation*").

48 Grace Underhill, Masterstroke or misguided? Assessing the proposed parallel proceedings solution of the Hague Conference on Private International Law and the likelihood of its acceptance in Australia, Journal of Private International Law 20(3) (2024), pp. 642–643 (discussing potential constitutional constraints in Australia where measures would direct or curtail the manner in which courts exercise jurisdiction).

49 Framing this alternative as "*issue estoppel*" may be too system-specific: many legal systems do not recognize issue preclusion in that form (and even fewer recognize foreign issue preclusion absent strict identity requirements), which may reduce the acceptability of such language in a global instrument.

court that has suspended will need to resume its own proceedings, taking into account the findings of the other court").

We believe that, while Articles 12 and 13 can be retained for jurisdictions that are willing to make use of this mechanism, a further provision should be inserted into Chapter III that would allow courts to stay a related action pending the resolution of a case before a foreign court and, upon resumption, to adjudicate the related action taking account of the foreign decision to the extent permitted by the law of the forum and any applicable instrument on recognition and enforcement (in light of, *inter alia*, any *res judicata* effects of the foreign judgment in a related action).

In practice, this may turn out to be the most widely used provision of Chapter III, as it is the least intrusive with respect to the jurisdiction of Contracting States. For example, a Russian court may decide to (i) stay proceedings involving a Cyprus-incorporated entity (regardless of cause of action) while Cypriot courts are considering a corporate dispute affecting the authority of its officers, and then (ii) once the Cypriot courts have adjudicated the matter, incorporate their findings into the Russian proceeding by deferring to the authority of the officer whom the Cypriot court determines to be proper (provided that the Cyprus judgment is capable of recognition within Russia). In this scenario, it could be both unnecessary and counterintuitive for a Russian court to find that the related action pending before it must be fully or partially resolved by Cyprus courts (if, for example, it relates to a claim for payment under a contract that is brought by the Cyprus entity affected by a corporate dispute). Given that Russian cases dealing with related actions have so far been primarily confined to this type of scenarios, it appears that Chapter III of the Draft Text – in its current shape – would not be readily adopted by Russian courts.

It could also be feasible to allow Contracting States to make declarations in order to decide on their preferred approach to dealing with related actions. Contracting States could choose between (i) the existing approach styled after *forum non conveniens* (Articles 11–13 of the Draft Text), or (ii) the less demanding option of staying domestic proceedings pending resolution of a related action abroad and then taking account of the foreign decision (to the extent permitted by the law of the forum and any applicable instrument on the recognition and enforcement) in order to adjudicate the related action that is before the suspending court; and

(b) unilateral determinations under Chapter III. At present, Articles 12 and 13 of the Draft Text seem to anticipate that two or more courts must unanimously decide (each by way of their own decision) that a set of related actions would (fully or partially) proceed in a single forum for the Chapter III framework to be engaged.

We query whether there may be scenarios in which one of the courts is already seized with the part of the related actions that the other courts prefer to have determined by that court. In that fact pattern, it could be redundant to require the court already seized with the requisite part of related actions to reach a determination on its own fitness to proceed with the adjudication.

Similarly, if the less demanding option of staying proceedings (subject to a duty to take the findings of a foreign court into account upon resumption) is adopted (as proposed above), it would appear to be unnecessary for the determination of the most appropriate court to be made jointly by two or more courts. Rather, each court would be able to decide for itself whether it is efficient to await findings made by a foreign court seized with a related action.

139. To make Chapter III more accessible to general audiences, it may also be desirable to consider two further revisions:

(a) first, the term "*part of the related actions*" used in Article 13 may benefit from a clarification. It is not presently obvious whether a "*part of related actions*" implies (i) a distinct claim (or several claims) that is capable of being adjudicated by one court, (ii) certain factual or legal questions at issue in several related actions, or (iii) both claims and questions; and

(b) second, as noted in our response to Question 1.1 above with regard to Article 1(3), it may be useful to clarify the consequences of a "*related action*" being completed by one of the courts (similar to Articles 5(2) and 5(3) of the Draft Text, if they are to be retained). That type of provision (even if formulated in broader terms or as a *renvoi*) could make the goals and the intended manner of operation of Chapter III of the Convention significantly more straightforward for generalist judges and litigants.

140. Finally, an issue worth additional consideration is whether Contracting States should be able to opt out of Chapter III by way of a declaration. Even though we expect that Chapter III will have significant practical importance, some jurisdictions may be ill-equipped to use the rules of Chapter III productively. Consider, for example, a legal system that (i) does not permit a court to refuse to exercise jurisdiction on the basis of discretionary factors in a manner similar to *forum non conveniens,* and (ii) does not recognize issue estoppel arising from foreign decisions not meeting the triple identity test (or at all). Suspension or dismissal of a related action by a court in such a legal system may not achieve procedural efficiency.[50]

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[50] Although Russia is usually classified as a civil law jurisdiction, Russian courts in principle recognize issue estoppel flowing from a foreign decision involving the same parties, regardless of the relief sought and the underlying cause of action in the foreign proceeding (*see, e.g.,* Ruling of the Arbitrazh Court for the Central District dated 01 February 2007 in case No. A09-8116/04-19(06-24). Moreover, Russian courts tend to query whether the foreign decision will give rise to issue estoppel for the case under consideration when exercising their domestic-law discretion on whether to stay proceedings pending a related action abroad. In this regard, Russian courts tend to state that "*findings* [of a foreign court] *must be capable of giving rise to issue preclusion for the parties to the present case*" in order for

However, a state of this kind may still be willing to adopt the Convention for the narrower purpose of preventing parallel proceedings under Chapter II (assuming the definition of related actions remains broad and the regime for parallel proceedings and related actions remains distinct).

a stay application to be granted (Ruling of the Ninth Arbitrazh Appellate Court dated 11 June 2024 No. 09АП-28850/2024). Otherwise, the Russian court "*would in any case need to undertake all relevant procedural steps on its own*" – meaning that the stay would not be procedurally beneficial (*see, e.g.,* Ruling of the Arbitrazh Court for the Moscow Circuit dated 28 November 2016 in case No. А40-213203/2014).

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 seized, in cases involving parallel proceedings and related actions?

141. Chapter IV may be useful when it comes to the effective operation of the Draft Text. Without a structured channel for obtaining neutral cross-border procedural information, courts risk either making allocation decisions on incomplete assumptions or turning the allocation stage into expensive satellite litigation driven by partisan submissions about what is happening abroad.

142. Our observations with regard to the likely effectiveness and practical operation of Article 15 are as follows:

(a) first, the most practical constraint is time. Cross-border judicial interaction tends to be slow in real-world operation. Experience with judicial cooperation mechanisms (including the delays often encountered under the 1965 Hague Service Convention framework) suggests that inter-court communications may create material pauses in the lifecycle of proceedings. For that reason, Chapter IV should not be designed (or interpreted) on the assumption that communications will occur quickly or routinely. In particular, it would be undesirable if the operation of the communication mechanism – formally or as a matter of practice – created a presumption that all proceedings must remain suspended while communications are ongoing. Currently, this reading is possible when Article 9(2) (per Approach 1) is seen together with Article 9(6). If the Convention is construed in this manner, that could elevate the risk of abusive tactics (including variants of the "*Italian torpedo*"), which in turn would require more frequent recourse to exceptional provisions (including Article 19) and would predictably reduce the Convention's overall predictability;

(b) second, the effectiveness of Chapter IV will depend on whether it is implemented as a tool for exchanging *procedural, logistics-centered information* – not as a forum for debating the merits, or for implicit comparisons about the "*quality*" of justice between legal systems. There may also be due process concerns if the Convention implicitly allows courts to discuss merits-adjacent outside of the adversarial process; and

(c) third, the bracketed formulations on the degree of obligation to cooperate are consequential for practical uptake. A strongly worded obligation may be normatively appealing but could be politically and institutionally unrealistic. In addition, communication may not be necessary in all cases (where, for example, the court feels it has sufficient information about the foreign proceeding) – which is why firmer language such as "*undertake*" or "*shall endeavor*" appears excessive. A balanced formulation should encourage

(rather than require) cooperation while making clear that communications remain subject to domestic procedural law.

143. On the specific methods of communication foreseen by Article 16, our views are as follows:

(a) overall, we believe the menu of communication methods is an appropriate design choice because it recognizes that judicial systems differ materially in their ability to engage in direct court-to-court contacts;

(b) in closely related jurisdictions, direct court-to-court communication is likely to be the most effective method where it is permitted. However, it is also the method most likely to raise domestic-law and due-process concerns (notably where communications occur outside the parties' presence). For that reason, the occurrence of such communications should be recorded and disclosed to the parties. While this can be left to domestic laws rather than regulated in the Draft Text itself, it may be desirable to address the issue in accompanying documents to the Convention;

(c) indirect communication via a central/competent authority may be essential for systems that cannot accommodate direct court contacts. But its principal limitation is speed: reliance on an intermediary will often entail substantial delay, and may create administrative bottlenecks. Practical experience with Central Authority channels under the 1965 Service Convention demonstrates that, where direct transmission channels are unavailable (for example, where a State has objected to the Convention's Article 10 channels, which include Russia), routing requests through a Central Authority can become a lengthy process. In Russia, these types of requests routinely require a postponement of litigation by over one year – something that would clearly undermine the basic objectives of the Convention. If this channel is expected to be used meaningfully, the Convention's supporting materials should encourage streamlined transmission and discourage unnecessary formalism. In addition, as noted above, it would be desirable to clarify that this type of communication should not in itself lead to a stay of any related actions or parallel proceedings as a matter of a state's compliance with its obligations under the Convention (which is currently a possible interpretation due to Article 9(2) and its interplay with Article 9(6)); and

(d) finally, as noted above, communication through the parties is a valuable minimum baseline and, in many systems, may be the only method that can operate without structural friction. It is also likely to be more time-efficient in practice than indirect communication through competent authorities. At the same time, it remains the channel most vulnerable to strategic behavior and reliability concerns. It may be desirable to set out in the Explanatory Report on the Convention potential ways to make use of this method of communication, including minimum content and supporting evidence which domestic laws may require in order to implement Article 16. It can also be

considered whether certain rules on this matter may be appropriate at the level of the Convention itself (subject to concretization in domestic laws). For example, a party invoking the Convention may be expected to provide objective proof of foreign seisin and current procedural posture (*e.g.*, case identifiers, seisin date per Article 4, key procedural milestones, and any timetables). This reduces the risk that the "*communication mechanism*" becomes a vehicle for selective disclosure and further satellite disputes.

144. Relatedly, it could be desirable for Article 16(3) to set out a number of stipulations aimed at liberalizing the form of communications:

(a) in particular, the bracketed drafting on translation reflects a real operational tension. Translation requirements proposed in Article 16(4) enhance accuracy and procedural fairness, but consideration should be given to a simple operational rule in Article 16(4) (or clear guidance in the Explanatory Report) that translations need not be officially certified, legalized or notarized, absent a specific reason in the individual case. This would reduce the risk of avoidable delay at precisely the stage where timely coordination is most valuable; and

(b) relatedly, it may be useful to provide a flexible rule on the *means* of transmitting court-to-court correspondence – by, for example, explicitly allowing electronic exchange (subject to appropriate security and authenticity safeguards), at least where a Contracting State has so declared.

145. On Articles 17 and 18, we generally agree that they are useful. We do not expect Article 17 (joint hearings) to be utilized outside of closely-knit regional frameworks, which is why we support its opt-in character per the Draft Text (Article 17(2)). We also support Article 18 (safeguards for communication and joint hearings) as this provision is essential for global acceptability given the potential challenges unique to judicial communication and joint hearings (including due process concerns).

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

146. Please see our response to Question 11.1 above.

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?

147. The three safeguards in Articles 19–21 are, as a conceptual point, both adequate and necessary as a counterbalance to the rigidity inherent in some of the rules of Chapters II and III.

148. This is subject to several potential refinements:

(a) first, the use of "*denial of justice*" terminology in Article 19 may lead to unwanted results. On the one hand, "*denial of justice*" is a term of art in public international law[51] (particularly as a prong of the customary minimum standard of treatment[52] and/or fair and equitable treatment in investment treaties),[53] which comes with a specific – and normally very high – threshold.[54] By virtue of Article 31(1) and Article 31(3)(c) of the VCLT, Article 19 of the Draft Text may be interpreted through the lens of this exceedingly high threshold – an outcome that is not necessarily desirable given the goals of the Convention.

On the other hand, a number of jurisdictions already have domestic notions of this standard which may be laxer than what the drafters of Article 19 may intend. This includes Russia, particularly when it comes to Article 248.1 of the Commercial Procedure Code which deals with exclusive jurisdiction of Russian courts involving the risk of denial of justice due to foreign sanctions.[55] One particular risk we are mindful of is that courts may use

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51 *See, e.g.,* Zachary Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' (2014) 63 *International and Comparative Law Quarterly* 867, 867 ("*among the primary rules of international law there is a special form of delictual responsibility known as denial of justice*").

52 *See, e.g., The Loewen Group, Inc and Raymond L Loewen v United States of America*, Award, 26 June 2003, para. 130.

53 *See, e.g.*, Vid Prislan, 'Investment Tribunals as Courts of Appeal? Determining State Responsibility for Substantive Denial of Justice' (2023) *British Yearbook of International Law* (advance access) 7 ("*claims of denial of justice were simply presented as violations of the fair and equitable treatment (FET) obligation. With the requirement of due process being inherent to the notions of fairness, investment tribunals invariably considered the prohibition of denial of justice to be subsumed under the FET standard*").

54 *The Loewen Group, Inc and Raymond L Loewen v United States of America*, Award, 26 June 2003, para. 130 ("*error on the part of the national court is not enough, what is required is "manifest injustice" or "gross unfairness*"); *Robert Azinian, Kenneth Davitian and Ellen Baca v United Mexican States*, Award, 1 November 1999, paras. 102, 103 ("*A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way* [...] *There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law*").

55 *See, e.g.,* Raid Abu-Manneh et al., 'Jurisdictional Battleground in Disputes with Sanctioned Russian Persons' (Mayer Brown, 31 July 2024): "[Articles 248.1 and 248.2 of the Commercial Procedure Code] *do not particularize the kind of obstacles to access to justice or the degree to which they must impede the Russian party's access to justice to constitute sufficient grounds for an applicable choice of forum agreement to be deemed inoperable. This issue was clarified by the Russian Supreme Court in December 2021. It held that it was not necessary for the petitioning party to demonstrate how the*

Article 19 to pass judgment on the legal systems of other Contracting States (such as whether they are equipped with adequate guarantees of due process, whether there is systemic corruption in a state's judiciary, whether the judiciary is sufficiently independent and impartial – as opposed to whether due process was available in the specific case, whether there is evidence of corruption in the case at hand, and whether resolution of the specific case was tainted with an appearance of bias). That, in turn, may undermine the Convention as an instrument that assumes a degree of mutual trust between Contracting States in each other's legal systems.

To address both of the foregoing points, it may be worthwhile to consider (i) replacing the reference to "*denial of justice*" in Article 19 with treaty-autonomous language that is not reminiscent of terms used in broader international law, and (ii) clarifying in Article 19 (or as a separate provision in Chapter V applicable to all safeguards) that the use of safeguards should be specific to the facts of each particular case (rather than to the judiciary or legal system of a Contracting State as such). For example, one could focus on the notion of independence and impartiality in the specific case other well-established (but case-specific) elements of the right to a fair trial – as opposed to the vaguer notion of "*due process*" and the like.

We also support the addition of the word "*manifest*" to Article 19 to ensure alignment between this provision and public policy (considering that denial of justice would, in most cases, also contradict procedural public policy of the forum);

(b) second, the notion of public policy in Article 21 may benefit from further clarification. We support the addition of public policy to the Draft Text in order to ensure the attractiveness of the Convention at the global level, notwithstanding the differences in legal systems. We also welcome the word "*manifest*" in Article 21 to refer to the public policy of the forum state.

That being said, we are concerned that the reference to "*sovereignty or security interests of the forum State*" in Article 21 is currently divorced from the notion of "*public policy*" – which can be read as suggesting that this is a distinct ground that can be construed more broadly than public policy. We think the reference to sovereignty and security interests, if retained, should be more explicitly framed as a subset of public policy (applicable only if it meets the requirements to public policy).[56] That would be similar to

restrictive measures have impacted, or may impact, its access to justice. The Supreme Court stated that the imposition of restrictive measures ipso facto prejudices the affected party's rights, at a minimum, reputationally, and thereby places that party at a disadvantage"). We expect, however, that Russia would make an Article 22 declaration with regard to matters falling under Article 248.1 if it were to ratify the Convention.

[56] As one US court recently noted, public policy is not the same as national political interest. *See* Satoriagricultural Consultancy & Projects Mgmt. LLC SPC v. T&R Prods. LLC, No. 1:25-cv-01287 (BAH), Memorandum Opinion at 1 (D.D.C. Jan. 8, 2026), ECF No. 22 ("*Even if payment of the arbitral awards would somehow violate U.S. sanctions, U.S. courts have consistently held that the public policy*

the approach of Article 7(c) of the Judgments Convention ("*manifestly incompatible with the public policy of the requested State, including* [...] *situations involving infringements of security or sovereignty of that State*") – thus also making clear that the word "*manifestly*" applies to situations involving security or sovereignty.

In addition, we believe that Article 21 would benefit from a clarification that the state may only invoke procedural public policy where "*specific proceedings* [are] *incompatible with fundamental principles of procedural fairness of that State*" (similar to Article 7(c) of the Judgments Convention). In other words, procedural public policy should not be available where the concern relates to the general fitness of another state's judiciary or its legal system to provide the necessary guarantees of justice; and

(c) third, the "*abuse of process*" regime in Article 20 may benefit from practical examples that would guide its application in real-world cases. While the safeguards listed in Articles 19–21 cannot be defined with precision due to the very nature of escape clauses, the Convention may benefit from setting out several common scenarios that would trigger their application in the context of Concurrent Proceedings. These may include the examples offered in the Consultation Paper.[57] It could be beneficial to mention some of these examples in the Convention itself (rather than in an accompanying document) given that the Explanatory Report will not, in practice, necessarily be treated as an authority by domestic courts.

In order to facilitate the application of Article 23 of the Draft Text (uniform interpretation) with regard to Article 20 (given its breadth and its less usual character than the notion of public policy), it may also be useful to offer potential factors that may speak on an abuse of process in the Draft Text. These can, for example, include (i) good faith, (ii) whether the initiation of a parallel proceeding was foreseeable or imminent when a party initiated a case that is later used to suspend the parallel proceeding, and (iii) whether the actions of a party are aimed at delaying the proceedings or leading to disproportionate costs for the other party. It may also be useful to add the word "*manifest*" to this provision – with the goal of preventing in-depth litigation on what is, after all, a preliminary point that does not directly affect the outcome of the case (suspension of the proceedings).

A distinct question that may arise in this context (if jurisdictional filters in Article 8 are retained in the Convention) is whether a court that does not have

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provision of the New York Convention "was not meant to enshrine the vagaries of international politics under the rubric of 'public policy,'" and that there is a distinction between the United States' "public policy" and its "national political interests. [...] *To deny recognition of an arbitral award under the public policy exception of the New York Convention, a court must find that the award conflicts with "fundamental notions of what is decent and just,"* [...] *not merely that the award conflicts with the interests of the United States*").

57 The Consultation Paper, para. 88.

connection per Article 8 may justifiably refuse to suspend proceedings in favor of a court that does have such connection on the basis of abuse of process. The current language of the Convention (rightly) permits this (consistent with the fact that the Convention should not be construed as regulating direct jurisdiction and precluding domestic law grounds for the exercise of jurisdiction). However, this may significantly reduce the practical relevance of jurisdictional filters in Article 8(2) and of what is currently framed as an obligation to suspend proceedings in Articles 5(1) and 8(1) of the Draft Text (effectively turning Chapter II into a largely discretionary tool similar to Chapter III when seen together with the Convention's safeguards).

149. As noted elsewhere in these comments, courts can be expected to expansively use the safeguards in Chapter V (thus reducing the utility of the core rules in Chapters II and III of the Convention) if Articles 1–18 of the Convention systematically fail to achieve what is perceived as a fair outcome. To avoid this, we believe that the core provisions of the Convention should embed sufficient flexibility to make it unnecessary for states to resort to safeguards in routine cases that are predictable already at this stage.

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.

150. The Draft Text offers an attractive legal framework aimed at achieving these objectives. That being said, its practical attainment may suffer from a number of difficulties as noted in our answers to the preceding questions.

151. On parallel proceedings, these difficulties broadly include (i) the complexity of application of the Draft Text by generalist judges and litigators (not least due to the presence of several lines of inquiry that they must undertake, including verification of subject matter in light of the Convention's definitions, review of jurisdictional filters, analysis of factors relevant to choice of forum, etc.), (ii) the relative obscurity of the current definition of "*parallel proceedings*" (making the application of Chapter II manipulable), and (iii) the rigidity of the rules of Chapter II (which are based on the idea of *lis pendens* that does not necessarily consider whether proceedings in a parallel forum would be more cost effective than the forum seized later or without proper connection).

152. On related actions, potential difficulties are primarily derived from (i) the relative obscurity of the current definition of "*related actions*" (potentially leading to sophisticated, and thus costly, disputes on threshold questions such as the requirement of "*substantially the same parties*"), and (ii) the fact that Chapter III seems modeled exclusively on a *forum non conveniens* type of solution and does not leave room for a less demanding approach involving a unilateral stay of proceedings subject to a duty to take into account the findings of a foreign court seized with a related action.

153. A shared concern for all Concurrent Proceedings is whether the benefit of reducing litigation costs and mitigating inconsistent judgments is necessarily proportionate to these difficulties associated with applying the Convention. Some questions currently posed by the Convention may prompt heavy litigation which (especially in legal traditions where judicial and counsel work is traditionally expensive) may not always justify the benefits of applying the Convention. Nonetheless, the Draft Text, on its face, does not currently permit the courts to take this aspect into account when deciding on a suspension (especially when it comes to Chapter II).

154. If the Working Group concludes that a rule-dense, hard-law instrument (with multiple gateways and factor tests) is unlikely to secure broad ratification or to operate predictably in generalist courts, a fallback architecture could be considered. A relatively straightforward solution to the problem of Concurrent Proceedings could be to adopt a relatively short binding text accompanied by lengthier "*soft law*" guidance. Under that model, the binding text could involve two primary duties: (i)

courts must *consider* suspending proceedings if they see an overlapping action (not necessarily on the same subject matter or between the same parties) and do so by reference to cost efficiency and the need to prevent irreconcilable judgments (which are the core objectives of the Convention), and (ii) courts must endeavor to communicate with each other (through the parties or otherwise) in devising ways to achieve the objectives of the Convention.

155. This type of softer model would effectively include duties of best efforts rather than "*absolute*" obligations and would not necessarily be applied uniformly across Contracting States. Despite this, it may have a number of advantages. For example, a softer model could be more acceptable for adoption at the global level. In addition, a less legalistic solution could permit courts to undertake an explicit assessment of whether the benefits of a suspension outweigh its costs on the specific facts of the case (thus potentially resulting in a closer match between the black letter law rules and the Convention's objectives).

156. On the other hand, an advantage of the existing, more complex, model is that it could lead to greater certainty if applied with the necessary degree of uniformity. However, we fear that, as a matter of practice, it will be difficult for courts to forego direct assessment of whether a suspension *makes sense in the circumstances* and instead rely on the more rigid rules found in the Convention (especially in its Chapter II) merely to achieve *ex ante* certainty on what may be seen as a low-stakes issue of suspension (as a refusal to suspend proceedings does not itself prejudice substantive rights and preserves the courts' ability to assess the foreign judgment at the stage of recognition and enforcement).[58]

157. It may turn out that courts will, in practice, manipulate the rules of the Convention, including its safeguards, to achieve the same outcome (driven primarily by *ad hoc* notions of efficiency) that they would achieve if the Convention were reduced to the simpler – and softer – model. But in doing so, courts and litigants could expend greater costs (as a result of having to construe the Convention's rules in a manner enabling them to achieve efficiency in a given case and to justify their decision by reference to the Convention) when compared to more direct reasoning on procedural efficiency based on softer guidance in the Convention and the accompanying documents. If these concerns turn out to be accurate empirically (which remains to be tested), there may be little to no cost saving from adopting the Convention because the litigation cost of achieving certainty on whether to utilize the Convention's framework (and the litigation cost associated with the application of its rules) might be substantial.

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[58] This is, *inter alia,* why Russian procedural law does not entitle litigants to appeal refusals to suspend proceedings. *See* Arbitrazh (Commercial) Procedure Code, Article 147(2): "*An order of an arbitrazh (commercial) court on staying the proceedings in a case, or on refusing to resume the proceedings in a case, may be appealed*" (meaning, *a contrario*, that an order rejecting a stay application is not separately appealable).

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

158. We believe that the rules set out in the Draft Text would in any event improve the *status quo*.

159. While existing rules of domestic law in most jurisdictions already address the problem of Concurrent Proceedings (through *lis pendens*, *forum non conveniens* or otherwise), in our experience these rules are often underutilized in practice. Notwithstanding the difficulties outlined in our response to Question 13.1 above, an international treaty on this issue may provide courts with the necessary (and uniform) justification to pay closer attention to considerations of cross-border efficiency (while also enabling litigants to raise the issue with greater legitimacy).

160. In addition, an obvious advantage of the rules set out in the Draft Text is that they are based on a mixture of domestic approaches (such as *lis pendens* and *forum non conveniens*). This can facilitate the adoption and discussion of the Convention, as each jurisdiction can be expected to find something that feels close to home in the Draft Text. As a downside, one can expect that jurisdictions will then zoom in on approaches that feel familiar (with common law countries emphasizing Chapter III while civil law countries expansively using Chapter II to address "*grey-area cases*") despite Article 23. However, this practicality seems largely unavoidable at present.

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?

161. As noted above, the biggest risk that we see is that the Draft Text may generate complex litigation on threshold matters such as whether the Convention applies, whether a particular Concurrent Proceeding is a parallel proceeding or a related action, whether one or more courts have connection per Article 8, etc.

162. These risks are greater than those that currently exist because existing rules in many jurisdictions are much more streamlined than what the Convention anticipates. For example, under Russian procedural law, the objectives of the Convention are attained by two very brief provisions: (i) one requiring a stay where the foreign proceeding passes the triple identity test[59] (but importantly a refusal to do so is not appealable separately from the merits judgment – which limits the

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[59] Arbitrazh (Commercial) Procedure Code, Article 252(1): "*An arbitrazh (commercial) court in the Russian Federation shall leave a claim without consideration under the rules of Chapter 17 of this Code if a case involving a dispute between the same parties, concerning the same subject matter and on the same grounds, is pending before a foreign court, provided that consideration of this case does not fall within the exclusive jurisdiction of an arbitrazh court in the Russian Federation in accordance with Articles 248 and 248.1 of this Code*."

mandatory effects of this provision for practical purposes),[60] and (ii) the other giving the court discretion to stay domestic proceedings where a foreign proceeding is a related action whose outcome may affect the domestic case.[61] These rules do not generate significant litigation as they effectively boil down to allowing courts to consider the equities of each particular case to decide whether a stay is efficient.

163. Relatedly, the Convention may provide further incentives for private litigants to attempt abusive tactics styled after the well-known "*Italian torpedo*" or the like. These risks may also be greater than the current system because it might be more difficult for courts to dismiss these attempts when they are based on an international instrument (thus backed by greater legitimacy) compared to domestic – largely discretionary – provisions noted above.

164. The question of whether these risks outweigh the benefits of adopting the Draft Text naturally does not have a clear answer and may need to be answered by each Contracting State individually. That being said, we take the view that existing rules (including the safeguards found in Chapter V) are likely to offer a satisfactory solution to some of these problems. In our answers to the foregoing questions, we have also proposed a number of potential ways to streamline the application of the Convention and to address some of the problems that we believe are foreseeable already at this stage.

60 Ibid, Article 147(2): "*An order of an arbitrazh (commercial) court on staying the proceedings in a case, or on refusing to resume the proceedings in a case, may be appealed*" (meaning, *a contrario*, that an order rejecting a stay application is not separately appealable).

61 Ibid, Article 144(5): "*An arbitrazh (commercial) court is entitled to stay the proceedings in a case in the following cases*: [...] *if another case is being examined by an international court or by a court of a foreign state, where the decision in that other case may be relevant to the consideration of the present case*."

Question 14 – comments

What other comments, if any, do you have?

165. We welcome Article 22 of the Draft Text, which provides the necessary flexibility for States to declare that they will not apply the Convention to certain matters. This may be useful for States that reserve exclusive jurisdiction over particular issues to their own courts (beyond actions in rem, as addressed in the Draft Text) and may enhance the Convention's prospects for global acceptance.

166. In addition, in light of our comments in paragraph 40(a) above, we suggest considering whether the Convention should apply to cases lacking a meaningful foreign element, along the lines of Article 17 of the Judgments Convention and/or Article 1(2) of the 2005 Convention. An optional declaration on this point may also be welcomed by some Contracting States, as the issue is not necessarily covered by Article 22 of the Draft Text.

167. We assume, however, that reservations and optional declarations remain subject to further discussion at a later stage of the Convention's development. Accordingly, we do not address these matters in detail at this stage.