FACULTY OF ADVOCATES

Response to Hague Conference on Private International Law (HCCH)

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

Question 1: on the scope of the Draft Text.

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

1.1. The general scope of the Draft Text, as set out in Article 1(1), is appropriate in principle. Rules addressing parallel proceedings and related actions between courts of different Contracting States would be beneficial in reducing duplicative litigation, procedural inefficiency, and the risk of irreconcilable judgments. However, aspects of the personal and geographical scope appear to require reconsideration or clarification to ensure that the Convention operates as intended. Broadly, the subject matter scope addresses situations in which coordination mechanisms are most likely to be necessary.

1.2 Does the subject matter scope of the Draft Text cover those mattes for which the rules on parallel proceeding and related actions would be beneficial?

1.2 The square bracketed and italicised text in Article 2 identify two very practical issues: exclusive court agreements (which may be subject to the Hague Conventions of 2005 and 2019) (but which may not apply to all parties to the litigation) and interim measures. Take the example of Worldwide Freezing Order proceedings in London in support of litigations elsewhere in the world. The cost of these proceedings can be very significant. For all but the wealthiest of litigants, in such satellite proceedings, a defendant who may vehemently dispute the allegations must risk either oppressive interim measures or running out of funds (giving rise to a de facto determination of the dispute). In our view, interim measures proceedings should be included in the Convention, albeit that rather different considerations may apply.

1.3 What are your views on the subject matter exclusions in particular, and how they would work in practice? For example, what are your views on the formulation of the arbitration exclusion in Article 2(3)?

1.3 The exclusions appear broadly to reflect the well-known categories of exclusions such as those contained in the EU's Brussels I Recast Regulation. The exclusion of arbitration would appear to be justified by the widely recognised New York Convention, which further provisions in a Parallel Proceedings Convention might undermine.

1.4 What are your views on the geographical scope of the Draft Text and how it would work in practice?(see paragraph 1 for further information).

1.4 The effectiveness of the subject matter scope depends significantly on how the personal and geographical conditions for application are framed, particularly in Article 1(2). Article 1(2), as currently drafted, appears to introduce an additional condition beyond the existence of parallel or related proceedings in different Contracting States. By requiring that a defendant be habitually resident in a different Contracting State, it would exclude situations in which each party has been sued in its home State. That outcome seems inconsistent with the objectives of the Draft Text. It is not clear that Article 1(2) is required at all; if a personal scope condition is retained, it would be more coherent to require that the proceedings involve at least two parties habitually resident in different Contracting States.

Question 2: on the definitions

2.1 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.

2.1 The definitions of parallel proceedings and related actions are broadly workable and consistent with established private international law concepts. Their practical application will depend on courts adopting a pragmatic approach that focuses on the substance of the disputes rather than formal or procedural differences. It is not entirely clear, however, how Article 3(2) would apply to trusts (recognising that trusts are expressly addressed in Article 8(2)(h)). They are not entities or persons. They may have a mix of juristic and natural persons as trustees.

Question 3: on when a court is deemed to be seised.

3.1 What are your views on Article 4?

3.1 Article 4 raises concerns. It appears to follow closely the principles of Brussels I Recast Art 32. But in its brevity it misses important details. For Scotland, the court can probably be said to be "seised" when "the document instituting the proceedings … is lodged with the court" in terms of Article 4(a) (as a summons has to pass His Majesty's Signet before it can be served on the defender). But there is no obligation or duty to serve such a summons or initial writ at all and passing the signet has no judicial effect. The proceedings do not commence until they are served. In England, in contrast, it is understood that a court is seised when the claim form is presented to the court. Conflicts between parallel proceedings among the UK jurisdictions are addressed by the doctrine of forum non conveniens not lis pendens.

Question 4: on Article 5 obligations

4.1 What are your views on Article 5?

4.1 Article 5 appears to assume that later-seised courts will normally suspend proceedings until the court first seised has ruled on the merits. While suspension is appropriate as a default, dismissal or striking-out should also be available once the first court has confirmed jurisdiction. Article 5(2) requires clarification, as the reference to "that Contracting State" lacks a clear antecedent. It appears intended to refer to the State of the court which suspended its proceedings. Article 5(3) appropriately addresses situations where it is foreseeable that the court first seised will not resolve the matter within a reasonable time. However, on one reading, the provision gives no discretion and may require resumption even where a final judgment is imminent, which is undesirable. It may be that it is intended that the court which is asked to recall a stay has an inherent discretion in determining what is a "reasonable time".

Question 5: on priority jurisdiction / connection

5.1 What are your reviews on Articles 6-8 including how they will work in practice?

5.1 Articles 6–8 establish structured priority rules, but some provisions risk producing counterintuitive or undesirable outcomes and may facilitate tactical behaviour rather than efficient dispute resolution.

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

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

6.1 The connecting factors listed in Article 8(2) are broadly appropriate, but Article 8(2)(k) should not be limited to "proceedings in rem". The location of movable property may be a relevant connecting factor in a wider range of proceedings. While the factors are generally suitable, they should not be applied mechanistically, and courts should retain flexibility to address lack of diligence or abuse/oppression. We refer to our comments on Article 9.

6.2 Based on experiences, do you consider these factors appropriate for parallel proceedings i.e. obliging courts to suspend or dismiss proceedings if they are not seised o the basis of one of these? Why or why not?

6.2 Our collective experience was based on the Brussels I Recast system which, pre-Brexit, applied in the UK. However, as we have identified above, we remain to be persuaded that a general lis pendens or first to file approach is suitable for international litigation.

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

6.3 There is the fundamental question, foreshadowed in the comments, of whether these factors are to apply to the proceedings as a whole or to each defendant. In multi-defendant proceedings it would appear that the factors would need to apply to the proceedings as a whole. However, in multi-defendant proceedings, grounds not included in Article 8 will often be engaged, such as where jurisdiction is founded against one defendant on the basis of habitual residence, but against the others on provisions akin to Brussels I Recast, Art 8(1) (one of a number of defendants, in courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings). This ground appears to us to be of some significant importance in the sort of multi-defendant international commercial cases which most often give rise to parallel proceedings.

We consider that there would be merit for inclusion of a specific provision on abuse of rights or oppression. It may that this is what is intended to be covered by Article 20. But we consider that Article 20 - and indeed all of the general clauses in Chapter V - could be expressly referred to in chapter II.

Question 7: on 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 under Articles 6-8 have not resolved?

7.1 In our view, there remains much to be said for the traditional common law rules of forum non conveniens, rather than a lis pendens rule, which is subject to the court first seised determining whether it is the forum conveniens in terms of Articles 8 and 9. Rather, in our view, the appropriate approach would be for the courts of jurisdictions subsequently seised to be required, of their own motion, to consider whether the court first seised is not the more appropriate forum. It is understood that a bright-line rule is required to accord priority. But we consider that requiring courts which may otherwise have general jurisdiction on the basis of habitual residence automatically to suspend proceedings, simply because some intiating writ has been served in another jurisdiction, creates an incentive in favour of tactical filings.

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

7.2 Nothing further to add.

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

7.3 Nothing further to add**.**

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)?

8.1 One factor that is often very relevant in modern UK case law is the availability of litigation funding for one or both of the parties. Issues of availability of evidence and witnesses, as well as the language of the evidence and witnesses, may also be relevant.

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

8.2 Nothing further to add.

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

8.3 Nothing further to add.

Question 9: on the effectiveness of the framework for parallel proceedings

9.1 Do you have an overall view on the effectiveness of the framework developed by 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.

9.1 The Draft Text provides a comprehensive framework that has the potential to improve coordination and predictability. Its main risk lies in encouraging tactical litigation if certain provisions are applied rigidly.

Question 10: on related actions

10.1 Do you have an overall view on the effectiveness of the framework developed by the Draft Text dealing for dealing with related actions in an internation context? Please explain any advantages and / or disadvantages of the framework, and how you think it will work in practice.

10.1 The framework for related actions is broadly sound and reflects a realistic need for coordination without requiring strict identity of claims. There is a question of whether applications for interim measures are properly to be considered "related actions". We consider that there may be some merit in the Convention allowing the Court seised in the principal proceedings to have some ability to control the parties before it engaging in extensive related actions in other jurisdictions which purport to support the principal proceedings.

Question 11: on the communication mechanism

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

11.1 We consider that there should be further consultation with judges. While we foresee the availability of such communication as being potentially useful in some cases, we consider that overall it may simply give rise to unnecessary complexity and challenges of practicality. It would seem to put a heavy responsibility on national courts, without a proper framework setting

out how such communications, never mind joint hearings, are supposed to proceed. We can foresee fundamental difficulties in relation to appeals, rights of audience and regulatory issues around joint hearings.

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

11.2 See above.

Question 12: on safeguards

12.1 What are your views in the three safeguards provided in the Draft Text (Articles 19-21), particularly as to how they will operate in practice?

12.1 We wonder whether the reference to "abuse of process" (which likely refers to procedural rules in many English-speaking jurisdictions) might be augmented or replaced by a more system-neutral test based on "oppression".

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 judgements in transnational litigation in civil or commercial matters.

13.1 We consider that the rules in the draft Convention do appear to be consistent with the stated objectives. Whether they would, in practice, achieve those aims is another matter.

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

13.2 We consider that bright line rules would, in many cases, contribute to certainty. But in many cases of parallel proceedings across multiple jurisdictions, injustice is not ameliorated by the inexorability of the result.

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 such risks could be addressed in the Draft Text?

13.3 We consider that the creation of a bright line rule in favour of a first-to-file or lis pendens model is bound to give rise to tactical filings, and more so than the wider, though less certain, common law doctrines of forum non conveniens.

Question 14: comments

14.1 What other comments, if any, do you have?

14.1 Nothing to add.