

Title	Working Group on Jurisdiction: Report
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Author	PB
Agenda Item	Item II.2
Mandate(s)	C&D Nos 8 and 9 of CGAP 2021 C&D No 7 of CGAP 2022
Objective	To report on the progress of the Working Group on the Jurisdiction Project and to present the recommendations of the WG following its fourth meeting
Action to be Taken	For Decision <input checked="" type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input checked="" type="checkbox"/>
Annexes	Annex I: Report of the Chair of the Working Group on matters related to jurisdiction in transnational civil or commercial litigation
Related Documents	- Prel. Doc. No 7 of February 2022 - Report of the Working Group on Jurisdiction - Prel. Doc. No 3 of February 2021 - Report on the Jurisdiction Project - Prel. Doc. No 5 of February 2020 - Third Meeting of the Experts' Group on Jurisdiction

Working Group on Jurisdiction: Report

I. Introduction

- 1 The Working Group on matters related to jurisdiction in transnational civil or commercial litigation (WG), under the chairmanship of Professor Keisuke Takeshita (Japan), was established following the Council on General Affairs and Policy (CGAP) mandate in 2021.¹ Since that time, the WG has met on four occasions. The first two meetings were held in October 2021 and February 2022. A report on the progress of these meetings was provided to CGAP in March 2022.²
- 2 Pursuant to the mandate given by CGAP at its meeting in March 2022,³ the WG met on 19-23 September 2022 (the third WG meeting) and 13-17 February 2023 (the fourth WG meeting). These meetings were held in person, with the possibility of remote participation.
- 3 The third WG meeting was attended by 66 participants, of which 19 attended in person, representing 24 Member States from various regions and two Observers. Similarly, at the fourth WG meeting, there were 70 participants, representing 24 Member States from various regions and two Observers.
- 4 Over the course of the third and fourth WG meetings, the WG has continued to discuss the rules dealing with parallel proceedings and has made solid progress on developing the draft text of a possible future Convention (see Annex I of the Report of the Chair of the WG which is attached to this Prel. Doc.), supported by a flow chart developed by the WG. The WG has considered, in detail, rules for parallel proceedings, rules of jurisdiction / bases for connection, the determination of the more appropriate / better forum, a communication mechanism, as well as other provisions, such as public policy and avoiding a denial of justice.
- 5 To support discussions in the third and fourth meetings, members of the WG submitted a total of 17 Working Documents, many of which were submitted jointly by several delegations. The intersessional work, collaboration and significant contributions made by members of the WG has facilitated discussions and enabled key aspects of a possible future Convention to be explored. The WG has also had regard to the interaction and alignment of the provisions of this possible future Convention, where appropriate, with the *Convention of 30 June 2005 on Choice of Court Agreements* and the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*.
- 6 The Report of the Chair of the WG (Annex I) highlights the matters discussed by the WG and reflects the points on which consensus has been reached in the two WG meetings. The Report also notes matters for future discussion and possible next steps recommended by the WG to continue the development of the possible future Convention.

II. Recommendation from the WG

- 7 The Report of the Chair of the WG noted the recommendation from the WG as follows:

Given the progress made, the WG recommends that CGAP approve the continuation of the Group's work, including two further meetings, as well as intersessional work prior to CGAP in March 2024. The WG would further report to CGAP in 2024.

¹ C&D Nos 8 and 9 of CGAP 2021, available on the HCCH website at www.hcch.net under "Governance" then "Council on General Affairs and Policy" and "Archive".

² Prel. Doc. No 7 of CGAP 2022, available on the HCCH website at www.hcch.net (see path indicated in note 1).

³ C&D No 7 of CGAP 2022, available on the HCCH website at www.hcch.net (see path indicated in note 1).

- 8 The WG also discussed the possibility of holding the next meeting at a location outside The Hague. A number of members supported this possibility, noting that specific dates and a suitable location would require further consultation. It was agreed that the PB would liaise with WG members on these logistical issues as early as practicable.

III. Proposals for CGAP

- 9 Based on the foregoing, the PB proposes the following Conclusion and Decision:
- CGAP took note of the Report of the Chair and welcomed the progress made by the WG. To further develop provisions for a draft Convention, CGAP invited the PB to convene two further meetings before CGAP 2024, possibly in the second half of 2023 and in early 2024, with intersessional work as required. These meetings should preferably be held in person, with the potential for the first of these two meetings to be held in a location outside The Hague.

ANNEX

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

I. Introduction

- 1 Pursuant to the mandate given by the Council on General Affairs and Policy (CGAP) at its meeting in March 2022,¹ the Working Group on matters related to jurisdiction in transnational civil or commercial litigation (WG), under the chairmanship of Professor Keisuke Takeshita (Japan), met on two occasions: 19-23 September 2022 (the third WG meeting) and 13-17 February 2023 (the fourth WG meeting). Both meetings were held in person, with the possibility of remote participation.
- 2 The third WG meeting was attended by 66 participants, of whom 19 attended in person, representing 23 Member States from various regions, one Regional Economic Integration Organisation (REIO), and two Observers. Similarly, at the fourth WG meeting, there were 70 participants, representing 23 Member States from various regions, one REIO, and two Observers.
- 3 This Report intends to highlight the matters discussed by the WG and reflect the points on which consensus has been reached in the last two WG meetings. This Report also notes matters for future discussion and possible next steps recommended by the WG to continue the development of the draft Convention.

II. Rules for Parallel Proceedings

- 4 Since the second WG meeting in February 2022, the WG has continued working on the rules dealing with parallel proceedings that might be inserted in the draft Convention. The WG has made good progress on developing a draft of the basic provisions on parallel proceedings (see Annex I), supported by a flow chart developed prior to the third WG meeting (Annex II).

A. International obligations (Art. 3)

- 5 The WG discussed the potential rules on parallel proceedings, including by considering several possible international obligations that the draft Convention could contain. The WG discussed two circumstances in which a court would be obliged to suspend or dismiss proceedings (without prejudice to the WG agreeing on other circumstances in future meetings): (i) where a court does not have jurisdiction / connection under the draft Convention and (at least) one of the other courts has such jurisdiction / connection, and (ii) where a court has jurisdiction / connection under the draft Convention, but its proceedings were not started within a reasonable timeframe after the proceedings were commenced in the court first seised having jurisdiction / connection under the draft Convention. The WG made substantial progress towards agreement on these circumstances.
- 6 The WG noted that further consideration should be given as to what the reasonable timeframe should be, and that this issue was linked to the discussion under section B below. The WG also

¹ C&D No 7 of CGAP 2022, available on the HCCH website at www.hcch.net under “Governance” then “Council on General Affairs and Policy” and “Archive”.

discussed further possibilities for mandatory suspension or dismissal of proceedings where courts had certain jurisdiction / connection or lacked it (see *infra*, paras 11-16).

- 7 The WG also agreed that certain safeguards / exceptions should be established for these international obligations, which would allow the courts to continue proceedings despite these obligations. Further consideration, agreement and drafting of the substantive contents of these international obligations is required.

B. Timeframes associated with parallel proceedings

- 8 The WG discussed whether the draft Convention should provide for specific timeframes associated with parallel proceedings, and in particular, a specific timeframe within which the proceedings of the court other than the court first seised should be started. It was noted in the discussion that further consideration of this issue would be necessary, including the consideration of the definition of parallel proceedings.

III. Rules of jurisdiction / bases for connection

A. Rules of [priority] jurisdiction / bases for [priority] connection (Art. 9)

- 9 The WG used the “bases for recognition” in Articles 5 and 6 of the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (2019 Judgments Convention) as a starting point for developing rules relating to jurisdiction / connection in the draft Convention for the purpose of resolving parallel proceedings. Given the different purposes of the 2019 Judgments Convention and the draft Convention, the WG revised some of the 2019 Judgments Convention filters to be included in the draft Convention.
- 10 Further attention was given to exclusive (or priority) jurisdiction / connection, party autonomy and parallel proceedings, and non-priority jurisdiction / connection, noting that the specific location of provisions addressing these connections, if adopted, would be further discussed.

B. Exclusive (or priority) jurisdiction / connection (Art. 8)

- 11 Concerning exclusive (or priority) jurisdiction / connection, the WG agreed that, in line with Article 6 of the 2019 Judgments Convention, where parallel proceedings which have as their main object rights *in rem* in immovable property are pending before courts of Contracting States, the court of the Contracting State in which the immovable property is situated shall have priority.
- 12 The WG will need to further consider whether the above provision on exclusive (or priority) jurisdiction / connection should also apply in situations where proceedings in the court of a Contracting State where the property is situated have *not* yet commenced.
- 13 The WG, taking account of Article 5(3) of the 2019 Judgments Convention, agreed to further consider whether to expand the exclusive (or priority) jurisdiction / connection to cover parallel proceedings which deal with a residential lease of immovable property (tenancy) or the registration of immovable property.

C. Party autonomy and parallel proceedings (Art. 7)

- 14 Concerning issues relating to party autonomy and parallel proceedings, the WG discussed non-exclusive choice of court agreements which mean choice of court agreements other than exclusive choice of court agreements defined in Article 3(a) and (b) of the *Convention of 30 June 2005 on Choice of Court Agreements* (2005 Choice of Court Convention). The WG reached consensus on the basic policy that, where a non-exclusive choice of court agreement designates one or more courts and also has a derogatory effect making the adjudication in the other courts

contrary to the agreement, priority should be given to courts chosen by such non-exclusive choice of court agreements. The WG noted that further consideration should be given to clauses waiving rights to contest jurisdiction.

- 15 Further consideration will need to be given to the location of this text in the draft Convention, bearing in mind that the element of party autonomy can also be found in other provisions of the draft Convention.

D. Non-priority jurisdiction / connection

- 16 The WG discussed a working document (Work. Doc.) proposing provisions on non-priority jurisdiction / connection, which would require suspension or dismissal of proceedings in certain circumstances, and which would only be applied when none of the courts involved have connections under the draft Convention. As there was no consensus reached on this issue within the WG, the proposed text has not been included in the draft Convention. Further consideration of this issue is necessary. It was suggested that other avenues, potentially within the framework of a more appropriate / better forum analysis, could be explored to address some of the concerns underlying the proposal.

IV. Determination of the more appropriate / better forum

A. Rules for determination of the more appropriate / better forum (Art. 10)

- 17 The WG discussed the more appropriate / better forum analysis in the context of when courts of more than one Contracting State have jurisdiction / connection under Article 9 of the draft Convention. Further consideration is required regarding when and how to conduct the analysis.
- 18 The WG members exchanged views on having an exhaustive or a non-exhaustive list of factors in the more appropriate / better forum determination. Providing clarity (having an exhaustive list) *versus* flexibility (having a non-exhaustive list, providing guidance) for the courts was discussed, as were questions of appropriate length or detail of the factors, and the content of the factors relative to other possible Articles (e.g., on denial of justice and public policy).

B. Factors listed in Article 10

- 19 The WG held detailed discussions on the enumerated list of factors in the current draft of Article 10 over the course of the two WG meetings. In the third meeting, the WG carefully studied each of the factors in Article 10, with a view to deciding which factors were particularly or most relevant for the purpose of determining the more appropriate / better forum. Based on further discussions and considerations at the fourth WG meeting, the WG agreed that, if a more appropriate / better forum analysis takes place, it would be appropriate to include factors such as the burdens of litigation on the parties, particularly in view of their habitual residence; the ease of accessing evidence or preserving evidence; and the prognosis of the recognition and enforcement of foreign judgments.
- 20 The WG also considered that it was appropriate to remove “applicable limitation or prescription periods” from the list of factors. Some members suggested that the essence of this factor be considered elsewhere in the draft Convention. Members discussed the need to identify objective criteria to assist with the consideration of the proposed factor dealing with “the stage of the proceedings before each court and the possibility of significant delay in one forum as opposed to the other”. It was determined that the “possibility of significant delay” should be included in the text of the draft Convention but in square brackets. A number of enumerated factors remain under consideration and the WG will need to continue to consider the relevance and merits of their inclusion.

V. Communication Mechanism (Art. 15)

- 21 The WG generally agreed on including a communication mechanism in the draft Convention. The WG also discussed the potential flexible and voluntary nature of this mechanism.
- 22 Some members were of the view that the parties to litigation should have a primary role in facilitating communication in the context of parallel proceedings. Some members also reiterated the importance of rapid communication and noted the practical challenges that may arise, especially language barriers.
- 23 Further details of a communication mechanism will need to be discussed, including the appropriate channels for such communication.

VI. Other provisions

A. Public policy (Art. 12)

- 24 The WG discussed a Work. Doc. on public policy and no consensus was reached on the inclusion of a provision on public policy in the text of the draft Convention. There was sufficient support within the WG to replace the “contrary to” threshold requirement in the draft public policy Article with “manifestly incompatible with” to align the wording with the 2019 Judgments Convention. The WG did not reach consensus on the introduction of the concept of “international” public policy, noting it was not a well-defined concept and asking the proponents of the Work. Doc. for further clarification and examples.

B. Avoiding denial of justice (Art. 11)

- 25 The WG noted the importance of avoiding a denial of justice when dealing with parallel proceedings. There was sufficient support within the WG to include a denial of justice Article in the draft Convention. The WG will need to consider further how to define denial of justice and the relationship between Article 11 and Article 10, which contains a list of factors to be applied to assess the more appropriate / better forum, as well as the interaction between this provision and the exclusive (or priority) jurisdiction / connection. Some members also suggested that the issue of limitation or prescription periods requires further consideration in this context.
- 26 The Chair noted the necessity of discussing the remaining issues pertaining to the mandate of the WG. The Chair also proposed that the WG would discuss a Work. Doc. on the definition of parallel proceedings and related actions or claims at the next meeting, pending a further mandate by CGAP.

VII. WG Recommendations

- 27 Given the progress made, the WG recommends that CGAP approve the continuation of the Group’s work, including two further meetings, as well as intersessional work prior to CGAP in March 2024. The WG would further report to CGAP in 2024.

ANNEX I

A draft of the provisions on parallel proceedings for future discussion

CHAPTER I *SCOPE AND DEFINITIONS*

Article 1 *Scope*

1. The provisions in this text shall apply to parallel proceedings in the courts of different Contracting States in civil or commercial matters. The provisions in this text shall not extend in particular to revenue, customs or administrative matters.
2. [The provisions in this text shall apply to parallel proceedings if [any of] the defendant[s] of [any of] the proceedings in a court of a Contracting State is habitually resident in another Contracting State.]
3. For the purpose of the provisions in this text, “parallel proceedings” means any proceedings in courts of different Contracting States between the same parties [on the same subject matter].⁵

Article 2

Exclusions from scope

1. The provisions in this text shall not apply to the following matters –
 - (a) the status and legal capacity of natural persons;
 - (b) maintenance obligations;
 - (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
 - (d) wills and succession;
 - (e) insolvency, composition, resolution of financial institutions, and analogous matters [,except where the proceedings are based on general rules of civil or commercial law, even if the action is brought by or against a person acting as insolvency administrator in one party’s insolvency proceedings];
 - (f) the carriage of passengers and goods;
 - (g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average;

⁵ The term “on the same set of operative facts” was not included in the text because it was pointed out that the inclusion of this term alone might cause problems. However, the WG will revisit the issue of definition of the parallel proceedings.

- (h) liability for nuclear damage;
- (i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;
- (j) the validity of entries in public registers;
- (k) defamation;
- (l) privacy;
- (m) intellectual property;
- (n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;
- (o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;
- (p) anti-trust (competition) matters, except where the proceedings are based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State where the proceedings are pending;
- (q) sovereign debt restructuring through unilateral State measures;
- [(r) *to be determined.*]⁶

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

2. Proceedings are not excluded from the scope of the provisions where a matter to which the provisions do not apply arose merely as a preliminary question in the proceedings, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude proceedings from the provisions, if that matter was not an object of the proceedings.
3. The provisions shall not apply to arbitration and related proceedings.
4. [This instrument shall not apply to proceedings related to contracts concluded by natural persons acting primarily for personal, family or household purposes (consumers).]
5. [This instrument shall not apply to proceedings related to individual contracts of employment.]
6. Proceedings are not excluded from the scope of the provisions by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party to the proceedings.
7. Nothing in the provisions shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

⁶ Before the discussion of the second WG meeting, there was a limb excluding from scope “cases in which the law of one or more of the Contracting States involved provides for exclusive jurisdiction in their own courts”. It was deleted because the problems arising from those cases would be dealt with by the declaration mechanism (Art. 13). However, the WG will revisit the issues concerning exclusive jurisdiction including the possible exclusion from the scope.

CHAPTER II
PARALLEL PROCEEDINGS

Article 3
Suspension or dismissal of the proceedings

Where parallel proceedings are pending before the courts of Contracting States, a court of a Contracting State shall suspend or dismiss the proceedings [at the request of a party to the proceedings] if –

- (a) it does not have jurisdiction / connection pursuant to Article 9 and one or more of the other courts has or have such jurisdiction / connection; or
- [(b) it has jurisdiction / connection pursuant to Article 9, but proceedings in that court were not started within a reasonable timeframe after proceedings were commenced in the court first seised having jurisdiction / connection pursuant to Article 9.]

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

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

Article 4 – Article 6
[to be considered.]

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

Article 7
Party autonomy

1. If the parties to the proceedings in both / all courts have agreed prior to the dispute that one or more courts shall have jurisdiction over the dispute, and only one of the courts seised is designated under such agreement as having jurisdiction, then that court shall proceed with adjudication of the dispute unless such agreement states that it does not deprive any other court or courts of jurisdiction. Any other court shall stay or dismiss adjudication of the dispute.
2. Paragraph 1 does not apply to an exclusive choice of court agreement. For the purposes of this subparagraph, an “exclusive choice of court agreement” means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts. A choice of court agreement which designates the courts of one State or one or more specific courts of one State shall be deemed to be exclusive unless the parties have expressly provided otherwise.

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

Article 8
[Exclusive] [Priority] jurisdiction / connection

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

[Note: Application of this rule to parallel proceedings which have as the main object a residential lease of immovable property (tenancy), or the registration of immovable property should be discussed further. The WG needs to discuss further the application of such rules to cases where there are no parallel proceedings, which means that, even if no parallel proceedings are pending, the courts of the Contracting State in which the immovable property is situated shall have priority and the courts of the other Contracting States shall suspend or dismiss the proceedings.]

Article 9
[Rules of [priority] Jurisdiction] [Bases for [priority] connection]

[Note: Interaction of Article 9 with Articles 3-8 needs further consideration.]

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

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

- (b) the defendant is a natural person who had their principal place of business in that State at the time that person became party to the proceedings as regards a [dispute] [claim] arising out of the activities of that business;
- (c) the defendant maintained a branch, agency, or other establishment without separate legal personality in that State at the time that person became party to the proceedings in that State, and the claim arose out of the activities of that branch, agency, or establishment;

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

- (d) [the proceedings have as their object] [the claim concerns] [the action concerns] a contractual obligation and the performance of that obligation took place, or should have taken place, in that State, in accordance with –
 - (i) the agreement of the parties, or
 - (ii) the law applicable to the contract, in the absence of an agreed place of performance, unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;

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

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

- (f) the claim concerns a contractual obligation secured by a right *in rem* in immovable property located in the State, if the contractual claim is brought together with a claim against the same defendant relating to that right *in rem*;
- (g) a claim concerns a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property and the act or omission directly causing such harm occurred in that State, irrespective of where that harm occurred;
- (h) the claim concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –
 - (i) at the time the proceedings are instituted, the State was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or
 - (ii) at the time the proceedings are instituted, the State is expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

This sub-paragraph only applies to proceedings regarding internal aspects of a trust between persons who are or were within the trust relationship;

- (i) a counterclaim arises out of the same transaction or occurrence as the original claim, if the court of the State has [priority] [jurisdiction] [connection] for the original claim under this Article and the original claim is pending in that court;
- [(j) *to be determined.*]

2. For the purpose of paragraph 1, an entity or person other than a natural person shall be considered to be habitually resident in the State –
 - (a) where it has its statutory seat;
 - (b) under the law of which it was incorporated or formed;
 - (c) where it has its central administration; or
 - (d) where it has its principal place of business.

[Note: Should this be a paragraph under a separate Article with definitions?]

3. A court of a Contracting State has [[priority] [jurisdiction] [connection]] if the court is designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.

[Note: may need more than “designated” here – cf. Article 3(b) of the 2005 Choice of Court Convention.]

For the purposes of this paragraph, an “exclusive choice of court agreement” means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts.

4. A court of a Contracting State has [[priority] [jurisdiction] [connection]] if –
 - (a) the defendant expressly [and positively] consented to the jurisdiction of the court [by written or oral format and addressed either to the court or to the claimant] in the course of the proceedings; or
 - (b) the defendant argued on the merits without contesting jurisdiction within the timeframe provided in the law of the State of the court, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law.

[Note: Should these connecting factors in both (a) and (b) be prioritised? As for (b), it should be considered to whom “it is evident”.]

5. Notwithstanding the preceding paragraphs, for an action brought on a [residential] lease of immovable property (tenancy) or brought on the registration of immovable property, [only] the courts of a Contracting State in which the property is situated have [priority] [jurisdiction] [connection].
6. Notwithstanding the preceding paragraphs, for an action on rights *in rem* in immovable property, the courts of a Contracting States in which the property is situated have exclusive [jurisdiction] [connection].

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

Article 10

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

For the application of Article [...], the courts involved shall take into account, in particular, the following factors in determining the [clearly] [more appropriate] [most appropriate] [better] forum –

- [(a) the relative strength of the connection between each of the courts seised of the case and the parties and the claims;]
- [(b) the existence of a non-exclusive choice of court agreement;]
- (c) the burdens of litigation on the parties, particularly in view of their habitual residence;
- (d) the ease of accessing evidence or preserving evidence;
- [(e) [the law applicable to the claims] [the law applicable to the claims if such law was designated in an agreement concluded between the parties];]
- (f) the stage of the proceedings before each court [and the possibility of significant delay in one forum as opposed to the other];
- [(g) the likelihood that the court may provide a complete or significantly more complete resolution of the related disputes;]
- (h) the likelihood of recognition and, where applicable, of enforcement in the Contracting State of that court of any resulting judgment given in the Contracting State of any other seised court [under –
 - (i) the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*; or
 - (ii) the applicable national law, including other applicable international instruments];
- [(i) the fairness of imposing the public costs and burdens of litigation on the public of a particular State;]
- [(j) *to be determined.*]

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

[Note: To include factor (a), the text needs to be revised for clarity. Factor (b) might prove to be unnecessary, depending on the rules for priority [connection] [jurisdiction] based on non-exclusive choice of court agreements in Article 9. Factors of “the interests of the parties in access to justice”, “which court was first seised”, “the ability of each court to achieve comprehensive resolution of the dispute”, and “any additional factors applicable to a specific case” are to be considered.]

[Alternative to Article 10 – WD No 08 REV]

[Note: This alternative is part of a holistic mechanism that also includes other matters.]

Each of the courts involved shall determine whether it is the most appropriate forum to resolve the dispute within a period of [30 days]. The courts involved shall take into account, in particular –

- (a) the proper administration of justice, including convenience for the parties in view of their habitual residence, access to evidence, the stage of the proceedings before each court ~~or~~ **and** the applicable limitation or prescription periods; **and**
- (b) the likelihood of recognition and, where applicable, of enforcement of any resulting judgment **given** in the Contracting State of ~~the~~ **any** other seised court under –
 - (i) the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*; or
 - (ii) the applicable national law, including other applicable international instruments.

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

[Alternative to Article 10 – WD 10]

Determination of the better forum

For the application of Article [...], the courts shall first apply the following criteria in determining the better forum –

1. the difficulty in each court that may exist for one or more litigants to present their case;
2. the likelihood that one court may provide a complete or significantly more complete resolution of the related disputes; and
3. the extent to which the proceedings in each court have already advanced towards completion.

If after considering the above criteria, no determination of the better forum is possible, the courts shall apply the following criteria in determining the better forum –

1. the possibility of significant delay or congestion in one forum as opposed to the other; and
2. the fairness of imposing the public costs and burdens of resolution of all related disputes on a particular country.

Article 11 *Avoiding denial of justice*

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

**[Article 12
Public policy**

Notwithstanding provisions from Article 3 to Article 8, the court shall not be obligated to suspend or dismiss the case if the proceedings may involve sovereignty or security interests of the forum State or the suspension or dismissal would be manifestly incompatible with the public policy or fundamental principles of the forum State.]

**[Article 13
Declarations with respect to specific matters**

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
2. *[Reciprocity to be considered]*

**Article 14
Uniform interpretation**

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

**Article 15
Communication mechanism**

[Whenever two or more courts in Contracting States are seised of a parallel proceedings case to which this Convention applies, and when each of those courts meets one of the requirements of Article 9(1) –

1. Each such court [shall] [cooperate to the maximum extent possible and] communicate with each other such court, or with the appropriate competent authority designated by the relevant other Contracting State, for the purposes of [coordinating and harmonising proceedings before it with those in the other jurisdiction and] determining the better forum under Article 10.
2. Judges engaging in direct judicial communications shall respect the law of their respective jurisdictions, including with regard to communications outside the presence of parties or their representatives (*ex parte* communications). For that purpose, a Contracting State shall, at the time of the deposit of its instrument of ratification or accession, inform the Ministry of Foreign Affairs of the Netherlands of whether its laws allow for *ex parte* communications.
3. A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, inform the Ministry of Foreign Affairs of the Netherlands whether the courts of the other Contracting States may directly communicate with its own courts. Should the Contracting State choose not to accept such communication, it [shall designate a competent authority for the purposes of communication in accordance with Article ##.] A Contracting State that chooses to accept direct communication between courts may also designate a competent authority to facilitate such communication.]

ANNEX II

Annex II

Basic structure of the possible future Convention

(Flowchart clarifying the points for future discussion by the WG)

*This flowchart is intended to help clarify the points still in need of further discussion in the WG. All issues in the flowchart are still open for discussion, including whether each of the issues will be addressed in the possible future Convention and at what stage of a proceeding the issue should be addressed by a court or courts seized.

