Survey response	
Please indicate: [Name:]	Richard Fentiman
Please indicate: [State:]	United Kingdom
Please indicate: [Region:]	Cambridge
Please indicate: [Affiliation:]	Professor Emeritus of Private International Law, University of Cambridge
Please indicate your profession:	Academia
Do you have practical expertise in cross-border civil or commercial litigation:	Yes
Press "Next" to continue	
1.1 What are your views on the scope of the Draft Text?	The draft convention is limited in its scope to cases involving proceedings in two Contracting States, and makes no provision for cases involving proceedings in a non-Contracting State. On the assumption that accession to the Convention may not be universal, this is problematic in three ways: First, it significantly diminishes the practical utility of the Convention. Second, it strengthens the case that introducing the Convention may not be justified given the disadvantages it would bring (see answer to Question 14). Third, it leads to the incoherent and unacceptable outcome that in any case involving two Contracting states and a non-Contracting State the conflict of jurisdictions would be resolved under the Convention as one between the Contracting States alone. It would be resolved without reference to the claims of the non-Contracting State to be the preferable forum, claims which may outweigh the claims of either of the two Contracting States involved. No doubt it could be provided that the Convention does not engage as between Contracting States in the event of additional proceedings in a non-Convention State. This, however, merely reinforces the point that the Convention's scope and utility is limited (see observations in response to Question 14).
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?	no comment
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)?	no comment

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).	See response to Question 1.1
2. What are your views on the definitions of parallel proceedings and related actions? In particular, please share your views on how these definitions might operate, and be applied by parties and courts, in practice.	The use of the phrase 'the same subject matter' is both uncertain and potentially very broad, and is likely to occasion litigation. Further specificity is required, although the distinction may be unnecessary (see response to Question 9).
3. What are your views on Article 4?	no comment
4. What are your views on Article 5?	No comment
5. What are your views on Articles 6 – 8 including how they will work in practice?	See responses to Questions 9 and 14
6.1 What are your views on the 'jurisdiction / connection' list in Article 8(2)?	No comment
6.2 Based on your experience, do you consider these factors appropriate for parallel proceedings i.e. for obliging courts to suspend or dismiss proceedings if they are not seised on the basis of one of these? Why or why not?	No comment
6.3 Are there any additional factors that you believe should be included?	No comment
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?	See responses to Questions 9 and 14
7.2 What are your views on how the two approaches may work in practice?	See responses to Questions 9 and 14
7.3 Do you have a preference for either approach? If so, please explain why.	See responses to Questions 9 and 14
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)?	No comment
8.2 Do you have any views on how Article 10 might work in practice?	No comment
8.3 Are there additional considerations that, in your view, should be taken into account?	No comment
9. 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	It is unclear why it is necessary to have distinct regimes regulating parallel and related proceedings, although the difference may no doubt be relevant to determination of the most appropriate forum. It would be simpler to

disadvantages of the framework, and how you think it will work in practice.	employ a single regime for seeking the most appropriate forum in both cases. It is unclear what fundamental difference warrants a different approach, and the present approach merely encourages definitional disputes about which regime applies. It is unclear what is served by Article 8. It would be simpler if all cases were remitted to the general test of appropriateness. Article 9 is a work in progress and any worthwhile comment depends on its final form. But any rule which turns on when a court is seised is inherently problematic, as the experience of the Brussels 1 recast regulation suggests. In some cases it encourages tactical forum shopping and in others privileges what may be a matter of chance. It also encourages needless litigation by litigants who not have commenced proceedings but for the need to establish priority. Importantly in the present context it is unclear why the timing proceedings should have any bearing on which court has the task of determining which forum is the most appropriate. In any multilateral regime it may the case that one court must be given the role of determining which is the most appropriate forum to avoid conflicting decisions on the issue. The logic is compelling. It is incoherent to have a regime intended to prevent a conflict between jurisdictions which itself generates such a conflict. Indeed, although a preference for the court first seised is presently a feature of Article 9 (parallel proceedings) rather than Article 11 (related actions), the note to the draft of Article 11 states revealingly that further consideration should be given to 'the possibility of introducing an order for the determinations'. The impetus towards prizing one court's determination over another is clearly hard to resist. Importantly, this points to the fundamental flaw in any instrument such as that proposed. In order that it can work it is necessary to incorporate an irrational preference for one court (in Article 9 the court first seised). See further, response to Question 14.
10. 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	See responses to Questions 9 and 14

advantages or disadvantages of the framework, and how you think it will work in practice.	
11.1 What are your views on the practical operation (or the effectiveness) of the communication methods set out in Chapter IV of the draft text for use between courts seised, in cases involving parallel proceedings and related actions?	No comment
11.2 Are there particular advantages and challenges you foresee in applying these methods?	No comment
12. 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?	No comment
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.	See response to Question 14
13.2 Do you have any views on whether the proposed rules set out in the Draft Text would improve the status quo?	See response to Question 14
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?	See response to Question 14
14. What other comments, if any, do you have?	I have two significant concerns which relate not to the present draft but to the objectives and feasibility of this project: First, the project appears to be driven by three related assumptions each of which may be questioned: (a) It assumes that the problems associated with parallel and related proceedings are of themselves worthy of treatment in a dedicated instrument. From a theoretical perspective, there may appear to be inefficiencies associated with such litigation, which may also lead to irreconcilable judgments. But in practice litigants are unlikely to pursue such litigation on two fronts for long. One party may simply capitulate or both may settle. The

	solution then lies in the dynamics of cross-border litigation. Again, although a risk of irreconcilable judgments (the outcome of parallel litigation) may exist in theory, this is significantly reduced in practice because it is unlikely that proceedings in either court will proceed to judgment. Cross-border cases are almost always settled before this occurs. Even if conflicting judgments arise any conflict is avoided by the rules familiar in all legal systems for giving priority to one judgment or another (perhaps the first in time). (b) It assumes that a uniform instrument is required to resolve such problems as parallel and related proceedings may cause. Uniformity may be appropriate or necessary to address national differences in relation to such matters as choice of court agreements and the enforcement of judgments. Certainty and predictability are of considerable importance in those areas and may be assisted by a multinational regime. But it is unclear why such a regime is beneficial here, given that national legal systems are likely to have rules for declining jurisdiction in such cases. It is possible, of course, that the local rules of some countries may be inadequate for responding to the problem of multistate litigation. That is, however, a matter for those countries and for local legislation not a multinational instrument. (c) As these considerations suggest, it is doubtful that the introduction of a uniform regime is justified given the disbenefits that would follow. One of these disbenefits is the novelty of any new regime and the uncertainty it entails. This is especially problematic if the regime is one designed to reflect different national laws with the result that it is universally unfamiliar. Another disbenefit is that any convention such as that proposed would inevitably sit beside rules of national law which would apply when the proposed convention does not (the scope of the draft being restrictive). There must be good reasons for introducing the complexity of parallel regimes. Of course, these familiar difficulties associated with any new instrument may be outweighed in some cases, as for example with the significant advantages brought by the Hague 2005 convention. Here, however, it is doubtful that any advantages

	exist which outweigh the disadvantages. Second, there are inherent difficulties in any regime which seeks a uniform, multinational approach to parallel and related proceedings. On the one hand, any solution which is satisfactory in principle is likely to be ineffective in practice. It might be possible to devise a scheme which avoids the complexity and conceptual difficulties present in the proposed draft. A preferable scheme to that proposed might be as follows: (a) It would dispense with the existence of distinct regimes for parallel and related proceedings. There is a distinction between such cases but it would be preferable to avoid the definitional problems that such a distinction entails and to allow courts to factor the difference into their flexible determination of the most appropriate forum. (b) It would dispense with the jurisdictional test provided by Article 8 and subject all cases to the general test of appropriateness. (c) It would dispense with any preference for the court first seised. It would instead permit courts having jurisdiction under their national law each to approach the allocation of jurisdiction on lines similar to that proposed in Articles 10 and 11(2). It would, however, retain the welcome flexibility introduced by Articles 10 and 11(2) . This is necessary given the inherent complexity and fact-specific nature of cross-border litigation, although it is perhaps likely to be welcomed more in those countries with a tradition of such an approach. Assuming that the structural distinction between parallel and related actions is removed, any material difference between those cases could be addressed when courts evaluate which forum is the more appropriate. Such an approach encounters fundamental difficulties, however. On inspection, a scheme in the simpler form suggested above would render any uniform instrument otiose. In particular, if the notion that one court (the court first seised) should determine which court is appropriate is rejected the effect is to permit parallel proceedings on the substance of a dispute and lead to inconsistent findings (and parallel litigation) on the issue of appropriateness. Again, as this suggests there is an inherent difficulty in any attempt to avoid

	multistate litigation by an international instrument. There is an ineluctable logic is any such scheme which requires one court to be given preference in identifying the appropriate forum. Yet to give preference to one court, necessarily on the basis of the timing of proceedings, although certain, lacks any rational basis. Moreover, any preference for the court first seised introduces the possibility of tactical litigation. It also encourages unnecessary litigation, litigation which perhaps would never have been contemplated but for the need to secure a tactical advantage. To be viable, it seems, any such regime must also be irrational and antithetical to the efficient resolution of disputes. The avoidance of parallel proceedings may be an issue which is inevitably best left to national law.