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Questions

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

Question 1 on the scope of the Draft Text

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

I don't think Art 1(2) is useful. Its relationship with Art 1(1) is uncertain - are they both prerequisites or alternatives? It is also unclear why the Convention should couch its material scope on the habitual residence of defendants in related actions as compared to claimants, as the risk of irreconcilable judgments seem the same regardless.

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?

NIL

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)?

The interplay between Art 2(1)(a) and Art 2(2) seems problematic. It seems that a natural person's lack of capacity to contract (for example) is almost always raised "by way of defence" (a defendant alleging that he is not bound by virtue of his or the claimant's lack of capacity). Art 2(4) is also very infelicitously worded - are "personal, family or household" contracts examples of "consumer" contracts?

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).

NIL

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.

NIL

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

NIL

Question 4 on Article 5 obligations

What are your views on Article 5?

Perhaps obvious, but the concept of a court being unlikely to render a judgment "within a reasonable time" must be further defined, else fragmentation in practice seems likely to occur

Question 5 on priority jurisdiction / connection

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

There is a concern that Art 7(1) may go against the actual commercial expectations of parties that enter into non-exclusive jurisdiction agreements. We may disagree about what those agreements mean, but self-evidently parties conceive that their chosen courts are not the only courts that may hear their disputes. Yet what 7(1) seems to do is transform a non-exclusively chosen court into an exclusive court once seised, at least among the courts of Contracting States.

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

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

I am not entirely clear what the purpose of the Arts 8 and 9 architecture is. It seems that Art 8(2) to establish prima facie connections between disputes and Contracting States before Art 9 operates as a tie-breaker by essentially using a forum non conveniens(FNC)-type test to determine the most convenient forum for trial. The point of Art 8, then, is to serve the same function as Art 9 - finding the more efficient forum for trial - without the hassle of FNC.

I think this is a good approach. But if this is correct, Art 8(2) should certainly be wider, since it would be unfortunate if the court of a Contracting State were unable to stay proceedings in favour of another court which it considered more efficient under Art 9, just because the more convenient court has no Art 8(2) connection.

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?

See response to 6.1.

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

It seems strange that, for non-contractual obligations arising from unjust enrichment, the fact that the enrichment is received in a particular Contracting State does not itself create a connection with that state.

I also think that Art 8(2)(j) should indeed be prioritised, and perhaps placed on the same footing as Art 7(3)

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?

In relation to Arts 9(1) and 9(5), I'd prefer the application to be made before the first defence on the merits, because that creates a more concrete timeline, and because more uncertainty here undercuts the marginal gains in efficiency that an FNC-like approach will deliver.

For Art 9(5), I'd prefer "As appropriate" in the chapeau and Option 3 for Art 9(5)(b). I think the court first seised should be given some priority, but too great a priority (as eg "exceptional circumstances" and Option 1 would entail) will enable a chauvinistic court first seised to engage in jurisdiction-grabbing, and in turn will incentivise litigants to rush to that court.

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

See response to 6.1.

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

See response to 6.1.

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)?

Art 10(b)/(c) should explicitly state that the evidence/applicable law is only relevant insofar as factual/legal issues are significant.

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

Art 10(f) sounds good in theory, but may lead to complex issues of foreign law on the recognition and enforcement of foreign judgments being discussed at the jurisdictional stage, as it involves not just the identity of foreign law but its content.

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

NIL.

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.

NIL.

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.

I think it strange that related actions do not have a similar mechanism to Art 8(2) for prima facie connections. I note that the main argument for a similar mechanism here is the argument against exorbitant jurisdiction, and I do think this argument is overblown. However, there is a better more modest justification for an Art 8(2) mechanism - that it produces a smaller list of prima facie jurisdictions between, because an FNC-like exercise cannot be conducted in relation to a very large group of alternative jurisdictions without becoming unwieldy - and I think it applies equally to related actions as it does to parallel proceedings.

Question 11 on the communication mechanism

11.1 What are your views on the practical operation (or the effectiveness) of the communication methods set out in Chapter IV of the draft text for use between courts seised, in cases involving parallel proceedings and related actions?

The word "sovereignty" in Art 18 is - as it almost always is in a treaty context - question begging and distracting.

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

NIL

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?

Between a "denial of justice" under Art 19 and public policy under Art 21, it is hard to see what space there is for the "prevention of abuse of process" under Art 20. Presumably an abuse of process would involve precisely the kind of forum shopping that the rest of the Convention targets.

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.

I should reiterate in particular that I think that the concept of a "reasonable time" needs to be further fleshed out, since it grounds exceptions to practically all the mechanisms in the Convention. I do also have concerns that the Convention will introduce one set of rules for indirect jurisdiction in disputes with parallel proceedings/related actions, and another set of rules for disputes without, which seems likely to create considerable practical complications.

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

I am unsure, and I think this will vary very much between jurisdictions. Common law jurisdictions in particular may well doubt that the game is worth the candle.

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?

I am unsure.

Question 14 - comments

What other comments, if any, do you have?

NIL