

Panel 11: Concurrent Proceedings: Where to from here on a Hague Convention?

CLE Reading Material:

- The HCCH Draft Text of a Possible Convention on Parallel Proceedings and Related Actions; The European Association of Private International Law (2026)
- A Hague Parallel Proceedings Convention: Architecture and Features; Paul Herrup and Ronald A. Brand, Chicago Journal of International Law Online Vol. 2(1) (2023)
- A Hague Convention on Concurrent Proceeding, Ronald A. Brand and Paul Herrup, Working Group at Hauge Conference on Private International Law

POSITION PAPER

In response to the public consultation on

**THE HCCH DRAFT TEXT OF A POSSIBLE CONVENTION
ON PARALLEL PROCEEDINGS AND RELATED ACTIONS**

*Draft submitted to the EAPIL Scientific Committee
on 27th January, 2026*

The European Association of Private International Law (EAPIL) is an independent and non-partisan organisation established in 2019 as a non-profit association under the law of Luxembourg with the aim of promoting the study and development of private international law. It does so by fostering the cooperation of academics and practitioners in European countries and the exchange of information on the sources of the discipline, its scholarship and practice. EAPIL has currently more than 600 members, mostly academics and practitioners, based in more than 60 countries.

For the purpose of taking part in the discussion launched by the Hague Conference's public consultation on its draft convention on parallel proceedings and related actions, EAPIL has established a Working Group chaired by Gilles Cuniberti to issue this position paper.

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A. Introduction

1. The purpose of this Position Paper is to comment on the [HCCH Draft text of a future convention on parallel proceedings and related actions published in November 2025](#) (hereafter ‘the Draft Convention’ or ‘the Convention’).

B. General Remarks

2. Parallel proceedings are undesirable in international commercial litigation due to various reasons, including that they bring uncertainties to litigation, increase cost and cause delays in dispute resolution by courts, and give rise to potential issues relating to enforcement of judgments. A widely adopted HCCH convention to coordinate parallel proceedings (and related actions) globally could be a useful tool to address some of these challenges in litigation. Therefore, we are in principle supportive of a HCCH convention on this matter. We also welcome the approach of the HCCH Working Group to combine priority- and jurisdiction-based approaches with the forum non conveniens doctrine. From our point of view this is the only sensible way to agree on a convention that as many countries as possible are willing to accede to.
3. We, however, think that there are certain issues which require further consideration or clarification and we expand on them in the following sections of our response.

C. Issues Requiring Additional Express Provisions

4. The following issues in our view are either unaddressed, or not clearly addressed, by the Draft Convention.

(1) Provisional Measures

5. The HCCH Working Group raises the issue of provisional measures in several places, including the Note under Article 3,¹ which seems to refer to provisional measures of protection ordered by a court that does not decide on the merits of the case. Obviously, at present, no decision has been taken on how this matter should be addressed. There is a shared view within the EAPIL Working Group that it would be both useful and appropriate to expressly exclude provisional measures from the scope of application in the normative part of the Convention. Accordingly, we propose either to exclude such measures in the provisions defining the substantive scope of application; or to address the matter under Article 3 (Definitions) by clarifying that such measures do not qualify as ‘parallel proceedings’. Equally the Convention should not apply to

¹ That Note reads: “There is a need to consider the inclusion of text in the Draft Text, or referring to this in the Explanatory Note, to clarify that, where a proceeding is pending in a court of a Contracting State, the fact that a related court order to compel or restrain the performance of any act is sought in a court of another Contracting State, if the act is confined to the territory of that other State, does not give rise to parallel proceedings, and may not give rise to related actions within the scope of the Draft Text.”

the proceedings stemming from (i) the losses caused by provisional measures that were later annulled or (ii) the breach of the party to comply with the provisional measures, e.g. actions to recover damages, to enforce cross-undertaking provided by the applicant or undo unauthorized transfers of assets.

6. Imagine a scenario where proceedings on the merits were initiated in the court of one contracting state and provisional measures were sought in the court of another. This situation would typically not fall within the definition of ‘parallel proceedings’ under Article 3, because the subject matter of most provisional measures of protection (e.g. freezing order, or appointment of a judicial expert for the purpose of gathering evidence) would be different from that of the proceedings on the merits.² One exception, however, is anticipatory measures, whereby the same remedy (e.g. payment of an invoice) is sought provisionally in one court (*référé provision* in France, *kort geding* in the Netherlands) and on the merits in another.³ A number of issues could then arise, in particular, whether seizure of the court for the purpose of obtaining a provisional order for payment should be taken into account to determine 1) the date of seizure of that court (if for instance it is later seized on the merits), 2) proceedings subsequently started on the merits in that court were within a reasonable timeframe under Article 8(1) and 3) whether a foreign court having a connection under Article 8 is seized, triggering rules under Article 8(1)(a) or Article 9.
7. Another case scenario is that of parallel proceedings all seeking provisional measures. The HCCH Working Group may consider clarifying in the Explanatory Report that the exclusion covers proceedings for the granting of provisional measures pending in multiple States.

(2) Influence of Existence of a Judgment

8. The current Draft Convention does not clearly address the influence of the existence of judgments deciding some or all of the relevant claims on its operation. The only provision which touches upon the topic is Article 1(3), which provides that “Chapter III shall apply only where none of the courts seised of related actions has issued a decision on the merits”, and which suggests that a decision on the merits has no influence on the application of other chapters of the Draft Convention. The basis for this distinction is unclear.
9. The issue arises whether a priority for rules on recognition and enforcement of foreign judgments should be established over rules on parallel proceedings. It is submitted that the objectives of legal certainty, reduction of litigation costs and avoidance of contradictory judgments should indeed result in such a priority. Any court seized of parallel proceedings should simply recognize the judgment originating from the other Contracting State where the parallel proceedings would have resulted in a judgment. It is further submitted that this should be made clear by an express provision of the Draft Convention.

² See, e.g., on whether the appointment of a judicial expert for the purpose of gathering evidence is meaningful to trigger the *lis pendens* rule under the Brussels I bis Regulation, CJEU C-29/16 *HanseYachts*.

³ The CJEU has suggested that in such a case scenario, the date of the application for the provisional measure could be the date of seizure for the purpose of *lis pendens*: see e.g. Case C-296/10 *Purrucker II*.

10. An express provision could usefully clarify the scope of the exclusion. It should provide that the Draft Convention would only apply to cases where none of the parallel proceedings would have resulted in a judgment on the merits, with two qualifications. The first qualification should be that the rule should only apply where the foreign judgment would actually be recognized in the other Contracting State under applicable rules (whether an international convention – e.g. the 2019 Hague Judgments Convention or the national law of foreign judgments of the relevant state). The second qualification should be that the rule should only exclude the operation of the Draft Convention for those claims decided by the foreign court.
11. Given that the basis for the recognition of the foreign judgment could be either an international convention or the relevant state's national law of foreign judgments of, this issue should be addressed as an issue of scope, and not as an issue of relation with other international instruments.
12. Where a judgment has only partially decided the dispute, the recognition of the judgment should exclude the application of the Draft Convention for the claims decided by the foreign court. However, it could be argued that the existence of the judgment could be a factor to be considered in the determination of the most appropriate court under Article 10 in respect of the remaining claims.

(3) Anti-suit injunctions

13. The current Draft is silent on anti-suit injunctions. This is unfortunate, as anti-suit injunctions are a major tool, in particular in common law jurisdictions, for coordinating parallel proceedings. The lack of an express provision in the 2005 Choice of Court Convention has given rise to significant issues of interpretation based on unclear legal history.⁴ As anti-suit injunctions are often granted as interim relief, it was argued that their availability was indirectly addressed by the exclusion of interim measures from the scope of the 2005 Convention, which left open the issue of the availability of permanent anti-suit injunctions. This shows that the lack of an express provision is generating legal uncertainty and that this should be remedied in the present convention.
14. Due to the absence of express treatment of the issue in the 2005 Convention, scholars have debated the extent to which the treaty obligations under the 2005 Convention prevent the courts of contracting states from issuing anti-suit injunctions. It is submitted that the Draft Convention should clarify which of the obligations it establishes excludes the use of anti-suit injunctions.

⁴ Mukarrum Ahmed & Paul Beaumont, 'Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast, especially anti-suit injunctions, concurrent proceedings and the implications of Brexit' (2017) 13 J Priv Int L 386; Johannes Landbrecht, 'Anti-Suit Injunctions and the Hague Choice of Court Convention – Turner v Grovit turning Global?' (2019) Zeitschrift für Zivilprozess International 159; Gilles Cuniberti in G. Cuniberti, B. Marshall & L.E. Teitz, *The Hague Choice of Court Convention – A Commentary* (Elgar 2025) para 7.18.

15. A first view (the broad view) could be that anti-suit injunctions can be seen as mechanisms aimed at resolving certain types of parallel proceedings which therefore should be excluded from the Draft Convention to the extent that it establishes a mechanism for resolving parallel proceedings binding on the relevant courts. A provision could then simply exclude the use of anti-suit injunctions within the scope of the Draft Convention, for parallel proceedings pending in courts of contracting states.⁵
16. A second view (the narrow view) could be that anti-suit injunctions should be unavailable where they would contradict specific treaty obligations. For instance, in the context of Chapter II (parallel proceedings), when the forum (by definition a contracting state) would be under an obligation to suspend or dismiss proceedings under Article 8(1) or under Article 9(2), it should not have the power to issue an anti-suit injunction to restrain proceedings respectively in a court having connection under Article 8 or in a court having such connection, seized first, and making a determination of whether it is an appropriate court. In contrast, where the forum would be the only one having a connection under Article 8, or would be seized first and have ruled that it is the appropriate forum, it could arguably restrain proceedings in a court of another contracting state ignoring its treaty obligation under Article 8(1) or under Article 9(2), unless that other court would have exercised its power to resume or continue proceedings under another provision of the Draft Convention, e.g. Article 9(5) (or Article 9(2) in the second approach), Articles 19 through 21.
17. In the context of Chapter III, the need for an express treatment of anti-suit injunctions is much higher, as the current text allows related actions to continue separately before different courts. It seems, however, that issuing an anti-suit injunction restraining the court of another contracting state to continue a related action would necessarily be in breach of the treaty obligations of the court issuing the injunction. This is because Article 14 recognises that any of the courts seized with a related action is ultimately free to make the determination that it should continue the relation action before it. It could be convincingly argued that Article 14 entails an implicit obligation for the courts of all contracting states not to interfere in the judicial process of courts deciding to continue to entertain a related action.

D. Answers to Individual Questions included in the HCCH Consultation Paper

Question 1 on the scope of the Draft Text

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

18. It is crucial for the field of application to be clearly defined since it appears that the judiciary frequently encounters difficulties when deciding whether to apply international conventions, bilateral or regional (such as EU) legislation.

⁵ This last requirement would only be useful if the scope of the Draft Convention is not directly or indirectly limited to proceedings pending in the courts of contracting states.

19. Regarding the geographical scope, the majority of this Working Group expressed the view that habitual residence should be abandoned as the criterion defining the scope of application. It is sufficient that the parallel proceedings are pending before the courts of the contracting States.⁶
20. It has been argued above that the existence of a decision on the merits should generally exclude the application of the Draft Convention. Article 1(3) should be redrafted accordingly.

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?

21. Ideally a convention on parallel proceedings and related actions would be beneficial for *all* matters of international litigation, however it is understandable that such a consensus could be difficult to achieve in an international convention and therefore exclusions would be necessary. This sub-question in our view is best answered by the specific focus on a number exclusions, which we engage with below.

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)?

Overall remarks, including on a questionable need for
assimilation with other Hague Conventions

22. It is evident that the Draft Convention's approach to scope and exclusions broadly mirrors that of the 2005 Hague Choice of Court Convention ("HCCCA") and the 2019 Hague Judgments Convention ("HJC"). At first glance, this continuity may appear both prudent and institutionally coherent. It reinforces the HCCH's established drafting practice and it facilitates familiarity among Contracting States. However, the resemblance here in our view serves a formal rather than functional purpose. The justification for exclusions in the HCCCA and HJC should in our view not be transferred immediately to a convention with procedural coordination as its primary object. Indeed, the current Draft Convention aims at coordinating parallel/related proceedings. It does not aim at achieving jurisdictional allocation or judgment circulation (these are what the HCCCA and HJC do). Moreover, both the HCCCA and HJC operate in a context of 'competition' with other international conventions. By contrast, not many other treaties deal with parallel proceedings and, therefore, the Convention is unlikely to interfere with the operation of such treaties. Finally, judgments issued on the basis of jurisdictional rules outside the HCCCA and HJC, may nevertheless obtain recognition on the basis of the residual rules in the contracting states. It would be a missed opportunity not to include these in a convention on parallel proceedings. In summary, therefore, when determining the scope of the future Convention, a different logic than other Hague Conventions in our view should be employed.

⁶ *Infra*, para 36.

23. Overall, while acknowledging continuity with existing Hague Conventions is institutionally valuable, a more context-sensitive approach could be engaged. Such an approach might include narrower exclusions. Indeed, the Draft Convention also sets some enhanced reliance on safety valves in Articles 19-21, e.g., public policy, denial of justice, abuse of process, as well as declaration option under Article 22 to accommodate State sensitivities. These in our view are a better means to ensuring as wide a scope of application as possible, and we propose the exceptions be revisited and narrowed down.
24. In principle, what would most certainly seem unattractive, is the exclusion of subject-matter which even in the HJC is not excluded. One example is consumers and employment contracts, but the Working Group was divided on this issue (see below para. 29).
25. With respect to all 'excluded matters', a definition of their meaning either in the text of the convention or the explanatory report, or, failing either of those, an identification of the law that determines qualification, would be warranted. CJEU authorities illustrate that difficulties with characterisation are encountered even when an international legal instrument is in place (e.g. viz the European Insolvency Regulation). In the current state of the draft, it is unclear to which matters 'uniform aka autonomous HCCH interpretation' applies, and which are left to national laws – and in the latter case which national law is the governing law for the qualification.

Individual exclusions

26. The 'family' related list of exclusions (which follows the list in Art. 2 of the 2019 Judgment Convention) in our view would be better structured if the exclusions under (a) and (c) and potentially (b) and (d) too, were not separated. For instance by redrafting as "a) the status and legal capacity of natural persons, family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; b) maintenance obligations; c) ..."
27. The insolvency exceptions in par. 1(e) of Article 2 is one of those areas where the aforementioned comment on a need for autonomous interpretation is acute. As it stands, the exclusion is not very well formulated. For instance is 'financial institutions' a denoter for all 3 categories: 'insolvency, composition and resolution', meaning 'insolvency' etc is only excluded to the extent it applies to financial institutions?
28. The inclusion in the scope of the convention of 'related' claims where they are brought under civil law claims adjudicated within the framework of the insolvency case, is to be welcomed. The status under the Convention of collective restructuring proceedings such as schemes of arrangement is however unclear and should be clarified either in the text of the Convention itself, or in the explanatory report.
29. As already noted, the EAPIL Working Group was divided on the need to exclude consumer and employment contracts. Some members expressed the view that they should be included, because they are included within the scope of the 2019 HJC. Their inclusion in the current Convention, of course, would require some changes, e.g., the inclusion in for instance Art. 7(3) that the court seised must have informed the weaker party of the effects of submission. Moreover, from

current wording it appears that only ‘contractual’ disputes in consumer and employment disputes are excluded. Convention or report should in our view clarify how one should distinguish (non)contractual consumer and employee claims, in the case of the former for instance in product liability cases. Convention or report should also clarify how assigned claims and those initiated as class actions are to be understood.

30. Other members thought that the exclusion should be maintained. They noted that the HCCH Working Group discussed this question⁷ and think that the reason for the exclusion (protection of weaker parties in litigation) is convincing. In the 2019 Hague Judgments Convention, Art. 5(2) limits the bases for recognition and enforcement. The Explanatory Report clarifies: „In practice, these exceptions are likely to restrict the circulation of judgments against a consumer or employee to those given in the State of that person’s habitual residence, absent express consent to the jurisdiction of another court by the consumer or employee directed at that court”.⁸ If consumer matters were to be included in the Draft, comparable protection would have to be provided with regard to Articles 8-10. However, it should be noted that parallel proceedings in consumer matters can be based on very different grounds that do not generally lead to a particular need for protection. For example, a consumer may bring two actions against a professional because the proceedings before the court first seised take so long. In this case, the interests are essentially comparable to those in normal parallel proceedings. The situation is different when consumers and professionals sue in different countries. In this case, there would be a greater need for consumer protection. This would require special rules in Art. 8-10, which would make political compromise difficult.
31. In this context, the continuity of maritime exclusions broadly (Art. 1(f) and (g)) might be particularly difficult to justify. While maritime matters are excluded from both the HCCCA and HJC, the reasons are context-specific: in the HJC, concerns centre on limitation regimes, public international law dimensions, and specialised international instruments; in the HCCCA, the focus lies on preserving mandatory jurisdictional rules and established maritime procedural mechanisms. None of these concerns directly apply to procedural coordination of parallel proceedings. The Draft Convention does not interfere with arrest of ships, limitation funds, or specialised maritime conventions. Instead, it could operate alongside them and mitigating duplicative litigation.
32. With respect to paragraphs 6 and 7,⁹ in our view there is no need for such an express exclusion, considering that the issues listed are closely related to the determination of the substantive scope of application in Article 1(1) – civil and commercial matters with exclusion of revenue, customs or administrative matters. It would in our view suffice to merely add in Article 1(1) a reference to the disputes involving States which are considered ‘*acta iure imperii*’.

⁷ Report of 2025, <https://assets.hcch.net/docs/007c2a52-2611-4470-b1dc-4d041c77f7c4.pdf>, para. 10

⁸ <https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf>, para. 221.

⁹ ‘6. Proceedings are not excluded from the scope of this Convention 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 this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.’

The arbitration exclusion

33. Various views were expressed in our Working Group on the arbitration exclusion. Some members argued that its scope should be narrowed, but no elaborate alternate proposal was made.
34. If the exclusion of arbitration is kept on the ground that it should not be for the Draft Convention to resolve issues of parallel litigation related to arbitration, it should avoid and indeed cure the flaw of the suggestion made by the Explanatory Report to the Choice of Court Convention¹⁰ that the arbitration exception is triggered by the mere allegation of the existence of an arbitration agreement. The issue arises as a result of the structure of Art 2, which suggests that the exclusion of arbitration applies both when raised as object of the proceedings, or by way of defence (art. 2(2) seems to apply only to exclusions in art 2(1)). As a consequence, if the application of an arbitration agreement is raised in one of the parallel proceedings, it will exclude the application of the Draft Convention, irrespective of whether the argument is rejected, and including if the argument was fanciful. This result is highly relevant from a policy perspective as it offers obvious incentives for strategic behaviour. The problem should be remedied either by clarifying that Article 2(2) also applies to arbitration. This could be done either by changing the structure of Article 2 and moving the arbitration exclusion before Article 2(2), or by adding text providing, for instance, that 'the arbitration exception is not triggered by an objection to jurisdiction by invoking the invalidity of an arbitration agreement, if the subject-matter of the dispute falls within the Convention's scope'.

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).

35. The limitation of the geographical scope of the future Convention to parallel proceedings pending in Contracting States only (Art. 1(1)) is logical. It establishes an incentive for third States to join the Convention in order to benefit from its rules.
36. By contrast, the rationale for an additional requirement that one of the defendants (at least) be habitually resident in another Contracting State (Art. 1(2)) is unclear and is not explained by the consultation paper. The majority view of the 'EAPIL group' is that the geographical scope should be differently defined so as to refer to litigations pending in the contracting States, regardless of the habitual residence of the parties. In many international disputes, none of the parties may be resident of any of the Contracting State. It would be undesirable if such non-resident parties could not avail themselves of the provisions of the Convention.
37. If the residence requirement were to be kept, its rationale should be clarified. Is it to establish an internationality requirement by requiring that at least a defendant be foreign based in one of the proceedings? If so, it is hard to understand why internationality could only be established by the foreign residence of defendants, and not by the foreign residence of claimants. That parallel proceedings are pending in two different States should in our view suffice to establish the

¹⁰ Hartley/Dogauchi Report, para 84.

internationality of the situation (just as, under the Hague 2005 and 2019 Conventions (respectively Art. 1(3) and 1(2)), the fact that recognition or enforcement of a foreign judgment is sought in the forum suffices to establish the internationality of the situation irrespective of the internationality of the case litigated in the court of origin). Further, a requirement for residence could easily be engineered by parties, and contracting states who find the requirement so essential, may perhaps be offered to do so by exercising a reservation option.

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.

38. The uniform application of the Convention depends to a large extent on the definition of parallel proceedings and related actions. It determines whether the concise procedure of Chapter II or the very flexible one of Chapter III applies. Therefore, the definitions should be as clear as possible.
39. As is generally known, this so called “identity” of the subject matter or cause of action is controversial in many jurisdictions. A good illustration is the standard practical example¹¹ of “parallel” proceedings: actions for performance versus actions for a negative declaration. (Alleged) debtors can attempt to pre-empt or follow-up an action for performance with an action for a negative declaration.
40. In Germany, by way of example, it is assumed that these proceedings do not have the same subject matter. The CJEU, by contrast, has held that such proceedings do have the same subject matter as long as the “central” or “essential” issue is the same.¹²
41. It would seem that the HCCH Working Group decided early on to give the expression “the same subject matter” the same meaning as in the Convention of 30 June 2005 on Choice of Court Agreements.¹³ However, the term is not defined in more detail there, either. According to the Explanatory Report, it is sufficient if the “central or essential issue” is the same.¹⁴ This suggests that actions for performance and actions for a negative declaration have the same subject matter, as they do in CJEU case law.¹⁵

¹¹ See e.g. with different examples from Japan *Haga*, Das internationale Parallelverfahren in Japan – aus der Sicht der gerichtlichen Praxis, ZZPInt 18 (2013), 339 ff.

¹² CJEU Case 144/86 *Gubisch Maschinenfabrik/Palumbo*; CJEU Case C-406/92 *Tatry*, [43]; CJEU Case C-116/02 *Gasser*.

¹³ HCCH Working Group on Jurisdiction, Report of 2022 (<https://tinyurl.com/bdemzej9>), para. 9.

¹⁴ *Garcimartín/Saumier*, Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2020 (<https://tinyurl.com/54j72fns>), para. 272.

¹⁵ See also *Garcimartín/Saumier*, Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2020 (<https://tinyurl.com/54j72fns>), para. 275.

42. Since the conflict between actions for performance and actions for a negative declaration occurs most frequently in practice, we believe that for the avoidance of all doubt, this should be specifically clarified in Article 3 of the Convention. In our opinion, such an important issue should not be dealt with in an Explanatory Report only, which may not be taken into account by courts.
43. Further, the requirement of identity of parties raises particular challenges in commercial contexts involving parent companies and subsidiaries or joint ventures. Absent express guidance, courts are likely to fall back on domestic doctrines: common law courts may adopt a stricter view of party identity and civil law courts may be more willing to look at economic reality or procedural representation. This divergence risks uneven application and reduced predictability across Contracting States.
44. Another practical difficulty concerns timing. Proceedings may evolve by amendments to pleadings and /or claim forms, by joinder of parties and by changes in relief sought. Therefore, a dispute that is initially non-parallel may later become parallel or related. The Draft Text does not specify whether courts must reassess classification of the proceedings dynamically. Without guidance, courts may diverge.
45. In contrast to the concise wording for parallel proceedings, Article 3 para 1(b) is very extensive in its definition of 'related actions'. The wording in our view is too vague and unnecessarily complicated. We would suggest it would be much more appropriate to follow the expression used in the Brussels Ibis Regulation: expedience in resolving proceedings and avoidance of irreconcilable judgments. A detailed, yet unclear approach is likely to raise numerous questions of interpretation. Under (b)(i) only the parties are mentioned, however it is unclear what is meant by 'substantially the same or connected'. No subject-matter or 'causes of action' are mentioned under (b)(i). Instead, (b)(ii) refers to the 'same transaction' or 'series of transactions'. It would be more appropriate simply to require that the claims are so closely related that expedience and avoidance of irreconcilable judgments justify deciding over both claims in one proceeding.
46. The term "the courts of different Contracting States" should in our view include such regional courts as the Unified Patent Court. The Convention could add a provision similar to par. 4 of Article 26 of the Judgments Convention.

Residence

47. As we have suggested above that the applicability of the Convention should not be conditional upon residence, we do not think it is necessary to define the concept. It would only be useful for establishing priority rules with other instruments: we propose that the relevant instruments define residence for this purpose (e.g. residence of all parties within the EU within the meaning of the Brussels I bis Regulation would trigger the applicability of the Brussels I bis Regulation).

Question 3 on when a court is deemed to be seised

What are your views on Article 4?

*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.*

48. The current version of Article 4, entitled “Court seised”, provides that “[f]or the purpose of [Chapter II], a court shall be deemed to be seised – (a) when the document instituting the proceedings or an equivalent document is lodged with the court; or (b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant”.
49. A note specifies that the inclusion of Article 4 in the body of the Convention would “not mean the adoption of certain types of rules [on first in time] for the suspension of proceedings”. There is a difference in meaning between the French and English (as well as Spanish) versions, the latter two being more precise in clearly referring to the “first in time” principle.
50. While offering a uniform definition that could prove useful to all Contracting States and promote harmonisation, a more comprehensive wording could explain in greater detail the meaning of a document “lodged with the court” or “received by the authority responsible for services”. Practice may indeed differ in countries wishing to become contracting parties, so a more comprehensive definition would be welcome in order to avoid, despite the wording of the current Article 23 (Uniform Interpretation), possible misunderstandings, discrepancies, and unnecessary delays in resolving the issue of parallel proceedings.
51. Within the EAPIL working group, concerns have been raised, particularly with regard to the member countries of the Commonwealth of Independent States (CIS). In these countries, court proceedings are usually deemed to commence when the court issues a procedural order on acceptance of the claim and commencement of the proceedings. Therefore, it would be helpful to address this scenario in the description of the moment when the court is deemed to be seised.

Question 4 on Article 5 obligations

What are your views on Article 5?

52. Article 5(1) – From the wording of Article 5(1) it follows that ‘[a] court that must suspend proceedings in accordance with this Chapter’ is: a) Any court which does not have exclusive jurisdiction in a dispute involving rights *in rem* over immovables, within the meaning of Art. 6; b) Any court which is not designated in a non-exclusive choice of court agreement within the meaning of Art. 7, c) a court second seised having connection under Art. 8.
53. Giving the party the possibility to inform the court of the existence of proceedings pending with another court is a good solution, particularly where communication between the contracting

states is slow or ineffective. It could be considered a step toward ensuring the fulfilment of the Convention's objective of preventing parallel litigation and promoting judicial cooperation.

54. According to Art. 5(1), a court that must suspend proceedings shall do so not only upon a request of a party, but also on a request of '[other relevant person,]' or through the communication mechanism established pursuant to Article 16'. A number of remarks have been put forward in our Working Group. Firstly, it is unclear what the wording '[other relevant person,]' refers to. Furthermore, with the exception of Art. 6, it is questioned how '[other relevant person,]' or through the communication mechanism established pursuant to Article 16', fits the notion of 'party autonomy' and 'tacit prorogation', within the meaning of Art. 7 and Art. 8(2)(j) respectively. In other words, it should be specified that the wording '[other relevant person,]' or through the communication mechanism established pursuant to Article 16' may relate only to Art. 6, whereas the suspension in other circumstances should be requested by a party to the proceedings.
55. In a similar vein, an objection is raised that it is not clear from the wording of Art. 5(1) whether after having become aware of the foreign parallel proceedings the court is required to give the parties an opportunity to comment on potential suspension of the proceedings before ruling on this issue. Alternatively, the court may in theory suspend the proceedings automatically allowing the parties to seek an alteration or a discharge of the suspension order. This is an important due process requirement that must be addressed by the Convention. This consideration appears even more important if the court decides to dismiss the proceedings as suggested in the first note¹⁶ to this provision.
56. Paragraph 2 of Article 5 in conjunction with the second note¹⁷ raises a number of questions, primarily those that concern recognition and enforcement. Firstly, the wording in the Note suggests that recognition and enforcement will be dealt with within this Convention. However, such approach is not reconcilable with the general idea that the current Draft Convention is intended to complement 2005 and 2019 Conventions.¹⁸ Accordingly, one would expect that the matters regulated in the two Conventions will be outside the scope of the current Draft Convention, since an overlap in the matters regulated should be avoided. Instead, this is the matter left to other international instruments and/or national law. Within this context, the Convention's role and purposes, as well as the relationship with other legal instruments, should be clearly and carefully drafted.
57. Further, the wording in paragraph 2 appears inadequate to resolve a conflict between actions for performance and actions for a negative declaration. The following example illustrates its potential negative consequences: A borrower had filed an action to declare its loan agreement invalid with the court in one contracting state. Subsequently, the lender filed a collection action

¹⁶ [Note: For the situation provided in paragraph 1, the possibility of dismissal instead of suspension should be further considered.]

¹⁷ [Note: Further consideration of the recognition and enforcement of foreign judgments and on the detailed rules is required.]

¹⁸ Consultation on the draft text of a possible convention on parallel proceedings and related actions, p.7, B.2 [e33df29b-8686-4f80-87c4-0d46d3e4b2f1.pdf](#)

with the court of the second state, which action was suspended. The borrower's claim was denied, and the relevant decision may be recognised in the second state. Why should the court in the second state dismiss the lender's claim in this scenario? It would seem obvious that these proceedings have to be continued. Therefore, the scope of Article 5(2) should be reconsidered, and the expression 'dismiss' considered inappropriate at this point. The word 'suspend' or 'stay' may be used instead, as it clearly reflects the temporary nature of the intervention in the proceedings.

58. The wording in paragraph 3 may be adjusted so as to reflect a later moment than the moment when the suspension was granted (e.g., 'is unlikely' may be replaced by 'appears unlikely').

Question 5 on priority jurisdiction / connection

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

The mechanism (Art. 6-8) in general

59. In our Working Group, there were discussions as to whether the rules on jurisdiction should be omitted and an appropriate forum test should be applied instead. On the one hand, doubts were raised as to whether States would be able to agree on jurisdiction rules. On the other hand, it was argued that defendants could challenge the jurisdiction of the court first seised not only under national law but also under the Convention after initiating parallel proceedings. This would create an "additional backdoor option".
60. A considerable majority of our Working Group, however, welcomed the approach taken in the Draft. We believe that it would be a great benefit to international cooperation if there were uniform, predictable, and fair rules worldwide on how to deal with international parallel proceedings. For various reasons, it is convincing to focus primarily on the question of jurisdiction to reach this goal.
61. In general terms, anything else would amount to a far-reaching adoption of the *forum non conveniens* doctrine. This would arguably find little support outside common law jurisdictions. It seems inconceivable that such a general, discretionary rule alone could be turned into a mechanism that enables cooperation between courts of different countries and ensures legal certainty. Rather, there would be a risk of costly competition between the courts. Particularly when the parties wish to achieve conflicting objectives with their claims, courts should be required to assess their jurisdiction on the basis of specific criteria.
62. We note that some lawyers (especially those in the United States) are very critical of jurisdiction rules. In particular, they criticise the fact that some provisions of the Brussels Ibis Regulation are vague and have led to many proceedings at the CJEU.¹⁹ However, difficulties in interpretation

¹⁹ Herrup/Brand 63 Harvard International Law Journal Online (2022) 1, 3 et seq.

are normal in international conventions and regulations. In fact, such problems arise even more when it comes to determining the “more appropriate” court.

63. That being so, the most important step in our view will be to agree on a list of internationally accepted jurisdiction requirements. Firstly, this could help curb national rules providing for exorbitant jurisdiction. Secondly, it would prevent national rules of jurisdiction from being elevated to the status of the gold standard. The latter can be observed in EU law and in some national legal systems. There, consideration of parallel proceedings already heavily depends on an assessment of the international jurisdiction of the foreign court.²⁰ For example, under German law, it is required that the proceedings abroad can be based on a German rule of jurisdiction.²¹ This is an unconvincing solution that is not suitable for an international Convention anyway.
64. We are aware that it is difficult to agree on a list of internationally accepted jurisdiction rules (see on Art. 8(2) of the Draft Convention later). However, Art. 5 of the 2019 Judgments Convention shows that it is possible. We believe this is also the case here, because it is not a matter of directly harmonising jurisdiction. It is merely a question of which of several courts seised should decide a case. States should therefore be made aware that this Convention does not directly change their national rules on jurisdiction.
65. Due to the importance of jurisdiction, we suggest not to require the request of a party in Art. 8(1). Where parties do not know that a court can stay or suspend proceedings on the basis of the Convention, courts should still be able to prevent irreconcilable judgments (*ex officio*).

Art. 6 – Exclusive jurisdiction

66. The current version of Art. 6, entitled “[Exclusive][Priority] jurisdiction/connection”, provides that “[w]here parallel proceedings which have as their [main] object rights in rem in immovable property [, tenancies of immovable property, or the registration of immovable property] are pending before courts of Contracting States and the property is situated in one of those Contracting States, the court of the Contracting State in which the property is situated shall proceed with adjudication on the dispute. Any other court shall [, on the application by a party,] suspend [or dismiss] the proceedings”.
67. A note specifies that “[a]pplication of this rule to parallel proceedings which have as the [main] object tenancies of immovable property or the registration of immovable property should be discussed further”. The note adds that “[f]urther consideration is necessary as to whether registration includes recordation and whether this term can be added to the text as well. Further discussion is needed to address whether the rule on tenancies should include an exception for cases where the tenant is habitually resident in a different State. Further consideration is needed as to how the above provision aligns with Art. 5(3) of the 2019 Judgments Convention”.

²⁰ For EU law, see Art. 33(1) of the Brussels *Ibis* Regulation.

²¹ See Section 328(1) no. 1 of the Code of Civil Procedure, which has relevance when it comes to the likelihood of recognition.

68. At first glance, it may be observed that the current version of Art. 6 is presented as a “qualified” jurisdiction rule, whereas the subject matter of the Convention should rather be rules of procedure/parallel proceedings. The heading of Art. 6 can therefore be called into question.
69. In any event, the wording of the current version of Art. 6 is unsatisfactory. Despite drafters not yet having made a choice, the usefulness of the adjective “main” in brackets must be reconsidered. How should the meaning of the term “main” be assessed? What would/should be the determining criterion for such an assessment? It seems that, if Art. 6 were to remain in the body of the future Convention, this adjective should be deleted or a clearer provision should be drafted.
70. With regard to the note, it is clear from the outset that this draft provision is incomplete. It is obvious that consideration must be given to whether or not it should be aligned with Art. 5(3) of the Judgments Convention of 2019. This raises a more general question, namely whether this draft Convention is intended to be a supplementary (or complementary?) instrument to the Judgments Convention. If so, then alignment with the current provision in Art. 5(3) of that Convention would be logical.
71. However, the main issue seems to be whether presumed exclusive jurisdiction in the field of rights in rem in immovable property still makes sense. CJEU case-law in this area has shown that the former basis of sovereignty is giving way to that of proximity (of the dispute with the competent court). Consequently, should a provision such as the current version of Art. 6 be included in the future body of the convention?
72. In any event, if consistency between this draft Convention and the 2019 Judgments Convention is considered essential, one might wonder why there is no alignment with the wording of Art. 5(3) of the Judgments Convention. This would imply adding tenancy (residential lease of immovable property) or registration of immovable property to the scope of the current version of Art. 6.
73. Furthermore, if the provision is extended to tenancies, it should only concern residential lease in order to preserve parallelism with the Judgment Convention (Art. 5[3]). And it would make sense to extend the scope of Art. 6 to residential lease and registration of immovable property, since all these matters are treated as exclusive jurisdiction in the Judgment Convention. Hence, it is not obvious why they should not be treated equally in Art. 6.
74. Also with regard to the scope of the current provision, it was suggested among the members of our Working Group that an Explanatory Report should address the case of other types of leases (e.g., commercial) and indicate whether such types fall within the scope of the provision, at least when they are considered as such by the law of the place of the immovable (see p. 111 of the Explanatory Report to the Judgment Convention for an illustration of both model and clarification).
75. Still with regard to the scope of the current version of Art. 6, one may also question whether this provision could only be applied if the property is situated in a Contracting State (and more specifically in one of the two Contracting States where parallel proceedings are pending). The logic of such a condition is debatable. If the relevant criterion is immovable property and if the

draft Convention considers that a right in rem in immovable property confers exclusive jurisdiction on the court where the immovable property is situated, why consider only the location of a Contracting State? If such a criterion is important, the draft Convention should in any case address it, otherwise it would prove, on the contrary, that the criterion is weak and cannot justify exclusive jurisdiction.

76. One might also ask why Art. 6 does not allow *lis pendens* (i.e. the application of rules such as Art. 8 and 9) in disputes concerning rights in rem in immovable property, especially if tenancy is included in the scope of this article. Even though some members of the Working Group questioned the very necessity of such a provision, if it were to be retained in the body of the Convention, the exclusion of any possibility of *lis pendens* seems questionable. Depending on the final scope of the current version of Art. 6, there could be room for at least one specific case of *lis pendens* in this area.
77. Regarding the discussion of a possible exclusion that can be found in the note, why should there be an exception when a tenant is habitually resident in a different state? Does this mean that the court of the Member State of a tenant's habitual residence should have jurisdiction? It is not clear why this factor attributing jurisdiction should "prevail" over *forum rei sitae*. It seems reasonable to discuss an exception only if both a tenant and a landlord would have common habitual residence in a different state. Also, it is then necessary to discuss further whether there would be a general exclusion or only regarding the short-term tenancies (like under the Recast Brussels I Regulation in the EU).
78. Finally, the relationship between the Recast Brussels I Regulation, which does not require the defendant to be domiciled in the EU in cases of exclusive jurisdiction, and the Convention must be clearly addressed, assuming the EU could and would accede to the Convention. Hague Conference Conventions that are open to signature by Regional Economic Integration Organisations (hereinafter "REIO") contain an REIO "give-way" clause. However, this clause will likely not give priority to the Regulation in cases where, under the definition of habitual residence in the Regulation, at least one party is habitually resident in a non-member state that is a contracting party to the Convention. This would, in effect, paralyse the exclusive jurisdiction clause and have consequences for *lis pendens* situations.

Art. 7 – Party autonomy

79. Many doubts were raised with regard to Art. 7 of the Draft Convention.

Should exclusive choice of court agreements be covered by Art. 7?

80. Art. 7 (2) of the Draft Convention excludes exclusive choice of court agreements in the sense of Art. 3 a) and b) of the 2005 Choice of Court Convention from Art. 7(1) of the Draft Convention. We welcome this in principle. Exclusive choice of court agreements already benefit from a highly developed and carefully calibrated regime under the 2005 Choice of Court Convention, including a dedicated *lis pendens* rule (Art. 6) and strong obligations of recognition and enforcement. Introducing an autonomous priority rule for such agreements within the Draft Convention risks

normative overlap and interpretative friction, even with an express *lex specialis* clause. In practice, courts may still struggle at an early stage to determine which Convention applies, particularly where party status, temporal scope, or material exclusions are contested. In fact, the Draft Convention is structurally designed to address situations of jurisdictional competition in the absence of clear party allocation of authority. Where parties have concluded an exclusive choice of court agreement, the problem is not one of coordination and the 2005 Choice of Court Convention addresses the matter directly and more effectively. This is why we suggest that Art. 2 of the Draft Convention should include an exception for exclusive choice of court agreements. This also makes sense because otherwise, one could think that Art. 7(2) only excludes the applicability of Art. 7(1), with the result that Articles 8 and 9 would be applicable. We think such an exception purely to Art. 7(1) was not intended.

81. However, Art. 2 of the 2005 Choice of Court Convention excludes some matters from that Convention which are covered by the current Draft Convention. In particular, this applies to “claims for personal injury brought by or on behalf of natural persons” and “tort or delict claims for damage to tangible property, and tenancies of immovable property” (Art. 2(1)(j) and (k) of the 2005 Choice of Court Convention). If Art. 7(2) of the Draft remained unchanged, exclusive choice of court agreements concerning these matters would neither be covered by the 2005 Choice of Court Convention nor by the Draft Convention. In contrast, non-exclusive choice of court agreements relating to these matters would be covered by Art. 7(1) of the Draft Convention. That seems contradictory as then, they would have a stronger effect than exclusive choice of court agreements. We understand that the matters are so sensitive that states may not wish to grant such a strong priority to the court chosen (like in Art. 6 of the 2005 Choice of Court Convention). In that case, these matters should perhaps be excluded from Art. 7 altogether. Then, in such matters Art. 7 would neither apply to exclusive nor to non-exclusive choice of court agreements. In practice, they occur relatively rarely anyway.

How should non-exclusive choice of court agreements be defined?

82. The definition of non-exclusive choice of court agreements in Art. 7(1) of the Draft Convention seems to contain a mistake. It also covers cases where parties have agreed that “one” court shall have jurisdiction. Then, according to Art. 7(1) this court shall proceed with the adjudication of the dispute “unless such agreement states that it does not deprive any other court or courts of jurisdiction”. If the latter is not the case (and Art. 7(1) could be applied), there will usually be an exclusive choice of court agreement in the sense of Art. 7(2) of the Draft Convention, meaning that Art. 7(1) could not be applied. This is because according to Art. 7(2) sentence 3, a choice of court agreement which designates the courts of *one* State shall be deemed to be exclusive unless the parties have expressly provided otherwise. Therefore, a reference to “one” court usually leads to an “exclusive agreement”. If they have expressly provided otherwise, the agreement “states that it does not deprive any other court or courts of jurisdiction”. This means that Art. 7(1) does not apply. Therefore, we do not see when the priority rule in Art. 7(1) can be applied at all when it comes to choice of court agreements regarding “one” court. A suitable wording could be that Art. 7(1) only applies if parties have agreed that “courts in two or more States shall have jurisdiction, and only one of the courts seised is designated under such agreement”.

83. Our Working Group also discussed what happens if two courts, that have both been designated under the choice of court agreement, have been seised in parallel. The majority view is that in such a case, it is hard to develop a priority rule under Art. 7(1) as both courts are equally designated by the choice of court agreement. Therefore, the mechanism of Art. 9 (or Art. 8(1)(b)) has to show which court is more appropriate. However, the application of Art. 9 and Art. 8(1)(b) requires both courts to have jurisdiction under Art. 8(2). Therefore, non-exclusive choice of court agreements should be added as accepted grounds of jurisdiction under Art. 8(2).

What exceptions to the priority rule of Art. 7(1) should there be?

84. Under Art. 7(1), where only one of the courts seised is designated under a non-exclusive choice of court agreement, that court shall have priority. The only exception so far applies when the agreement “states” that it does not deprive any other court or courts of jurisdiction. We think that the term “state” might be ambiguous. On the one hand, it could mean that the wording must be clear. Then it would be similar to Art. 7(2) sentence 3 (“expressly provided”). On the other hand, it could be sufficient if it can be inferred from the agreement that the parties did not want to deprive any other court of jurisdiction. The last interpretation seems convincing to us. If the wording of an agreement implies that general rules on international jurisdiction remain unaffected, then such an agreement has no derogating effect. It merely confers jurisdiction to (a) court(s) which otherwise would not have jurisdiction. In other words, it is on the same “footing” with other jurisdiction grounds/connection provided in Art. 8(2). Because of that, Art. 9 of the Draft Convention should be applied. This can be reached by providing for a jurisdiction ground/connection in Art. 8(2). The alternative (referring to Art. 9 in Art. 7(1)) seems less convincing as there are other reasons why non-exclusive choice of court agreements should be mentioned in Art. 8(2), as explained earlier (see para. 83).
85. More importantly, the question is why so far Art. 7(1) only has this one exception. Art. 6 of the 2005 Choice of Court Convention has five (different) exceptions. This means that even where there is an exclusive choice of court agreement, courts not chosen do not have to suspend or dismiss proceedings in every case. Especially, they can proceed with the case if “the agreement is null and void under the law of the State of the chosen court”. We think that at least this exception must also be included in Art. 7(1) of the Draft Convention. A counter-exception could then be made in cases where the defendant does not raise an objection when an alleged (non-exclusive) choice of court agreement is relied upon by the claimant. With regard to the other exceptions to Art. 6 of the 2005 Choice of Court Convention, consideration should be given to the extent to which they or comparable rules also make sense here. Furthermore, a rule on the formal validity of the agreement has to be included as already suggested by one of the Notes to Art. 7.

Art. 7(3) and its relationship with Art. 7(1)

86. Art. 7(3) confers priority to courts which have been expressly “accepted” by the defendant during the proceedings. Art. 7(1) applies to non-exclusive choice of court agreements that exclude the possibility for the parties to bring proceedings before another court. This raises the question of the relationship between paragraph 3 and paragraph 1, specifically, whether paragraph 3 can

override the choice made under Art. 7(1). Due to the scope of matters excluded from the Convention's applicability, we would suggest leaving open the possibility to override paragraph 1 in this way. With regard to Art. 7(3), the question remains whether the court should be required to inform the party of the consequences. Given the exclusion of proceedings involving weaker parties from the material scope of the Convention, we believe it should not.

87. From the wording of Art. 7(3), we assume that the conditions for an express consent are much higher than the "tacit prorogation" in the sense of Art. 8(2)(j). In our Working Group, there were discussions as to whether Art. 7(3) should already apply in the case of such a tacit prorogation. It was submitted that in practice, it could be difficult to distinguish between "expressly [and positively] consented to the jurisdiction" on the one hand and "tacit prorogation" on the other. Furthermore, it was argued that the principle of party autonomy requires priority of "tacit prorogation" (even over choice of court agreements). There were, however, general reservations about granting strict priority to the court where the defendant has not contested jurisdiction. While this was not a unanimous view, a strong opinion was, that a tacit prorogation might sometimes not be a conscious decision on the part of the defendant: If the defendant merely fails to object to jurisdiction in good time, this does not create a particularly close connection to the forum – at least not as close as in the case of non-exclusive choice of court agreements or express consent.
88. Finally, paragraph 3 requires harmonisation of the term "stay". Like in all the other Articles, the term "suspend" should be used.

Art. 8(1) – Jurisdiction and timeframe issues

General remarks

89. Art. 8(1) of the Draft Convention deals with two fundamentally different situations. Art. 8(1)(a) applies where only one of the courts seised has jurisdiction under Art. 8(2). Courts not having jurisdiction under the Draft Convention are required to suspend or dismiss proceedings. This is because certain national grounds for jurisdiction are considered so weak that these courts should "take a back seat".
90. In contrast, Art. 8(1)(b) applies where *both courts* have jurisdiction under Art. 8(2) of the Draft Convention (like in Art. 9). A court second seised shall suspend or dismiss proceedings only because it was seised after the proceedings had already been ongoing for some time at the court first seised. We doubt that this case is comparable to Art. 8(1)(a). First, we think, the strict requirement to suspend or dismiss, which fits well for Art. 8(1)(a), may be too strong for the cases described in Art. 8(1)(b). From our point of view, there might be good reasons why the court second seised should not always suspend or dismiss the proceedings in such cases. For example, the proceedings at the court first seised might take a very long time because it is not working expeditiously. So far, the only option here is to apply Art. 21, which in our opinion should only be applied in absolutely exceptional cases. Art. 5(3) only applies if a court has already stayed the proceedings. But why should a court stay the proceedings if the proceedings at the court first seised have been going on for a long time and are not being conducted seriously by that court?

91. Second, from our point of view, there are several options to improve the structure (and the content) of Art. 8. On the one hand, Art. 8(1)(b) of the Draft Convention could be placed in a separate paragraph. On the other hand (and this might be more convincing), Art. 8(1)(b) could become part of Art. 9 or Art. 10. There, it could either be used as a strict rule (as it is now). Or it could also be only part of Art. 10. Then, the meaning of “a reasonable timeframe” would not have such a significance as it has now (on this, see our comments later).

Art. 8(1)(a) – Jurisdiction of only one court

92. A noteworthy problem regarding Art. 8(1)(a) of the Draft Convention arises from the fact that the list in Art. 8(2) does not fully correspond to national jurisdiction rules. If a court first seized has jurisdiction under its national law, but this is not considered “sufficient” under the Draft Convention, the court would have to suspend the proceedings under Art. 8(1)(a) if an action was subsequently brought before a court with “sufficient” international jurisdiction. Again, this is correct and intentional. However, this rule would also apply if the second court was seized unreasonably late, and the proceedings before the court first seized were already nearing completion. Art. 8(1)(b) would not apply as the court first seized does not have jurisdiction under Art. 8(2). Defendants could use this to their tactical advantage. They could delay proceedings before a court with jurisdiction (under national law) by initiating proceedings in another Contracting State. Art. 5(3) of the draft does not help in this case,²² because the court first seized may only continue the proceedings if a decision by the court second seized cannot be expected within a reasonable time. To assess that, it will be necessary to wait for the proceedings there to continue. Art. 19 of the Draft Convention is also hardly helpful. It allows jurisdiction to be exercised if this would otherwise result in a manifest denial of justice. This would not be the case if sufficient protection can be obtained in the court second seized. Art. 8(1)(a) of the draft should therefore contain an exception. This should clarify that *“a court first seized does not need to suspend or dismiss the proceedings if the proceedings in the other court were not started within a reasonable timeframe and it can be expected that the proceedings in the court first seized will be completed within a reasonable period of time”*.

Art. 8(1)(b) – Jurisdiction of both courts and timeframe issues

93. We have already explained above the strict rule of Art. 8(1)(b) raises doubts. Our Working Group discussed whether this is also the case because the wording “within a reasonable timeframe” is unclear and uncertain. Some have argued that such terms are common and useful because they offer appropriate solutions for individual cases which vary in practice. Some have proposed to give a time limit in Art. 8(1)(b), which would be extendable by the court first seized for a certain period of time. Others took the view that a timeframe might be determined by the court first seized. The latter cannot be considered as a solution for standard cases. This is because at the beginning of the proceedings at the court first seized, it is unclear whether any party will initiate

²² Some members of the HCCH Working Group had a different opinion; see HCCH Working Group on Jurisdiction, Report of 2024 (<https://tinyurl.com/2hx98f7f>), para. 17.

parallel proceedings in other States, and, in fact, that is a rare occurrence. The courts would, therefore, have to set a time limit for the possible, but rather improbable case of possible later proceedings abroad as a precautionary measure. The court first seised might, however, be entitled to set a time limit if there are indications that one of the parties will bring parallel proceedings in another State (e.g. if one of the parties has announced to sue the other party in another country). In this sense, the following could be added as a second sentence in Art. 8(1)(b): “*Where appropriate, a court first seised may set a timeframe*”.

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

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

94. The jurisdiction list plays a normative (not merely descriptive) role in the Draft Convention. It identifies the jurisdictional bases that are sufficiently legitimate to trigger coordination obligations between courts. For this reason, the use of the term “connection” might be problematic.
95. “Connection” suggests a factual or relational link of variable strength, inviting courts to engage in qualitative balancing: Which connection would be stronger enough to uphold? Perhaps some connections are too weak to consider? That might risk becoming a ground for forum shopping, particularly in common law systems familiar with concepts, e.g., “real and substantial connection” or forum appropriateness. By contrast, what the Draft Convention is doing is endorsing specific jurisdictional grounds as internationally acceptable bases for deference.
96. Existing HCCH instruments, including the HCCCA and HJC, avoid the language of connection and instead rely on clearly articulated jurisdictional bases. Departing from this vocabulary also risks doctrinal inconsistency and interpretative elasticity, especially in the absence of a supranational interpretative authority.
97. A clearer and more coherent approach would be to frame the list explicitly as “recognised jurisdictional bases”. This would stress that Art. 8(2) of the Convention does not harmonise national jurisdiction rules directly. It would also preserve flexibility at the coordination stage, while ensuring that only jurisdictional assertions meeting a minimum international legitimacy will be accepted.
98. When determining the specific acceptable grounds of jurisdiction, problems arise. Insofar, the “deadlock” in the negotiations in The Hague is understandable. We would mainly like to comment on the general question whether the list in Art. 8(2) should be narrow or wide. We assume that the Convention will only be successful if neither a particularly narrow nor a particularly wide list is sought. A narrow list would promote legal certainty, as there would be fewer cases in which courts would have to determine the more appropriate court. But this is a very continental European way of thinking. In order for as many countries as possible to be able to accept the convention, one has to find a balance: The list must not be too narrow because too many states would “miss” “their own” familiar grounds of jurisdiction. But it must not be too wide either in order to curb national rules providing for exorbitant jurisdiction. For example, it should not be a sufficient basis for jurisdiction that assets of the defendant are located in a state.

99. Regarding the individual grounds of jurisdiction, we think that the wording used should follow the 2019 Judgment Convention as much as possible. Instead of multiple alternatives (claim concerns, action concerns, proceedings have as their object etc), the wording ‘in a dispute on ...’ or ‘dispute involving ...’ could be used in paras. d) et seq. in a consistent manner.
100. Finally, we think it is sensible not to prioritise any of the grounds of jurisdiction in Art. 8(2) of the Convention. The Note to Art. 8(2)(j) considers whether a tacit prorogation should be prioritised. In light of the reasons we have put forward above with regard to Art. 7 (para. 87), we reject this idea.

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?

101. See our general comments under para. 98.

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

102. We think that non-exclusive choice of court agreements should be mentioned in Art. 8(2). This is because there are situations in which such agreements do not lead to a priority under Art. 7(1) of the Draft Convention. See in detail our comments in paras. 83 and 84.

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?

103. Article 9 of the Draft Convention addresses a residual but structurally unavoidable category of cases: parallel proceedings that cannot be resolved through exclusive jurisdiction (priority rules), party autonomy, or special jurisdictional bases under Articles 6–8. In such circumstances, where two or more courts have jurisdiction under Article 8(2), allowing the “*more appropriate*” court to prevail offers a pragmatic solution. At the same time, concerns about legal uncertainty and opportunistic litigation are well founded. Indeed, an unconstrained discretion to identify the more appropriate forum could incentivise tactical second filings and prolong parallel proceedings.
104. Against this background of legitimate concerns, Article 9 does not seek to replicate a domestic *forum non conveniens* doctrine. Rather, it disciplines and multilateralises discretionary decision-making within a clearly circumscribed framework. The Draft Convention mitigates the identified risks through a set of cumulative procedural safeguards: the central role accorded to the court first seised (as specified in Approach 1 concerning Article 9(1)), the mandatory suspension of

proceedings by courts second seised subject to specific grounds (as outlined in Approach 1 (Article 9(2)), strict temporal limits for applications (as outlined in Approach 1 (Article 9(5)) and Approach 2 (Article 9(2)), and further to be defined in the future Explanatory Report), and a closed list of factors (as provided in Article 10).

105. Taken together, these mechanisms might significantly narrow judicial discretion, promote coordination rather than competition between courts, and reduce incentives for forum shopping, while preserving a necessary degree of flexibility in cases where rigid priority rules would prove unworkable. In this sense, Article 9 should be read as a *control mechanism*, not an invitation to forum shopping. It channels discretion into a structured, predictable process precisely because parallel proceedings already exist. In the absence of any “more appropriate court” mechanism, rigid priority rules would either entrench tactical races to court or render the Convention unacceptable to common law jurisdictions. Article 9 thus performs an integrative function by reconciling different procedural cultures and preventing uncoordinated assertions of jurisdiction.
106. In analytical terms, to achieve these goals, the preference for a strong role of the court first seised is persuasive. A particularly convincing design choice is to give procedural priority to the court first seised in determining which court is the more appropriate forum, as reflected in Approach 1 to Article 9. This does not reintroduce rigid first-in-time priority but instead establishes an orderly *sequence* for decision-making. By centralising the initial assessment in the court first seised, the Draft Convention would avoid the immediate and destabilising scenario in which multiple courts simultaneously conclude that they are the more appropriate forum. This sequencing function is crucial. It would not only reduce the risk of competing determinations but also place a meaningful deliberative burden on any court second seised that might later consider resuming proceedings. In practice, a second court is far better positioned to assess whether it should depart from the first court’s assessment than to conduct a *de novo* “appropriateness” analysis in parallel. For that reason, any power to override the decision of the court first seised must be tightly constrained and subject to clear, elevated parameters.
107. Against this backdrop, allowing a court second seised to resume proceedings merely on the basis that it *assumes* itself to be the more appropriate court as contemplated in Approach 1 (Article 9(5)(b)) and Approach 2 (Article 9(2)(b)), would significantly undermine the Draft Convention’s objectives. Such an approach would predictably generate frequent conflicts of competence, encourage strategic second filings, and re-create parallel proceedings with the attendant risk of inconsistent judgments. This is precisely the outcome the Draft Convention is intended to prevent.
108. Accordingly, if an exception to the suspension obligation is retained, it should operate only under a narrowly defined and heightened threshold (such as the “*clearly more appropriate court*” threshold), rather than a parallel reapplication of the same Article 10 factors. Any such resumption of proceedings by a court other than the court first seised should not be based on that court’s unilateral assessment of its own appropriateness. Rather, it should be possible only upon an application by the parties and subject to strict temporal limits. Such a design would ensure that departures from the first court’s determination are exceptional, transparent, and party-driven, rather than assumption-based. This approach aligns Article 9 with the Draft Convention’s core objectives of reducing parallel proceedings and conflicting judgments, while still preserving

a limited degree of flexibility for genuinely exceptional cases. Otherwise, the Draft Convention would risk reproducing precisely the conflicts it seeks to avoid.

109. Furthermore, it bears emphasis that the effectiveness of Article 9 would likely be contingent upon the proper functioning of the coordination and communication mechanisms established in Chapter IV of the Draft Convention. The structured sequencing of jurisdictional decision-making presupposes timely information flows between courts, including notification of seising, suspension, and determinations under Article 9. Without these institutionalised channels of communication, the procedural safeguards built into Article 9 would risk operating in isolation, thereby weakening its capacity to manage parallel proceedings coherently.
110. Finally, procedural coherence issues such as the treatment of jurisdiction, *lis pendens*, and discretionary doctrines as part of a single judicial process in some legal systems deserve attention. The Draft Convention should clarify that Article 9 does not require courts to abandon their internal procedural structures, but rather to sequence their decisions consistently with the Convention's objectives. In this respect, time limits and mandatory suspensions are preferable to vague references to "exceptional circumstances" (e.g., options 1, 2 and 3 in para 5(b)), as they would promote efficiency without empowering courts second seised to act unilaterally. Yet we are appreciative of potential complexities of defining such time limits in a Convention, if possible. Therefore, perhaps such definitions might be left to the future Explanatory Report.

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

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

111. Taking Question 7.2 and 7.3 together:
112. With regard to Article 9, we do not express a preference for either approach in its entirety. Rather, our view is that the most workable solution in practice would likely be to combine the stronger features of both approaches, as discussed in response to Question 7.1. In particular, the emphasis placed in Approach 1 on the central procedural role of the court first seised provides an essential sequencing function and promotes legal certainty by reducing the risk of competing determinations. At the same time, certain elements of Approach 2, notably parties' application, the use of clear temporal limits and structured procedural triggers, may enhance predictability and discipline the exercise of discretion. A calibrated combination of these elements would, in our view, better reflect the Draft Convention's overarching objectives of preventing parallel proceedings and conflicting judgments, while preserving a limited and clearly circumscribed degree of flexibility for genuinely exceptional cases. Such an integrated design would also be more likely to function effectively in practice across different procedural traditions.

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)?

Preliminary remarks

113. At the outset, we note that the list in Article 10 seems to only include private interest factors and not public interest factors. As is well known, the US doctrine of *forum non conveniens* uniquely takes into account both. This reflects the fact that parallel litigation is not only a problem (in particular, a waste of resources) for the individual litigants, but also for states. The main public interest factors taken into account under US law are 1) court congestion, 2) local interest in resolving the controversy and 3) preference for having a forum apply law with which it is familiar.
114. Some factors in Article 10, however, could be understood both as protecting private and public interest. The issue arises whether this should be clarified, forbidden, or left open to interpretation by courts.
115. In any case, public interest factors might resurface through other mechanisms established by the Draft Convention, in particular the safeguards in Art. 19-21.

Litigation burdens for the parties

116. The factor in Article 10(a) (burdens of litigation on the parties) reflects a fundamental private interest and rightly appears first in the list. It is suggested that this factor should really be about the burdens of litigation, rather than its convenience.

Ease of Access to Evidence

117. The factor in Article 10(b) (ease of accessing evidence) also reflects a fundamental private interest when the burden of gathering evidence lies with the parties. The parties, however, could request assistance from the State to obtain certain evidence (ordering a witness to appear in court, appointment of a judicial expert), and it is also conceivable that certain countries would have an inquisitorial system where the court would be in charge of gathering evidence. The issue arises, therefore, whether not only the burden on the parties, but the burden on the respective courts, should be taken into account.
118. It is unclear whether Article 10(b) should refer to the preservation of evidence. This would typically be done through provisional measures which should be available locally, and should not determine the jurisdiction to decide the case on the merits once the relevant evidence has been preserved.

Applicable law

119. The meaning and purpose of the factor in Article 10(c) should be clarified. First, we trust that the drafters of Article 10(c) did not mean to suggest that the content of the potentially applicable substantive laws and the substantive outcomes could play a role at this jurisdictional stage. It would be useful if the factor could be reformulated in a way which would confirm this.
120. If understood as a private interest factor, the sole issue would seem to be the burden for the parties in establishing the content of the applicable law. While this cost can be high in certain jurisdictions where the ascertainment of foreign law requires the appointment of private experts, it can be much lower where the court appoints experts whose fees are determined by law, and indeed nonexistent in cases where it is the court which will ascertain the content of foreign law.
121. The law applicable to the claims however also has a significant impact on the workload of the relevant courts. If foreign law is applicable, a court will have to incur additional efforts to understand it, and indeed in certain jurisdiction to establish it. In other words, applying a foreign law which is not familiar is an extra cost for any court.
122. While the substantive outcomes of the application of the potentially applicable laws should not be taken into account, the issue arises as to whether the applicability of international mandatory rules should influence the process of determining the most appropriate court. The most obvious case scenario would be that of a court having a fundamental interest protected by a forum's international mandatory rule. It is submitted that this case scenario should be dealt with through Article 21. The opposite case scenario, however, could also arise: the forum might consider that it is the most appropriate forum under Article 10, except for the existence of a foreign international mandatory rule protecting a fundamental interest of the foreign state (e.g., an Asian court considering whether it would be more appropriate than the court of an EU state to decide a contractual dispute subject to EU sanctions), and that the foreign court would thus absolutely want to apply. The question arises as to whether this consideration could be taken into account through Article 10(c).
123. One possible way to clarify Article 10(c) would be to redraft it as allowing to take into account only "the costs [for the parties] associated with the determination of the applicable law". If the applicability of international mandatory rules (whether of the forum or foreign) is to be part of the analysis under Article 10(c), it should be provided expressly.

Advancement of the proceedings

124. While one can see why resources already invested in certain proceedings should not be wasted by starting at a late stage other proceedings in a foreign court, it is unclear how the issue could arise given the requirement in Art 8(1)(b) that the second proceedings are started within a reasonable time frame after the first.
125. The issue of the possibility of a significant delay in one of the two courts should be taken into account.

126. Although it is appreciated that applicable limitations or prescription are taken into account in the doctrine of *forum non conveniens* in certain common law jurisdictions, these are issues related to the outcome of the proceedings. It is no more unjustifiable to take them into account than the eligibility of certain types of losses or the availability of punitive damages.

Complete resolution of the dispute

127. The meaning of the factor in Article 10(e) is unclear in the context of ‘parallel proceedings’ where both courts have jurisdiction to decide the dispute. If it is concerned with available remedies in both fora, it would imply an indefensible comparison of the potential outcomes of the proceedings.

Likelihood of recognition

128. We take a critical view of the fact that the likelihood of recognition is only one of several possible factors (Article 10(f)). This means that courts second seized can suspend their proceedings although the decisions of the court seized in another country will not be recognised and enforced in the court’s own country. This threatens to undermine adequate legal protection and create denial of justice. Article 5(2) only allows to *dismiss* the case if the other proceedings resulted in a judgment capable of recognition. In the event that no such decision has been or will be issued, Art. 5(3) does not provide for the continuation of the proceedings. They would therefore remain suspended.
129. It is suggested that the factor in Article 10(f) should become a safeguard alongside Article 19-21. Alternatively, since the likelihood of recognition plays an essential role in many jurisdictions, the convention should at least allow states to make a corresponding declaration.

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

130. See above.

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

131. As already underscored, it is conceivable that one of the two courts decided certain claims in a prior judgment, and that the issue of parallel proceedings would arise for other claims brought before the two courts. A specific factor could be added to take into account the existence of the first judgment to determine whether the court which rendered it would be appropriate to decide these other claims. It is possible that this case scenario was contemplated when elaborating factor (e).

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.

132. We think that the framework developed in the draft is very complex. However, we do not see any other way to reach a compromise between priority-/jurisdiction-based approaches and the *forum non conveniens* doctrine.
133. In our view, there is a risk of significant procedural delays in practice. The jurisdiction rules raise many questions of interpretation, and determining the more appropriate court is particularly uncertain. If the parties can still appeal against court decisions, there is a risk of long-lasting delays. The Convention will therefore only be successful in practice if courts really do decide expeditiously within the meaning of Art. 9(6)/Art. 9(3) of the Draft Convention.

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.

134. The mechanism established in Chapter III is based, in effect, on an agreement of the relevant courts on the fact that one of them is the more appropriate court and should adjudicate the entirety of the claims. It is for this purpose that the cooperation and communication mechanisms established by Chapter IV will likely be most useful.
135. Some members of our Working Group wondered, however, whether a more ambitious mechanism could not have been established giving some form of priority to the court seized first, and relying on agreed standards of jurisdiction. However, no elaborate alternate proposal was made.

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?

136. Chapter IV is one of the Draft Convention's most innovative and forward-looking elements. By facilitating communication between courts seized of parallel proceedings or related actions, it seeks to move coordination beyond abstract obligations and towards procedural practice. In principle, this responds to the realities of contemporary transnational litigation, where unilateral decision-making is often insufficient to prevent duplication, delay, and inconsistent outcomes.

137. In practice, however, the effectiveness of the communication mechanisms would most likely depend heavily on judicial culture, institutional capacity, and domestic procedural traditions. Many courts, particularly outside specialised commercial, maritime, or international divisions have limited experience with direct inter-court communication. Judges may be reluctant to engage actively due to concerns relating to procedural fairness, transparency, and the parties' right to be heard, especially where domestic law provides little guidance on the legal status or permissible scope of such exchanges.
138. Operational asymmetries might further complicate implementation. Differences in language, court infrastructure, case-management systems, and available judicial support might slow or discourage meaningful communication. Without standardised formats or clearer expectations regarding the purpose and evidentiary status of communications, exchanges might risk becoming *ad hoc*, uneven, or purely symbolic.
139. At the same time, the deliberately soft and permissive design of Chapter IV is also one of its principal strengths. By framing cooperation and communication as encouraged rather than mandatory, the Draft Convention would avoid constitutional and procedural resistance in Contracting States. While doubts may arise with regard to the permissive nature of the provisions and absence of a concrete obligation to cooperate and communicate, taking such a responsibility would be up to Contracting States to declare at the time of the deposit of their instruments of ratification, acceptance, approval or accession or at any time thereafter (as provided in Article 16.2). Once declared, we assume that Contracting States would be obliged to coordinate channels of cooperation and communication in either (i.e., direct, indirect or combination of both). This flexibility would allow practices to develop incrementally, most likely first within specialised courts such as commercial or maritime courts where judges are already accustomed to cross-border coordination. Certainly, such an objective would be realised subject to the willingness of Contracting States. Indeed, a permissive language of the respective provisions would also likely enhance more accessions. Over time, practice-based tools (e.g., guidance developed through best-practice protocols or judicial networks as have already been established²³ may enhance consistency and confidence without the need for rigid harmonisation.

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

140. The principal advantage of Chapter IV lies in its potential to enhance mutual awareness and coordination between courts, thereby supporting the effective operation of the Draft Convention's mechanisms on parallel proceedings and related actions. Even limited exchanges such as clarification of procedural posture or the existence of pending determination may significantly reduce the risk of contradictory decisions.
141. An additional advantage of Chapter IV is that, if effectively operationalised, it would work in close functional alignment with Article 9 in facilitating procedural coordination and supporting

²³ See: <https://www.hcch.net/en/publications-and-studies/publications2/practical-handbooks>; see also <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ihnj>

the orderly sequencing of the relevant procedural decisions essential to the operation of the (Draft) Convention. The communication mechanism is particularly important in ensuring that the role of the court first seised is respected and that any resumption of proceedings by a court second seised occurs only within the structured conditions envisaged by the Convention. Where Article 9 requires that a court other than the court first seised may resume proceedings only upon a party's or parties' application (which is proposed above), judicial communication can facilitate awareness of the procedural posture and the existence, scope, and timing of such applications.

142. In this sense, Chapter IV supports the disciplined operation of Article 9 by reducing the risk that courts second seised act on unilateral assumptions about their own appropriateness. Absent such communication, there is a real danger that Article 9(5)(b) as set out in Approach 1/ Article 9(2)(b) as set out in Approach 2 could be applied in a manner that undermines the Draft Convention's objectives, allowing courts to resume proceedings simply on the basis that they consider themselves to be the more appropriate forum. This would predictably generate conflicts of competence, incentivise strategic second filings, and re-create the very parallel proceedings and inconsistent outcomes the Convention seeks to avoid (see above in response to Question 7). Properly used, the communication framework in Chapter IV thus operates as a coordinating safeguard, reinforcing the primacy of the court first seised and ensuring that any departure from its determination is informed, transparent, and procedurally controlled rather than based on a mere assumption.
143. Possible challenges, however, are both conceptual and practical. First, Article 15 does not prescribe specific methods or minimum standards of engagement between the seised courts. While this advisory character preserves flexibility (similar to the points discussed above), it also raises questions as to the normative added value of the provisions and the extent to which it would alter judicial behaviour in practice. It is unclear whether the aim is to develop uniform standards or to refer to the national standards of the cooperating courts (Arts. 16(2) and 18 somewhat suggest that those issues would be governed by the cumulative application of the national laws of the relevant courts). We appreciate national procedural and cultural diversities which might complicate further elaborations or definitions in the normative text of the Draft Convention. Therefore, we propose that the Draft Convention either clarifies that the standards are defined at national level (and possibly made public by Contracting states in their declarations) or that the development of uniform standards is expected. In the latter case scenario, the best place to clarify such standards would be the future Explanatory Report. Furthermore, as mentioned above, practices under Articles 15 and 16 would likely be developed gradually.
144. Secondly, Article 16 would benefit from greater clarity, particularly regarding the meaning of "*ex parte*" communication under Article 16(2)(a). While read together, it seems that this expression refers to the communication of seised courts without parties' involvement. Yet the term remains potentially ambiguous. It is unclear whether it refers to the communication initiated at the request of one party without informing the other or conducted solely between courts without the involvement or even notification of either party. Given the sensitivity of *ex parte* communications in many legal systems, further clarification in the future Explanatory Report would be valuable to avoid potential misunderstandings and resistance at the implementation stage.

145. Similar clarification could usefully be provided in the future Explanatory Report in relation to Article 16(2)(c), which allows for a “combination” of direct and indirect communication methods. In particular, the future Explanatory Report could clarify how such combinations are intended to operate in practice, especially where Contracting States would have notified different preferred methods of communication. Guidance on whether mixed method communication presupposes the absence of party involvement, and on the role to be played by central authorities in such scenarios, would enhance legal certainty and facilitate the practical application of the provision.
146. Overall, Chapter IV provides a promising and appropriately cautious framework for judicial communication. Its success is unlikely to be immediate or uniform, but it creates the institutional space for cooperative practices to emerge organically. The long-term effectiveness of these mechanisms would depend less on formal obligations and more on the gradual development of judicial trust, experience, and supporting guidance at both national and transnational levels.

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 need for safeguards in the operation of the rules is undeniable. As these safeguards apply both in the context of Article 8 and Article 9, it seems clear that they should not appear in the list of Article 10 for the determination of the appropriate forum, but rather in more general provisions.
148. Before discussing the proposed safeguard, it is submitted that an important safeguard is missing: likelihood of non recognition in the forum of the judgment to be rendered by the foreign court. It seems inconceivable that a court of a contracting state could be under the obligation to suspend proceedings if the judgment of the foreign court was unlikely to be recognized in the forum: the result would be that no judicial resolution of the dispute could ever be binding in the forum. This would amount to a denial of justice and threaten legal protection. This explains why many civil law jurisdictions and the Brussels I bis regulation have established a requirement in the operation of their rules on parallel proceedings with respect to third states that “it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in [the forum].”²⁴ The fact that the contracting states to the Draft Convention might also be party to the Hague 2005 and 2019 conventions cannot be a serious reason for failing to address this issue, if only because the Hague judgments 2005 and 2019 conventions both contain grounds for denying recognition or enforcement of judgments.
149. Nevertheless, the Working Group decided against including a provision to prevent this problem. Such rules “would add additional obligations to the courts and affect the feasibility of the Draft

²⁴ Brussels I bis Regulation, Art. 33(1) (*lis pendens*) and 34(1) (related actions).

Text”.²⁵ The argument is unconvincing, as it suggests that the convenience of courts should prevail over the risk of denial of justice.

150. This safeguard could be included in a specific, additional provision. It could also be included in the denial of justice proviso, but it should then be expressly mentioned as one subset of denial of justice.
151. In most commercial cases, the purpose of obtaining a judgment is to enforce a monetary obligation. It could be argued that the defendant in the forum could raise as a defence that the foreign judgment could be enforced in other jurisdictions than the forum, and that the forum should thus suspend the proceedings despite the unlikelihood of enforcement in the forum.

Denial of Justice

152. The concept of Denial of Justice is too broad and insufficiently defined. Most importantly, the present wording does not allow distinguishing between procedural and substantive justice. It is believed that the safeguard should be limited to cases where it could be foreseen that the parties’ fundamental procedural rights would not be respected in the foreign court. This would include a foreign court which would not be impartial or independent. In contrast, the fact that the foreign court would apply a different law on the merits or afford different procedural remedies to the parties (discovery/disclosure, cross examination of witnesses, etc...) should be irrelevant. It follows that the fact that the two competing courts would apply different standards to assess liability (e.g. strict liability v. fault based liability, different types of losses being eligible for compensation) should be irrelevant. Likewise, and although it is appreciated that common law courts have ruled otherwise in the context of the *forum non conveniens* doctrine, it cannot be justified that a court would not be an appropriate forum because the time limit for the claims would have expired. It is therefore submitted that Article 19 should be redrafted and that the standard of reference should not be labelled ‘denial of justice’ (or ‘manifest injustice’, despite its use in art 6 of the 2005 Convention), but ‘fundamental procedural rights’. Also, it is unclear what the word ‘reasonable’ adds in the current text.

Abuse of Process

153. This provision is very important for the most common case of parallel proceedings: actions for performance colliding with actions for a negative declaration. In practice, this mainly concerns *preventive* actions for a negative declaration. The draft does not contain any specific rule on this problem. The Working Group had considered introducing a general provision for proceedings aimed at preventing imminent or impending legal action taken in bad faith.²⁶ Article 20 is more general. It could, therefore, also be applied to cases of preventive actions for a negative declaration. However, from our point of view, at least an Explanatory Report should make clear that such actions are not generally abusive. They may, for example, aim to prevent legal action being

²⁵ HCCH Working Group on Jurisdiction, Report of 2024 (<https://tinyurl.com/2hx98f7f>), para. 10.

²⁶ HCCH Working Group on Jurisdiction, Report of 2025 (<https://tinyurl.com/mr2ajmz6>), para. 31.

brought in a highly inappropriate forum. Whether a preventive action for a negative declaration is abusive, should also be decided by the court first seized under Article 9.

Public Policy

154. Article 21 distinguishes between proceedings involving ‘sovereignty or security interests of the forum State’ and instances where ‘the suspension or dismissal would be manifestly incompatible with the public policy or fundamental principles’. The different issues addressed by each of these two categories are unclear and should be clarified.
155. Arguably, Article 21 could offer a ground for retaining a case in spite of the rules of the Draft Convention in three cases scenarios. The first is where the case would be concerned with a dispute involving the core interests of the forum state (e.g. essential natural resources such as oil or rare earths). This case scenario seems to be captured by the first category mentioned in Article 21, but it is likely to be rare. It is submitted that it should be dealt with through Art 22 rather than Art 21. The second is where a court would consider that it has an important local interest in resolving the dispute. This could be, for instance, because the case would give the opportunity to the court to establish new principles and provide guidance for future cases (e.g. establish new safety standards after an accident – Bophal, Crans-Montana). The third is where an international mandatory rule (overriding mandatory provision in EU parlance) of the forum would apply, and its application by the foreign court would not be guaranteed.
156. Some drafters of this position paper have insisted on the fact that in their home (non European) jurisdiction, courts routinely rely on the ‘public policy’ nature of jurisdictional rules to refuse to decline jurisdiction in international cases, and in particular to enforce choice of court agreements. In this context, they urge the drafters not to establish a safeguard based on a vague and undefined concept of public policy, but rather to clarify how the safeguard would actually operate in the context of the Draft Convention.

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.

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

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?

Question 14 – Comments

What other comments, if any, do you have?

157. The Convention does not have important provisions on (i) declarations of the Contracting Parties limiting the application of the Convention, (ii) declarations pertaining to the proceedings involving a State, (iii) review of the operation of the Convention, (iv) relationship with other international instruments, (v) non-unified legal systems, (vi) the Regional Economic Integration Organisations. The provisions on these issues are contained in the Judgement Convention and the Choice of the Court Agreements Convention and should be adapted for the purpose of the Convention.

A Hague Parallel Proceedings Convention: Architecture and Features

Paul Herrup and Ronald A. Brand*

Abstract

The Hague Conference on Private International Law has established a working group to examine a possible international instrument applicable to the same or related actions in courts in different countries. The goal of the project should be to improve the efficiency of resolving such situations and providing as complete a resolution as possible by channeling litigation to the “better forum.” Current approaches—lis alibi pendens in the civil law world and forum non conveniens in the common law world—are not working well and are likely to be increasingly inadequate in an ever more complex and fluid world. In this Article we provide suggestions on the architecture and certain critical features of a convention in this area. The general architecture of such an instrument must include (1) criteria for determining the “better forum” and (2) mechanisms that move cases to that forum. It should also include (1) a requirement that the parties notify the relevant courts when the same or related proceedings are lodged in two or more fora; (2) a mechanism for judicial communication to discuss the situation upon notification; (3) a fallback rule if the better forum declines jurisdiction; (4) necessary and appropriate procedural provisions, for example to expedite movement of evidence to the better forum; and (5) provisions addressing expedited recognition and enforcement of the judgment from the better forum. Because the ultimate users of any instrument will be judges and litigators, the instrument should be framed in terms they will understand. Accordingly, the instrument should rest upon relatively simple, empirical tests that courts around the world can apply easily, rather than on complex legal concepts drawn from one or another legal tradition. The tests, in turn, should be keyed to the fundamental objective of the instrument: the efficient resolution as completely as reasonably possible of parallel proceedings and related actions. This

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Article illustrates how such an approach might be fashioned by suggesting empirical tests to determine two critical decision points for the instrument, substantive scope and determining the better forum.

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I. INTRODUCTION

In a previous article, *A Hague Convention on Parallel Proceedings*,¹ we argued that the Hague Conference on Private International Law should not undertake a project to require or prohibit exercise of original jurisdiction in national courts. A functioning and effective international convention that would purport to do so is unnecessary, undesirable, and unobtainable. In contrast, an instrument regulating parallel proceedings is needed now and will be needed even more in the future. It would be highly beneficial in the world of transnational litigation and may be obtainable. The goal should be to improve the concentration of parallel litigation in a “better forum” to achieve efficient and complete resolution of disputes in transnational litigation.

The Hague Conference appears to be willing to take this path and now has a Working Group considering draft text that could be passed on to a Special Commission in the preparation of such a convention.² However, as the Experts Group and Working Group have moved forward on the Parallel Proceedings Convention project in the Hague Conference, there has been significant difficulty in leaving behind existing approaches that have not led to acceptable solutions. These existing approaches are:

1. The traditional civil law *lis alibi pendens* approach to parallel litigation (same parties, same claims) that results in a simple and rigid focus on deference to the court first seized;
2. The traditional common law *forum non conveniens* doctrine that relies on a substantial element of judicial discretion in determining whether to move forward with a case that has been or may be brought in another court; and
3. The focus on indirect bases of jurisdiction, which has been a part of the Jurisdiction and Judgments Project from the beginning and is seen as key to the 2019 Judgments Convention Article 5(1).³

The focus on these approaches has prevented fresh thinking and engendered an “us versus them” atmosphere of concerted effort to hang on to

¹ Paul Herrup & Ronald A. Brand, *A Hague Convention on Parallel Proceedings*, 63 HARV. INT’L L.J. ONLINE 1 (2022), <https://perma.cc/7ZX2-L3K2>.

² While the current project is catalogued under the title “Jurisdiction Project” on the Hague Conference website, the Working Group has focused on an instrument dealing with parallel proceedings, as indicated by the most recent documents included under the title. See *Jurisdiction Project*, HAGUE CONF. ON PRIVATE INT’L L. (2022), <https://perma.cc/HKM4-NE3L>.

³ Francisco Garcimartín & Geneviève Saumier, *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters*, HAGUE CONF. ON PRIVATE INT’L L. 88 (2020), <https://perma.cc/QH7P-4B2A>; see also Hague Conference on Private International Law, *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, Jul. 2, 2019, <https://perma.cc/P2BY-CR87>.

the familiar and champion one's own legal system. A path forward is needed that removes the focus from a contest between existing systems, none of which currently provides a satisfactory approach to the problem.

In this Article, we examine the possible architecture and some of the critical features of a parallel proceedings convention geared to moving litigation to the better forum. We hope to elicit and contribute to discussion on this subject, as part of the Hague process as well as more generally. Unfortunately, this is an area in which no national law, legal system, or family of legal systems performs well.⁴ Success in reaching a good convention will require all participants to approach the project with open minds and to adopt a willingness to listen to others and make reasoned departures from old dogmas and preconceptions. There will be little virtue to a convention that simply attempts to bridge currently inadequate or even dysfunctional rules and approaches.

II. GENERAL OBSERVATIONS

The situations in which more than one country asserts jurisdiction under its own law over the same or related claims constitute an existing irritant in transnational civil litigation. As we noted in our previous discussion of the effort to find a way forward on parallel proceedings:

The traditional solution in many common law countries is to let litigation proceed in multiple countries, with resolution of the matter (or not) coming at the stage of recognition and enforcement of the first judgment issued by the various courts considering the matter. This approach leads to a race to judgment, and may result in duplicative litigation, significant additional expense for litigants, and potential conflicting judgments. These problems may be modulated by application of the doctrine of *forum non conveniens*, which usually requires a court to balance a basket of factors and defer to proceedings in another forum only if the other forum is clearly more appropriate to resolve the dispute.

The traditional solution in many civil law states is to rigidly prescribe and rank order jurisdictional bases and, if nonetheless jurisdiction might subsist in multiple fora, then apply a strict *lis pendens* rule, which bars consideration of a claim or set of claims if another court was "seized" first. This approach leads to a race to the courthouse and very artificial strategic litigation, such as an anecdotally reported proliferation of requests for negative declaratory judgments (e.g., a declaration in favor of a party who expects to be sued in another forum that the party bringing the request has no legal obligations to the other persons).⁵

⁴ See, e.g., THOMAS E. CARBONNEAU ET AL., INTERNATIONAL LITIGATION AND ARBITRATION: CASES AND MATERIALS, 182–83 (3d ed. 2020).

⁵ Herrup & Brand, *supra* note 1.

As increasing global mobility brings in its train an increase in global disputes and lower barriers to entry in international markets, this problem will only grow in magnitude.

The problems created by the conflicting approaches to parallel litigation make desirable an instrument that could move parallel litigation to the “better forum” in appropriate cases or classes of cases, but only if that can be done without the complex and difficult enterprise of mandating or prohibiting pre-existing national jurisdiction rules. Such a better forum approach has the potential to enhance convenience for litigants and efficiency for dispute resolution generally, while taking into account the legitimate sovereign interests that might be implicated in each dispute.

The general architecture of such an instrument must include (1) criteria for determining the “better forum” and (2) mechanisms that move cases to that forum. It should also include (3) a requirement that the parties notify the relevant courts when the same or related proceedings are lodged in two or more fora; (4) a mechanism for judicial communication to discuss the situation upon notification; (5) a fallback rule if the better forum declines jurisdiction; (6) necessary and appropriate procedural provisions, for example to expedite movement of evidence to the better forum; and (7) provisions addressing expedited recognition and enforcement of the judgment from the better forum. Because the ultimate users of any instrument will be judges and litigators, the instrument should be framed in terms they will understand.

The general architecture described above can be put into sharper focus by examining the life course of a parallel proceeding. This life course moves from the filing of the same or related cases in more than one forum, to the decisions of each forum regarding its own jurisdiction (possibly also taking into account the proceedings in other fora), to adjudication (including gathering of evidence), to issuance of judgments and the resulting issues of recognition and enforcement.

Consideration of the life course of actual parallel proceedings allows us to identify and to build from the ground up a set of decision points that may have to be considered for inclusion in a parallel proceedings convention. These decision points include:

1. What falls within (and without) the definition of “parallel proceedings” for convention purposes?
2. What issues (subject matters) are to be excluded from scope that otherwise might fall within more general scope provisions?
3. If the Convention itself specifies gateway determinations into scope other than determinations of national courts that they have jurisdiction under their own law, what should be included on that gateway list, and

what are the consequences if one court has a factor on the list and the other does not?

4. Once within scope, what should govern the determination of the better forum?
5. What considerations might apply that may result in both courts continuing with the case?
6. Should there be other limitations, such as sovereignty issues, that would allow a court *not* to defer to a court of another jurisdiction?

In this Article, our focus will be on several keystone decision points that require extended and early consideration and will ripple throughout the Convention, namely the definition of parallel proceedings (decision point 1) and the determination of better forum (decision point 4).

III. KEYSTONE DECISION POINTS

A. Scope

The Parallel Proceedings Convention should apply when adjudication is sought in courts in more than one State of disputes that are so connected that they should be resolved in a unified fashion. Scope in this sense requires attention to four features: (1) cases, that are both (2) international and (3) multiple, in the sense that courts located in different countries each are asked to adjudicate a claim or claims, and (4) related, such that there are connections between the cases that satisfy criteria specified in the Convention.

1. International Cases

The restriction to cases and the requirement that the cases be international should be relatively straight-forward and have well-worn usage in other Hague Conventions.⁶ The Convention should apply to “cases” in the sense of proceedings to resolve legal disputes in national courts. Other types of dispute resolution, such as arbitration or mediation, will have their own rules for assigning priorities to parallel proceedings, while dispute resolution in either national administrative tribunals or international tribunals pose issues of their own and usually do not fall within the scope of Hague conventions.

The cases should be “international” in the sense that they involve courts in more than one country. A more inclusive scope on this feature would allow convention rules to intrude into municipal rules for assigning cases, including rules of removal and transfer; areas into which an international instrument should not intrude.

⁶ See, e.g., Hague Convention on Choice of Court Agreements art. 1(1), Jun. 30, 2005, 44 I.L.M. 1294.

2. Multiplicity

The requirement of multiplicity, in other words the basis of adjudication in each court that then qualifies the case as within scope (assuming the other features are satisfied), may be approached from two different perspectives, which aptly may be labelled “empirical” or “a priori.” The empirical approach to multiplicity accepts that the cases fall within the scope of the Convention if each court has determined that it has jurisdiction under its national rules, including any relevant private international law rules. That two courts each have jurisdiction over the same or related claims is a matter of fact, is the ground upon which the Convention should rest, and allows building the Convention rules from the ground up. This approach differs from trying to construct an enumerated set of a priori connecting factors, often with a jurisdictional or quasi-jurisdictional flavor, to act as a gateway to scope.

In terms of the problems such a Convention should solve—most notably the expense and vexation of duplicative litigation across borders—the advantages of the ground up approach are significant, clear, and appealing; the disadvantages of the gateway connecting factor approach are equally significant, clear, and discouraging.

The empirical approach has two major, irrebuttable advantages that contribute to the object and purpose of the proposed Convention. First, it has the advantage of certainty. Either courts in more than one country have determined that they have jurisdiction to adjudicate a claim presented to them or they have not. With as much certainty as it is possible to find in any legal context, there is a fixed and invariant answer to the inquiry. Second, the empirical approach is simple. To find the answer, one must but ask. The inquiry involves no legal somersaults or comparative law investigation. Nor does it require multiple convention definitions of factors to be applied.

The comparison of the certainty and simplicity of the empirical approach with the complexity of the a priori approach is stark. The a priori approach will require each national court first to analyze a case before it—and the case before the other court as well, due to the need independently to verify fulfillment of the requirements of the convention—on the basis of factors listed in a gateway provision of the convention. The factors will have a content autonomous to the convention, but subject to interpretation in a wide variety of courts. They will be, at best, strange to those legal systems which do not use such factors, and dangerous because they will be misleading to courts in legal systems that employ similar terms, but which now must differentiate their local understandings from the autonomous requirements of the convention. There will be sharply diminished certainty in results, and the results will come only after potentially difficult legal analyses. Two or more different courts, all required to apply the convention factors, may well produce differing outcomes in that application,

needlessly complicating the process even before the fundamental purposes of the convention are addressed. There will be nothing simple about it.

Furthermore, a list of gateway factors in the convention will be either under-inclusive or over-inclusive—or both—especially if the list consists of jurisdictional or quasi-jurisdictional bases. The list will risk being under-inclusive because it will not be able to keep pace with relatively modern bases of jurisdiction that already exist or are likely to emerge in our rapidly changing world. Nineteenth-century ideas of jurisdiction based upon physical presence are increasingly less reflective of reality.⁷ Newer jurisdictional bases will not be in the list and may easily generate multiple proceedings that are duplicative and avoidable, but not within the scope of the Convention because they do not qualify as gateway factors. These cases will be lost to resolution under the Convention.⁸ On the other hand, an attempt to list every possible basis of jurisdiction or related criterion in a gateway provision will give no guidance as to where adjudication should be centered, but will simply pass all cases through the gateway, where they will have to be sorted out under different criteria at a later stage in the convention. This adds yet another area that will be fruitful for litigation and defeat the objective of reducing complexity and expense.

An additional consideration is that, by eliminating a priori gateway factors into scope, the empirical approach to scope disposes of the need to address the third decision point mentioned above, and with it the need to agree on a priori factors and to determine the resolution if one court has a factor on the list and the other does not. Ultimately, a convention burdened with too many decision points, particularly if similar factors are considered at multiple decision points, will collapse of its own weight and not draw states to it in the ratification and accession process. This argues strongly for simplicity of structure and approach to convention architecture. There will necessarily be a definition of parallel proceedings that focuses the Convention, just as there will necessarily be a list of subject matter exclusions from the scope of the Convention. But it makes no sense to have a jurisdiction-style set of connecting factors as a gateway to consideration of the better forum. If two courts in different countries have jurisdiction over a case that satisfies the criteria of relatedness for purposes of the Convention, then the question is a simple one: which is the better forum for deciding the dispute, or is there otherwise good reason for both courts to proceed in parallel? That does not require a fractured analysis of why each

⁷ See Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. INT'L L. 187, 204 (2014) (“The issue has, however, reduced in significance because in practice, through the doctrine of *forum non conveniens*, jurisdiction based on bare presence will not generally be exercised.”).

⁸ Emerging technologies such as block chain accentuate this concern. Many actions may no longer involve traditional concepts of “physical presence” of the actors in any place, or, conversely, “presence” may be non-physical but in a multitude of locations simultaneously, many of which will not necessarily be known to the actors at the time of the action.

national legal system determined it appropriate to take jurisdiction in the particular case. Nor does it make one state's decision on the jurisdiction question better in quality than the other. The fact remains that, no matter the basis of jurisdiction in each court, there are parallel proceedings. Thus, the problem the Convention is intended to address exists, and no discussion of jurisdiction of each court will either change or resolve that problem. Only a determination of which court is the better court to proceed will do so. That is better done through a factual determination, not a determination of who might have "better" jurisdiction. Making qualitative decisions about bases of jurisdiction is not and should not be the role of a parallel proceedings convention.

3. Relatedness

The cases that satisfy internationality and multiplicity also must have some type of relatedness to each other to fall within the Convention as parallel proceedings. As with the question of multiplicity, there are two general possible approaches to the subject of relatedness. The first approach is empirical and would look to see if the cases arise from a common set of relevant facts. The second is legal and would analyze the claims and defenses in each complaint seeking common legal characteristics, such as the same parties, the same causes of action, and the same relief sought.

Again, it is our view that the balance inclines toward an empirical approach. It is relatively simpler, involving a comparison of the facts presented, which are the source of the claims in the various cases. It also comports better with a proper objective of the Convention, to concentrate litigation in the better forum by allowing a single court to adjudicate all the claims arising from a common set of facts and to do so in a consolidated manner. In contrast, the legal approach encounters a number of significant comparative law challenges at the threshold, including finding criteria to establish the commensurability of various causes of action and forms and quanta of relief in different legal systems (which often do not compare well), challenges in assessing cases with few or no common causes of action but which are inextricably tied together, and difficulties with cases involving overlapping, multiple parties.

We look to European law to provide a useful point of departure that has worked well in a similar situation. The European Court of Human Rights (ECHR), in its double-jeopardy or *ne bis in idem* jurisprudence, has had to determine when two offenses are *in idem*—the same. This task is analogous to the task of determining when two cases are "the same" such that they constitute parallel proceedings. In *Sergey Zolotukhin v. Russia*, the ECHR adopted a fact-based standard to guide the analysis while rejecting several standards that focused on legal characteristics and that it had used previously.⁹ The ECHR

⁹ See *Zolotukhin v. Russia*, 2009-I Eur. Ct. H.R. 291, <https://perma.cc/7WF8-9CQ9>.

stated that the *ne bis in idem* bar operates when a second “offence” arises from “identical facts or facts which are substantially the same” as those from which a previous prosecution arose.¹⁰ The ECHR concluded that “[t]he Court’s inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space” and which provide predicate facts for the proceeding.¹¹ To adapt this fact-based standard to the situation of a parallel proceedings instrument, two proceedings will be “related” for purposes of the instrument if they involve (1) “identical facts or facts which are substantially the same” and which are “inextricably linked together in time and space” as predicates for the claims, and (2) parties to the proceedings whose rights or obligations are connected to each other by virtue of these facts. The successful application of this kind of standard by Europeans in the context of a demanding legal inquiry provides promise that such a fact-based standard will work effectively as a determinant of scope in a parallel proceedings instrument.

B. Finding the Better Forum

Once the existence of parallel proceedings within the meaning of the instrument is established, the Convention should provide a mechanism to concentrate proceedings in the better forum. However, it should not be the objective of the treaty to concentrate every instance of parallel proceedings in a single forum. Success should be measured by a significant decrease in parallel proceedings that have limited justification. There may well be certain classes of proceedings that are best left to continue in parallel. Also, the costs in terms of complexity and intelligibility of the instrument may rise sharply if the instrument aspires to anticipate and regulate all conceivable or possible instances of parallel proceedings. This is an international agreement, not a piece of domestic regulatory legislation that can bring to bear all the mechanisms of the modern state, including apex courts, to achieve a purely internal result.

Creating a satisfactory test or set of tests that provide criteria identifying a “better forum” will be a difficult exercise. The task calls for a common, good faith inquiry with open minds. As we have noted elsewhere, “[t]he Hague Conference has a once-in-a-generation opportunity to engage in” creative and constructive thinking about a significant problem in international and comparative law.¹² “Whether it will meet the challenge remains to be seen.”¹³

¹⁰ *Id.* ¶ 82.

¹¹ *Id.* ¶ 84. In reaching this language, the ECHR quoted approvingly from the decisions of the Court of Justice of the European Union (then the European Court of Justice) in Case C-436/04, *Leopold Henri Van Esbroeck*, 2006 E.C.R. I-2351 and Case C-367/05, *Norma Kraaijenbrink*, 2007 E.C.R. I-6619. *Zolotukhin v. Russia*, ¶¶ 37–38.

¹² Herrup & Brand, *supra* note 1.

1. Inadequacy of Existing Approaches

As we have noted, the problem is not handled well in any legal system of which we are aware.¹⁴ Current and past models are palpably inadequate to a global setting and will be of limited utility.

In the common law world, the general approach is a form of *laissez-faire* model that allows parallel proceedings to move to judgment, then treat the matter in terms of recognition and enforcement of the first judgment that issues.¹⁵ Within this *laissez-faire* model, variations on the doctrine of *forum non conveniens* provide mechanisms that are applied either within the jurisdictional analysis or for declining jurisdiction that might exist. The *forum non conveniens* doctrine is not a fruitful candidate for a global regime regulating parallel proceedings (although it may provide some useful insight). While generations of case law have produced a *forum non conveniens* doctrine in the United States that is largely predictable and precise in fitting forum to circumstance, this predictability is the result of years of incremental case-building with apex courts at both the federal and state levels providing parameters and guidance.¹⁶ Asking courts and legal systems globally to consider a list of perhaps a dozen factors in making a determination of better forum is unlikely to yield happy results in terms of intelligibility, transparency, or predictability. Furthermore, the complex balancing tests that *forum non conveniens* brings in its train are often not part of the armament or mind-set of judges in other legal systems¹⁷ and it is unfair and unworkable to ask them to adopt an unfamiliar *modus operandi* to deal with a single class of cases.

The civil law world approach to regulating parallel proceedings by attempting to stipulate exclusionary jurisdictional rules *ab initio* is equally unpromising for a global convention. We have discussed elsewhere and above

¹³ *Id.*

¹⁴ See CARBONNEAU ET AL., *supra* note 4, at 165 (“Few legal systems have enacted rules specifically regulating transborder litigation. Characteristically, legal systems adhere to an antiquated methodology of choice-of-law rules through which they designate a controlling substantive predicate by which to resolve disputes.”).

¹⁵ See Herrup & Brand, *supra* note 1 (discussing parallel proceedings in the common law world).

¹⁶ See RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS, 37 (2007) (“In the United States, the doctrine of *forum non conveniens* has a long history, beginning with cases in the nineteenth century that allowed discretionary dismissal when the parties and the subject matter were unrelated to the forum, gaining direction in a seminal law review article in 1929, and finding definition in two U.S. Supreme Court decisions in 1947.”).

¹⁷ See *id.* at 158 (“Ultimately, how one views the application of the doctrine of *forum non conveniens* to a case brought by a foreign plaintiff probably depends on one’s perspective. The foreign plaintiff will tend to see any consideration of its nationality as discrimination, while the local defendant will tend to consider the plaintiff’s foreign nationality as a factor indicating inconvenience in the forum seised and weighing in favor of litigation in an alternative forum.”).

the reasons for the current and growing inadequacy of this approach, both in terms of an instrument on a global scale purporting to require or prohibit the exercise of direct jurisdiction, or the use of jurisdictional or quasi-jurisdictional factors as a gateway into the scope of a parallel proceedings instrument. Jurisdictional factors also fail as a test to determine the better forum for parallel proceedings within scope, for many of the same reasons. Simply put, there is no connection between a basis for the exercise of jurisdiction in a particular forum and whether that forum is a better forum than any other to dispose of litigation in an efficient fashion that is fair to all parties. Jurisdictional criteria for selection of a better forum will simply force litigation into Procrustean beds ill-suited to the particular cases. In addition, because of the multiplicity of jurisdictional bases and the likelihood that evolving global mobility will give rise either to different emphases in terms of the importance for any given country of a particular jurisdictional basis or to entirely new, reasonable bases, there will be (and should be) no global agreement on the priority of one jurisdictional basis over another. Metaphysical musings over the relative “quality” of jurisdictional bases are a scant foundation for a necessary global consensus on the subject. Each country makes and will continue to make its own determination in this regard.

Finally, as noted above, “first-in-time” rules have less to do with better forum than with the faster litigant, which often favors the party best able to hire for speed.

2. Proposing a “Cascade” Approach

In our view, a promising approach to designation of a better forum is to build from a small and manageable number of factors that are closely linked to the proper objectives of the instrument, namely the efficient and complete resolution of multiple related proceedings. In addition, a “cascade” approach might be useful: if the initial tranche of factors does not yield a resolution as to the better forum, a second tranche of factors may be considered to identify the better forum. If there is no resolution of the better forum question in the second round, it may be best simply to allow the proceedings to move in parallel. Once again, this is an effort at making the world a better place through a treaty. It is not the creation of perfect legislation for a single legal system. The goal must be workable as well as likely to gain a significant number of ratifications and accessions.

If the fundamental objectives of the convention are to reduce costs to litigants and achieve repose through complete resolution of related proceedings, the first tranche of better forum criteria should reflect these objectives. We propose three initial criteria for determining better forum:

1. Does one forum make it significantly more difficult or burdensome than others for one or more litigants to present their case under forum rules?

2. Is one forum more likely than others to provide a complete or significantly more complete resolution of the related disputes?
3. Are the proceedings in one forum at a significantly more advanced stage than in others?

Each of these criteria requires additional comment. The first criterion, difficulty or burden in presenting a case, combines considerations of fairness and efficiency and is restricted to the logistics in each legal system proceeding with adjudication of the particular cases in question. Its focus should be on such concrete problems as the relative ease or difficulty of necessary movement of witnesses and evidence, or access to physical locations for inspection. Estimates of relative cost are a fair component of this inquiry but they are speculative and should not be dispositive. Completely unacceptable are inquiries into the relative merits of features of procedural systems. There is no place in this criterion for normative judgments on matters such as the adequacy of disclosure regimes as opposed to the oppressiveness of discovery regimes, or the standards and burdens of proof, or the nature and type of remedies available in the other legal system.

The second criterion, likelihood of complete resolution of related claims, combines considerations of efficiency and repose. It is a disjunct with a qualitative and quantitative aspect: absolute repose may be a value to be sought through complete resolution of all related disputes but, if that is not possible, the forum that can provide a significantly more complete resolution should be favored.

The third criterion, stage of the proceedings, involves considerations of efficiency and fairness to litigants and should include considerations of whether designation of a forum in a less advanced stage of proceedings will require duplication of effort already expended or will otherwise prejudice one or more parties or interested persons.

Under this framework, each court presented with a parallel proceeding should make its own initial determination of the better forum based on these three criteria, although communication and cooperation with other courts should be encouraged. There will be two possible results.

- a. Both courts agree that one is the better forum. The better forum proceeds with adjudication, subject to discussion below.
- b. There is no agreement on better forum, either because each court determines that it is the better forum or because each determines that the other is the better forum.

If there is no agreement on the better forum, the courts move to a second tier and add other criteria for consideration, which will be additive to the results of the first level of inquiry:

4. Is there likely to be significantly greater delay or congestion in one forum as opposed to the other?
5. Is it significantly less fair to impose the public costs and burdens of resolution of all related disputes on the public of a particular country?

The fourth criterion combines efficiency and public interest considerations. It goes not to the logistical aspects of local procedural law, but to the factual situation in the local courts. When will justice be done, and with what burden as a matter of fact on each court involved? This combines considerations of public interest and fairness to the parties that come from efficiency of process. The fifth criterion is a public interest consideration and could conceivably include a consideration of the center of gravity of the related disputes. As with the procedure under the first tranche of criteria, communication and coordination of the courts involved should be encouraged.

If there is agreement on the better forum, that forum proceeds with adjudication. If there is no agreement, the convention provides no further rule regulating parallel proceedings and national law will control subsequent developments. There is nothing inherently wrong with two courts, or two legal systems, each having jurisdiction to decide the same case. The question is how to decide when it is best not to proceed in parallel but rather to consolidate time, expense, and effort in a single court. We acknowledge that there is a trade-off resulting from the use of limited and simple criteria for the designation of the better forum. Use of a limited number of simple better forum criteria may yield an instrument that is desirable and obtainable in terms of broad ratification but, at the same time, may limit the ability to perform delicate balancing and give up the comprehensiveness that the profusion of factors provides in a *forum non conveniens* analysis. As a policy choice, it may be better to tolerate a certain level of parallel proceedings rather than attempt to complicate further the better forum factors. As noted above, the balancing by courts of a multitude of factors may be a feature of particular legal systems and may work well within a single legal system but is not likely to work well in a multilateral convention that attempts to reach legal systems that do not employ this mechanism.

Finally, a point that merits discussion is whether there are situations in which parallel proceedings might continue despite the fact that the courts involved all determine that one is the better forum. Examples of such situations might be when a state is a party to litigation and that state's own courts are not the better forum, and cases that involve very strong public policy of the state whose courts are not the better forum. One or all of these situations might be an appropriate subject for declarations or other treatment.

IV. FINAL OBSERVATIONS

The ultimate justification for a parallel proceedings convention is that, by making transnational litigation more efficient, fair, and complete, it would contribute to a form of global good governance over and above the particular national political interests of the states involved. If the provisions of a proffered multilateral treaty do not make a significant contribution to global good governance, there should be no hesitation in rejecting the treaty. If the Hague Conference fails to produce a text in this area that makes a significant contribution to global good governance—and it might—other options such as select bilateral agreements with interested countries with which the U.S. has dense transboundary connections, or acceptance of the status quo pending future developments, might recommend themselves.

A Hague Convention on Concurrent Proceedings

Ronald A. Brand* and Paul Herrup**

Abstract

A Working Group at the Hague Conference on Private International Law has produced a Draft Text of a future convention on parallel proceedings and related actions. The Council on General Affairs and Policy (CGAP) of the Hague Conference was unable in 2026 to decide on the next step involving that Draft Text. The complexity of the Draft Text, the many disagreements on specific provisions in it, and the uncertainty of its operative mechanisms have resulted in a lack of consensus on how to proceed. In this article, we consider the existing legal frameworks for dealing with concurrent proceedings, the need for a global approach to concurrent proceedings, and the problems embedded in the Working Group Draft, offering an Alternative Draft Text of a Future Convention on Concurrent Proceedings that we believe offers a way forward at the Hague Conference. We identify a clear list of goals of any such convention as well as a clear list of concerns with the Working Group Draft Text and conclude that the Alternative Draft Text provides a better approach to an effective global convention.

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- 4. Avoiding unnecessary definitions and rules dealing with the timing of the initiation of proceedings in each court**
- 5. Encouraging courts to work cooperatively rather than competitively in efforts to determine a single appropriate forum for litigation of common issues**

VI. Conclusion

A Hague Convention on Concurrent Proceedings

I. Introduction

In 2021, the Council on General Affairs and Policy (CGAP) of the Hague Conference on Private International Law mandated the establishment of a “Jurisdiction Project”¹ Working Group to “focus on developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims).”² That project focuses on how to deal with situations in which courts in more than one State have the same or overlapping cases before them at the same time.

The Working Group’s mandate is the most recent chapter in a series of efforts to address issues of transnational litigation. This initiative began with a proposal in 1992 for a global convention addressing direct jurisdiction and the recognition and enforcement of judgments. When it became clear that the larger original project was unattainable, work at the Hague Conference retrenched to produce two valuable conventions that have addressed specific, identifiable, and pressing problems: the 2005 Convention on Choice of Court Agreements and the 2019 Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters.

The Working Group has met nine times, producing a Working Group Draft Text that illuminates the current status of the project. In March 2026, CGAP failed to agree on further work by either the Working Group or progression to a larger Special Commission format, leaving the concurrent proceedings project at an impasse similar to that which confronted the original project. The Working Group Draft Text, like the original larger project Interim Text in 2001,³ has many bracketed provisions and notes demonstrating both a lack of consensus on appropriate rules and language, and a lack of a clear delineation of the problem to be solved.

¹<https://www.hcch.net/en/projects/legislative-projects/jurisdiction>. This is listed on the organization's website as falling within the “jurisdiction project” for reasons described below.

²Hague Conference on Private International Law, Council on General Affairs and Policy (CGAP) Conclusions & Decisions (March 2021) para 9(b) [CGAP Mandate], *available at* <https://assets.hcch.net/docs/94e2d886-1cbf-4250-b436-5c1899cb942b.pdf>.

³Hague Conference on Private International Law, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June 2001

Interim Text Prepared by the Permanent Bureau and the Co-reporters, *available at* <https://assets.hcch.net/docs/e172ab52-e2de-4e40-9051-11aee7c7be67.pdf>.

When the Hague Conference Member States were presented with a text with too many areas of disagreement and uncertainties in 2001, they made the important decision to step back and work on a less complex convention—one for which there was common ground and clear practical need—a Convention on Choice of Court Agreements. In the discussion that follows, and the accompanying Alternative Draft Text, we propose a similar approach in order to deal with an existing practical problem in a manner that involves as little complexity of language, as much potential for reducing unnecessary litigation, and as much potential for global acceptance as possible.

We begin in section II by stating goals to be achieved and concerns to be considered in developing a workable international convention on concurrent proceedings. In Section III we discuss the ways in which different legal systems deal with the problem of concurrent proceedings. In section IV, we consider the current Working Group Draft Text, applying the list of goals and concerns to test that text and demonstrate its shortcomings. In section V, we discuss our Alternative Draft Text that we believe strips away the shortcomings of the Working Group Draft Text and properly addresses our goals and concerns, thus providing a way forward at the Hague Conference on Private International Law.

II. Goals and Concerns

Beginning with the basic structure and language of the Working Group Draft Text, we propose an Alternative Draft Text that we believe will address our goals and concerns. Any convention on concurrent proceedings should be designed to address a real-world problem. Thus, the text should be conceived to achieve the following general goals:

- 1) clearly identify the existing problem;
- 2) provide clear solutions to the existing problem that can be understood and efficiently applied by generalist lawyers and judges;
- 3) avoid creating new problems that either prevent the efficient resolution of disputes or encourage strategic manipulation; and
- 4) be readily acceptable to states in order to achieve ratification and implementation.

We are concerned that a workable convention should:

- 1) address the problem of overlapping proceedings in courts of different nations;
- 2) avoid the need to begin any analysis by applying categories and definitions likely to lead to additional litigation;
- 3) avoid the creation of unnecessary litigation issues based on differing approaches to jurisdiction;

- 4) avoid unnecessary definitions and rules dealing with the timing of the initiation of proceedings in each court; and
- 5) encourage courts to work cooperatively rather than competitively in efforts to determine a single appropriate forum for litigation when concurrent proceedings exist.

We believe the current Working Group Draft Text suffers both from a failure to address these goals and, in the process, produces these important concerns. We offer an Alternative Draft Text that we believe avoids the concerns and moves toward achieving the goals. Our Alternative Draft Text is based not on an effort to retain and further ensconce existing theory or doctrine but rather on the need to address the simple fact that when the same or overlapping cases are before courts in more than one country, the problem of concurrent proceedings exists. Nonetheless, it is useful to understand just how differing legal systems have addressed and do address this problem.

III. Existing Legal System Acknowledgment of the Problem of Concurrent Proceedings

Any proposed new legal instrument should address a real problem. We believe the problem of concurrent proceedings is a real one and that there can be a new convention that positively addresses that problem. We do not believe the current Working Group Draft Text is that appropriate new legal instrument.

Goods, services, people, capital, and data are today transferred across borders at greater speed and in greater quantity than at any time in human history. This lowers barriers to entry to cross-border transactions and relationships, both commercial and otherwise, and in turn increases the likelihood of disputes in the course of those transactions and relationships. At the same time, legal systems have failed to adapt to the needs of resulting changes in cross-border dispute resolution in courts.

But we need to be clear about just what the problems are that can be addressed in seeking to keep legal system coordination up-to-speed with the changes those systems must address. The existence of concurrent proceedings in the courts of two or more states is not a new problem. Both common law and civil law legal systems have adopted measures that provide strong evidence that concurrent proceedings are viewed as creating problems. Each legal family, however, has approached the problem in different ways, but with similarities of concern and sometimes even of language used in the process.

Before directly addressing a comparison between the current Working Group Draft Text and our proposed Alternative Draft Text, it is useful to begin with the context in which legal systems define and address the problem of concurrent

proceedings. This context, first and foremost, is a context of fact. Accordingly, in our Alternative Draft Text, we propose a functional approach that starts from facts. In contrast, much of the discussion of concurrent proceedings thus far has focused on existing legal doctrine, with scant attention to the facts that create the problem being addressed. As we will demonstrate, this disregard of the basic factual context has resulted in a cumbersome, inadequate, and often difficult-to-decipher Working Group Draft Text.

We take multiplicity of proceedings as our starting point and open the possibility of a more fact-based consideration of how efficiencies of process and consistency of result can be obtained on a more cooperative basis. We believe it can be demonstrated that beginning with the facts that create the problem is a better way to address that problem than simply beginning and ending with legal doctrine.

A. Existing Legal System Approaches to the Problem of Concurrent Proceedings

Any effort to draft a new treaty requires that we first determine whether a problem exists and, if so, that we provide a clear description of just what that problem is, with clear and workable definitions of key concepts that are elements of the problem and components of its solution. Various doctrines and litigation tools have been developed to deal with concurrent proceedings, so that the evidence of an existing problem and the content and contours of that problem are largely found in cases applying one or more of those doctrines or tools.

Different legal systems take different approaches to the problem of concurrent proceedings. None of those approaches has shown itself to be particularly satisfactory. This suggests a need to examine carefully each approach courts have taken, consider the advantages and disadvantages of each, and think seriously about why none of them has been adopted in national law on a global basis.

Legal systems currently apply four devices to address problems posed by the fact, or possibility, of concurrent litigation. Two of them, a first-in-time priority rule (often referred to as *lis pendens*) and *forum non conveniens* demonstrate differences between civil law and common law legal system approaches to concurrent proceedings:

- 1) First-in-time priority rules: Under this (*lis pendens*) doctrine, a court or tribunal may (and in some instances must) stay or dismiss a case if another competent court with the same parties and subject matter was “seised” of the dispute first. This is the approach normally taken in civil law legal systems.

- 2) *Forum non conveniens*: This common law approach allows a court that has jurisdiction in a case to decline to exercise that jurisdiction if it determines that a foreign court is a more appropriate and convenient forum to hear the dispute.

The other two approaches are found primarily in common law legal systems:⁴

- 3) International judicial comity abstention: This is a doctrine by which a court may voluntarily yield jurisdiction to a foreign court out of mutual respect for the laws and judicial acts of other sovereign nations.
- 4) Anti-suit injunctions: This is a more dramatic remedy by which a court orders the parties involved to abandon or refrain from pursuing concurrent litigation in a foreign court. This approach raises questions and concerns about whether it interferes with the sovereignty of the foreign judicial systems in which the parties are enjoined from proceeding.

A review and exposition of each approach is useful both to defining the problem to be addressed by a new legal instrument and indicating the shortcomings of existing approaches that have prevented their uniform (or even harmonized) adoption in national legal systems. Understanding each of them can be helpful in moving toward the goals for future global system.

B. Considering the Existing Approaches to the Problem

Concurrent proceedings in the courts of two or more different states have been described as being to “some degree . . . inherently vexatious,” creating “inconvenience, added expense, [and] the burden of litigating in a potentially inconvenient forum.”⁵ They also create the problem of inconsistent rulings, whether in the form of a final judgment or on specific issues each court must consider in reaching its judgment. As noted, different legal systems deal with the problem of potential and actual concurrent proceedings in different ways.

The traditional solution to concurrent proceedings in many civil law states is to apply variations of a first-in-time priority rule, which bars or conditions

⁴Unlike *forum non conveniens*, which generally is applied before proceedings are initiated in another court, these two doctrines deal most often with existing concurrent proceedings.

⁵Hannah Buxbaum, A Primer on Antisuit Injunctions (Transnational Litigation Blog, Jan. 14, 2026), available at <https://tlblog.org/a-primer-on-antisuit-injunctions/>.

consideration of a claim or set of claims if another court was "seised" first.⁶ Thus, the second court in which a case is initiated must give various levels of deference, depending on the situation, to the court first seised. This approach is applicable to both potential and actual concurrent proceedings. Thus, filing in a court in one legal system can pre-empt the filing of the same or similar case in another legal system and, if the case has been filed in two or more legal systems, the first court seised has priority and will proceed with the case, while the other will not go forward with the case except in very limited circumstances. This prevents concurrent litigation, and thus avoids its attendant costs and inefficiencies.

The first-in-time approach of civil law legal systems has obvious drawbacks. It can lead to a race to the courthouse and the potential of artificial strategic litigation. In the European Union this has resulted in predictable difficulties and strategic manipulation, including exacerbating issues associated with negative declaratory judgments (a declaration in favor of a party who expects to be sued in another forum that the party bringing the request has no legal obligations to the person expected to bring the suit in another court). If the party seeking a negative declaratory injunction gets to court first, then it is the party who ordinarily would have to defend the substantive merits of a claim who controls the choice of forum rather than the party who is asserting a breach of a legal obligation by another.

In common law legal systems, the general approach is to tolerate concurrent proceedings, waiting for the first judgment, which can be given effect in other courts. Thus, for example, the general rule in U.S. courts is that "[p]arallel proceedings in the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as *res judicata* in the other."⁷

The common law approach results in obvious inefficiencies of time, economic cost, and duplicative judicial administration. Rather than a race to the courthouse, it can lead to a race to judgment. The inefficiencies are tempered somewhat by three discretionary mechanisms designed to address both potential and existing concurrent proceedings. The doctrine of *forum non conveniens* provides a court with the discretion to refrain from exercising its jurisdiction where the case may better be decided in a court in another legal system.⁸ Thus, the doctrine can

⁶See section III.B.1, below.

⁷Royal and Sun Alliance Ins. Co. Of Canada v. Century Intern. Arms, Inc., 466 F.3d 88, 92 (2nd Cir 2006), *quoting* China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir.1987), *quoting* Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 926–27 (D.C.Cir. 1984), *citing* Colorado River Water Cons. Dist. V. U.S., 424 U.S. 800, 817 (1976).

⁸See generally, RONALD A. BRAND & SCOTT JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS (2007).

prevent concurrent proceedings by the discretionary withdrawal of one court from continuation of the case. Two additional mechanisms sit at the ends of the spectrum of concurrent proceeding options. A court may decide to defer to another court seised under the doctrine of international judicial comity abstention, and a court may decide to protect its own jurisdiction by issuing an anti-suit injunction in order to prevent parties from proceeding in another court.

The fact that the traditional civil law and common law approaches to the possibility or existence of concurrent proceedings have such obvious and glaring deficiencies suggests the value of an international legal instrument that would resolve the concurrent proceedings problem by allowing either the entire case or specific issues to move forward in a single, optimum, court where that is both appropriate and possible. The difficulty is to determine just how to make this work on a global basis. In order to consider possible solutions, it is helpful first to provide a more detailed exposition of the methods currently in effect in civil law and common law legal systems.

1. Civil Law First-in-Time Rules and the Brussels I (Recast) Regulation

A good example of the civil law first-in-time approach to concurrent proceedings is found in the Brussels I (Recast) Regulation of the European Union.⁹ The Regulation is focused primarily on unifying rules of jurisdiction and the recognition and enforcement of judgments within and among the Member States of the European Union.¹⁰ Articles 29-34 of the Regulation deal with the matters now being considered at the Hague Conference. They comprise Section 9 of Chapter II, which is titled “Lis pendens – related actions.” These are the two basic litigation postures covered by and addressed withing Section 9, with a further distinction made between when the courts involved are all within EU Member States and when at least one is not.

⁹Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J.E.U. L 351/1 (“Brussels I (Recast) Regulation”). Like the Working Group Draft text, that approach breaks down concurrent proceedings into “parallel proceedings” and “related actions.” *Id.* Chapter II, Section 9 (Arts. 29-34). Of course, consistency with their own legal framework resulted in EU support for the Working Group Draft Text.

¹⁰Chapter II of the Regulation (Articles 4-35) provides rules of jurisdiction, and Chapter III (Articles 36-57) provides rules on the recognition and enforcement of judgments. Brussels I (Recast) Regulation, *supra* note 9.

Articles 29 and 30 of the Brussels I (Recast) Regulation address litigation involving courts of different Member States. Article 29 covers situations in which the proceedings involve “the same cause of action and [are] between the same parties” (strict parallel proceedings). Article 30 provides rules for related actions pending in the courts of different Member States. “Related actions” are defined as actions that “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.” Article 31 deals with actions that come in various ways within the exclusive jurisdiction of each of several courts. Article 32 provides criteria autonomous to the Regulation for determining when a court is “seised” of a “proceeding.”

Articles 33 and 34 provide rules that apply when cases are pending in the courts of non-Member States at the time that a court of a Member State is seised of an action. Article 33 applies to cases with the same parties and same cause of action (“parallel proceedings”). Article 34 applies a similar limited discretionary deferral when there are related actions in non-Member States.

a. Distinguishing Parallel Proceedings and Related Actions

As already described, Section 9 of the Brussels I (Recast) Regulation begins with an Article that addresses the situation “where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States.”¹¹ If those proceedings are in the courts of two Member States, Article 29(1) provides a strict first in time rule that requires the court second seised to “of its own motion stay its proceedings” in favor of the court first seised. Article 29(3) then requires any court other than that first seised to “decline jurisdiction in favor of that court” once the court first seised has established that it has jurisdiction.

If the proceedings involving the same parties and same cause of action are in a Member State court and a Third State court, Article 33(1) turns a Member State court requirement into Member State court conditional discretion, by providing that a Member State court “may stay” proceedings if a court in a third State (not a Member State) was first seised, “if” the third State court’s judgment is likely to be capable of recognition in the Member State court. Article 33(2) allows the Member State court to continue proceedings if the first court’s judgment is not likely to be capable of recognition or if continuation is “required for the proper administration of justice.” Article 33(3) requires the Member State court to dismiss if the third State court first seised has reached a recognizable judgment.”

¹¹*Id.* art. 29.

Articles 30 and 34 of the Brussels I (Recast) Regulation address cases in which the litigation does not involve strictly the same parties and same cause of action, but rather “related actions” (defined for purposes of Article 30 as actions that “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”).¹² If both courts are in EU Member States, Article 30(1) gives the court second seised discretion to stay proceedings in favor of the court first seised. Article 30(2) allows a court in such a case to decline jurisdiction “if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.” Thus, while strict parallel proceedings result in mandatory or tightly constrained rules, related actions generate a greater degree of discretion on the part of the second Member State court seised.

For related actions that are in a Member State court and a Third State court, Article 34(1) gives a Member State court discretion to stay its proceedings if doing so will “avoid the risk of irreconcilable judgments from separate proceedings,” and a judgment of the Third State court will likely be capable of recognition. Article 34(1) also gives the Member State court discretion in such a case to continue proceedings if there is no risk of irreconcilable judgments, the Third State court has stayed or dismissed, or the Third State court proceedings are likely to take too long (or for “the proper administration of justice”).

As can be seen, the Brussels I (Recast) Regulation provides for significant differences in treatment between situations internal to courts within the European Union and those that involve courts of a non-Member State, as well as different treatment for strict parallel proceedings and for related actions. This reflects in part the goals of political, economic, and legal integration for states within the European Union. A lack of such systematic integration means that the relationships between potential Contracting States of a Hague Convention are different from those between Member States of the European Union and more similar to those between third States and Member States of the Union. Thus, the rules in Articles 29-32 of the Brussels I (Recast) Regulation are of limited utility in constructing a Hague Convention, and perhaps contain troublesome unintended consequences. Moreover, the discretionary nature of the rules for parallel proceedings and related actions when Non-Member State courts are involved do not allow simple application in a global convention because the Brussels I system clearly prioritizes the decisions of the Member State courts.

b. Concerns Raised by the Brussels I Rules on Concurrent Proceedings

1) The Case Law

¹²*Id.* art. 30(3).

Decisions interpreting the Brussels I (Recast) Regulation and its predecessor instruments by the Court of Justice of the European Union (CJEU—formerly the European Court of Justice (ECJ)) do not afford encouragement for transplanting such rules into a global convention text.

The concept of strict parallel proceedings (as opposed to “related actions”) has resulted in litigation over definitions in a manner that creates added delay and cost rather than providing economy of time and cost. In 1987, under the predecessor Brussels I Convention, the ECJ held in *Gubisch Maschinenfabrik KG v Palumbo*,¹³ that the “same cause of action” language in Article 29 is to be autonomously defined, even if Member States have different definitions of the term. The Court created a “triple identity” approach to strict parallel proceedings, requiring (1) the same parties, (2) the same “end in view” (legal objective, broadly defined), and (3) the same cause of action (factual and legal basis). Expansion of these requirements to a global context, with even less homogeneity regarding legal system definitions of parties, “ends,” and causes of action, would likely create significant uncertainty and add to the burden and expense of litigation.

There is no way in a Hague instrument to provide for a single final arbiter of any “autonomous” interpretation of defined terms. Thus, a Hague instrument should avoid the need for categories that require definitions that are amenable to multiple interpretations, do not move across legal families well, and can be manipulated in litigation. To the extent definitions are required, they should be based upon factual occurrence rather than a priori legal doctrine in order to facilitate efforts toward uniform interpretation. Unlike the situation with the CJEU, with a Hague Convention there would be no single final arbiter of interpretation on Convention terms.

In 1994, the ECJ held, in *The Tatry*,¹⁴ that a negative declaratory action has the same status as a positive claim for purposes of determining the same cause of action, allowing a negative declaratory action that shipowners had no liability for cargo damage to prevail over the positive action for liability when the negative action was first-in-time. This reasoning was extended in 2012 when, in *Folien Fischer AG v Ritrama SpA*, the Court of Justice held that negative declaratory actions are permissible within the EU jurisdictional regime and are treated the same as actions for positive remedies in applying Brussels I rules of special jurisdiction.¹⁵ The other half (same parties) of the same parties/same cause of action determination creates further problems in light of the ECJ’s holding in *Drouot Assurances SA v Consolidated Matallurgical Ind.* that an insured and the

¹³Case 144/86 [1987] ECR I-4861.

¹⁴Case C-406/92, *The Tatry* [1994] ECR I-5460.

¹⁵Case C-133/11, *Folien Fischer AG v Ritrama SpA* [2012] ECLI:EU.

insurer could be “same parties” for purposes of Article 29 (even though in that case the Court determined that they were not the same parties).¹⁶

The Court of Justice further complicated the required analysis in *Gantner Electric GmbH v Basch Exploitation Maatschappij BV*,¹⁷ by holding that Article 29 may not apply even where there are the same parties and the same cause of action if it is a defense to one claim in the court first seised that provides the basis of a claim in the second proceeding. In *Maersk Olie & Gas A/S v Firma M de Haanen W De Boer*, the Court ruled that an action to establish liability and an action seeking to limit liability were not the same cause of action under Article 29.¹⁸

The Opinion of Advocate General Lenz in *Owens Bank Ltd v Bracco*,¹⁹ suggested a procedural rule in “related actions” cases under Art 30 (considering the earlier text of the Brussels I Convention) that could significantly limit judicial discretion and require a stay:

The national courts must bear in mind that the aim of this provision is “to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might arise therefrom”, as the Court stated in its judgment in *Overseas Union Insurance*. . . . It would therefore be appropriate in case of doubt for a national court to decide to stay its proceedings under [what is now Article 30].²⁰

The Recast of the Brussels I Regulation in 2011 made clear that discretion is to be exercised in Article 33, when there are same parties/same cause of action cases in a Third State court, and in Articles 30 and 34, when there are “related action” cases, whether in other Member State courts or in Third State courts. While the elements to be considered in exercising such discretion are not found in the text of the Regulation, there is guidance in Recital 24 in construing the references to the “proper administration of justice” in Articles 33 and 34. Recital 24 states:

(24) When taking into account the proper administration of justice, the court of the Member State concerned *should assess all the circumstances of the case before it*. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by

¹⁶Case C-351/96, *Drouot Assurances SA v Consolidated Matallurgical Ind.*, [1998] ECR I-3075.

¹⁷Case 111/01, [2003] ECR I-4207.

¹⁸Case C-39/02, [2004] ECR I-9657.

¹⁹Case C-129/92, [1994] ECR I-117, Opinion, paras 74-79.

²⁰*Id.*, para 75. Like the commentary on the Regulation (see part IV.D.2, *infra*), the Advocate General’s language here uses the term “parallel proceedings” to refer to an article dealing with “related actions.”

the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.²¹

At least with respect to actions pending in a court of a Non-Member State when a court of a Member State is seised, this seems to move the Brussels I (Recast) Regulation toward the kind of discretion (and a broad-based totality-of-the-circumstances review) that courts exercise in a common law *forum non conveniens* analysis, albeit within the confines of a first-in-time rule (the other court is first seised) and in a more limited way. It also seems to demonstrate a lack of strict parallel proceedings cases that reach judicial decision. It is significant that the Regulation's application to both Member State-Member State and Member State-non-Member State cases, and to both parallel proceedings and related actions, creates four possible permutations, three of those permutations involve some discretion for courts of Member States.

2) The Commentary

The cases in the Court of Justice of the European Union highlight just how difficult it has been to use what is now Section 9 of the Brussels I (Recast) Regulation to deal with concurrent proceedings—even within a rather more homogenous set of Member States than would be the case for a global convention. The commentary on these provisions goes further to identify problems, particularly the encouragement of negative declaratory judgments.

In THE BRUSSELS I REGULATION RECAST, edited by Andrew Dickinson and Eva Lein,²² the discussion of the relevant articles notes the importance of the 1994 decision in *The Tatry*,²³ in which the Court of Justice ruled that negative declaratory judgment proceedings involve the same cause of action as positive proceedings for purposes of the *lis pendens* rules of the predecessor Brussels I Convention.²⁴ Thus,

That decision, coupled with the precedence of the first seised court, encourages a race to the court and permits a party that would naturally be in the position of a defendant to choose a forum in which the dispute is to be ventilated. Settlement is, thereby, discouraged. This problem remains unsolved, and indeed has been heightened by the CJEU's more recent case

²¹Brussels I (Recast) Regulation, *supra* note 9, recital 24 (emphasis added).

²²THE BRUSSELS I REGULATION RECAST (Andrew Dickinson & Eva Lein eds., Oxford University Press, 2015).

²³Case C-406/92, *The Tatry* [1994] ECR I-5460.

²⁴*Id.*, para 42.

law equating claims for negative declarations to claims for positive relief in the operation of the Regulation's rules of jurisdiction.²⁵

Concern about the operation of these provisions is similarly stated in the other major treatise on the Recast Regulation, edited by Ulrich Magnus and Peter Mankowski.²⁶ The discussion in that treatise notes that Articles 19 and 30 "have given fresh impetus to the practice of seeking negative declaratory relief,"²⁷ and goes on to state:

[T]he tactical importance of suing first is reinforced by the Regulation's rules concerning the recognition and enforcement of foreign judgments. Only in exceptional cases does jurisdictional error in the court first seised jeopardise the subsequent enforcement in another Member State of a judgment obtained in the court first seised. . . . The likelihood that the parties will settle or surrender once jurisdiction is determined, or once a court is seised, gives Arts. 29-30 particular importance. Their effect may be to hand final victory to the party who sues first; their role is as much substantive as procedural.

....

[T]he Regulation is striking because merely by suing first, the winner takes all. Moreover, the effect of the Regulation may be to encourage litigation which might never have occurred at all. At a time when many national legal systems are seeking to promote less formal means of dispute resolution, and to defer the moment at which the parties feel compelled to litigate, the importance of winning any battle of forums that may occur, ensures that litigation will often be a weapon of first resort.²⁸

Notably, these two major treatises on the Brussels I (Recast) Regulation seem to take entirely different approaches to the terminology applied to different types of cases, a further illustration of the terminological imprecision that characterizes much of the discussion in this area. While Article 29 of the Regulation deals with same parties/same cause of action cases, and Article 30 deals with "related actions," the Magnus-Mankowski treatise includes both articles under a heading that uses the term "parallel proceedings."²⁹ The Dickinson & Lein treatise uses headings with the term "related actions" for its discussion of all of Articles 29, 30, 33, and 34,³⁰ indicating a view that strict parallel proceedings (same parties/same

²⁵Dickinson & Lein, *supra* note 22 at 323, *citing* Case C-133/11, *Folien Fischer AG v Ritrama SpA* [2012] ECLI:EU: C:2012: 664.

²⁶BRUSSELS IBIS REGULATION: COMMENTARY (Ulrich Magnus & Peter Mankowski, eds., Sellier European Law Publishers, 2016).

²⁷*Id.* at 719.

²⁸*Id.* at 719-20.

²⁹Magnus & Mankowski, *supra* note 26 at 713.

³⁰Dickinson & Lein, *supra* note 22, at 324, 331, and 346.

cause of action) actually are a sub-set of related actions. Thus, there seems to be no common understanding whether the term “parallel proceedings” includes only same parties/same cause of actions or includes other related actions, and no clear term to encompass the full set of types of cases to which this section of the Brussels I (Recast) Regulation applies or which are presented in the real world.

The commentators also take different approaches on the impact of a race to the courthouse. While the Dickinson treatise notes that a race to court discourages settlement, the Magnus treatise notes the importance of settlement or surrender once jurisdiction is established and then finds that the rule encourages litigation. It may be that the rule—in situations in which there is a forum that is likely to issue a decision strongly in favor of one party—will discourage pre-filing settlement if that party believes it can win the race to its favorable court, and will thus encourage filing suit in such situations but then coerce settlements once suit is filed. The problem with this is that what is encouraged may well be unjust settlements to the disadvantage of the party who can least afford to hire speedy lawyers.

The treatment to date of Section 9 of the Brussels I (Recast) Regulation by both the Court of Justice of the European Union and the principal commentary on the Regulation together show that, even within the more homogenous group of Member States of the European Union, rules that distinguish between strict parallel proceedings and related actions, rather than simply dealing with the more generic category of concurrent proceedings, has been at best problematic, and at worst an incentive to additional (not less) litigation.

2. Common Law Continuation of Concurrent Proceedings, Tempered by *Forum Non Conveniens*, International Judicial Comity, and Anti-Suit Injunctions³¹

As already noted, the general common law approach is to allow concurrent proceedings to continue at least until one court has issued a judgment. Most common law systems, however, allow some measure of limited judicial discretion to stay or dismiss a case when it is determined that the case would be better decided in a court in another State, through either the doctrine of *forum non conveniens* or the doctrine of international judicial comity abstention. Some also offer courts discretion to issue anti-suit injunctions to prevent parties from initiating or continuing the same or overlapping actions in the courts of another country. The fact that these options are discretionary is another element that can set the common law mechanisms apart from the civil law first-in-time approach that is inclined towards being mandatory.

³¹This section relies on RONALD A. BRAND & SCOTT JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS*, chapter 1 (2007)

a. *Forum Non Conveniens* as a tool to prevent concurrent proceedings

Forum non conveniens is a doctrine applied in common law judicial systems allowing a court in which proceedings have been instituted to discretionarily decline to exercise jurisdiction because the interests of justice are best served if the trial takes place in another court. The doctrine generally is raised by a defendant's motion to dismiss or stay the case in favor of a court in another legal system, and usually occurs before a case has been filed in another legal system.

While Scottish courts are credited with first developing and applying the concepts underlying the *forum non conveniens* doctrine, courts in other countries have joined in its evolution, resulting in familiarity with the doctrine throughout the common law world. This does not, however, result in uniformity of the doctrine across legal systems. One variation is the extent to which the doctrine is incorporated into questions of direct jurisdiction. In England and Canada, for example, the doctrine is applicable to basic jurisdictional analysis.³² Thus, depending on the legal system, the factors involved in a *forum non conveniens* analysis may be part of the initial jurisdictional analysis and come into play even before the initial determination of jurisdiction is complete.³³

The *forum non conveniens* doctrine is only one part of a package of approaches available to address concerns connected with concurrent litigation in multiple judicial systems. Other tools include international judicial comity abstention and anti-suit injunctions. Indeed, it may not be possible to understand any single tool completely without analysis of the rest of the package.³⁴ In

³²In England, CPR 6.20 of the Civil Procedure Rules of the Supreme Court (formerly Order 11, Rule 1(1), of the Rules of the Supreme Court) allows discretion in permitting service of a writ out of the jurisdiction. Through this system, service of process is fundamental to jurisdiction over a foreign defendant, and the exercise of discretion can bring in the *forum non conveniens* analysis.

³³See, e.g., Genevieve Saumier, *Forum Non Conveniens: Where Are We Now?*, 12 SUP. CT. L.REV. (2d) 121, 131 (2000) ("the test for establishing jurisdiction and the test for deciding whether or not to exercise that jurisdiction are the same"). In the U.K., while the same test may be applied for both purposes, the burden of proof may differ. *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, 480 (in jurisdiction through "service out" cases "the burden of proof rests on the plaintiff, whereas in the *forum non conveniens* cases that burden rests on the defendant").

³⁴In August 1994, a General Report and National Reports on "Rules for Declining to Exercise Jurisdiction in Civil and Commercial Matters: *Forum Non*

some legal systems, for example, the same test may be applicable in analyzing jurisdiction, in applying the *forum non conveniens* doctrine, and in determining whether an anti-suit injunction should issue.

In order to note some of the similarities and differences in the application of the *forum non conveniens* doctrine in common law legal systems it is worth a brief consideration of the evolution of the doctrine in four major common law jurisdictions: the United Kingdom, the United States, Canada, and Australia.³⁵ In the United Kingdom, the basic contours of the current *forum non conveniens* test were stated in *Spiliada Maritime Corp. v. Cansulex Ltd.*:³⁶

[A] stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for trial of the action, *i.e.*, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.³⁷

In *Spiliada*, Lord Goff set up a two part analysis, with the first part focused on the appropriate forum and the second on considerations of justice. Thus, the initial burden is on the defendant to show that another available forum is clearly more appropriate than the British forum. If the defendant meets this burden, then the burden shifts to the plaintiff to show “circumstances by reason of which justice requires that a stay should nevertheless not be granted.”³⁸

In the United States, the law on *forum non conveniens* developed largely through three major Supreme Court decisions: *Piper Aircraft Co. v. Reyno*,³⁹ *Gulf Oil Corp. v. Gilbert*,⁴⁰ and *Koster v. Lumbermens Mutual Casualty Co.*⁴¹ These cases

Conveniens, Lis Pendens and Other Rules” were presented at the XIVth Congress of the International Academy of Comparative Law. These Reports provide useful analysis and are published in *DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW* (James J. Fawcett ed., 1995).

³⁵The *forum non conveniens* doctrine also exists in Israel, *see* Stephen Goldstein, *Israel*, in *DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW* 259, 261-74 (James J. Fawcett ed., 1995); and New Zealand, *see* R.J. Paterson, *Forum Non Conveniens in New Zealand*, 13 N.Z. U. L. REV. 337 (1989); as well as in Ireland, Hong Kong, Brunei, Singapore, and Gibraltar, *see* PETER NORTH & JAMES J. FAWCETT, *CHESHIRE AND NORTH’S PRIVATE INTERNATIONAL LAW* 335 (13th ed. 1999).

³⁶[1987] A.C. 460.

³⁷[1987] A.C. at 476.

³⁸[1987] A.C. at 478.

³⁹454 U.S. 235 (1981).

⁴⁰330 U.S. 501 (1947).

generally have been followed in both federal and state courts, and have been tracked in some instances in state legislation.⁴² The analysis is similar to that in the United Kingdom. A court chosen by the plaintiff may decline to exercise its jurisdiction if it is a seriously inconvenient forum, another forum exists with jurisdiction, and a balancing of factors allows the court to determine that justice is best served by sending the case to the other, more convenient, available forum. Unlike the U.K. analysis, however, the U.S. procedure allows consideration of public (as well as private) interest factors, and tends to place greater emphasis on a local plaintiff's choice of forum. In addition, in *Atlantic Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*,⁴³ the Supreme Court applied the forum non conveniens doctrine to a case involving a choice of court agreement, making enforcement of such agreements nearly automatic by presuming the test for private interest factors favors the chosen court.

Canada generally follows the UK House of Lords' decision in *Spiliada*. The Supreme Court of Canada, in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*,⁴⁴ applied the forum non conveniens doctrine in a case involving jurisdictional service outside the forum state. The Court balanced private interest factors in determining that "the existence of a more appropriate forum must be *clearly* established to displace the forum selected by the plaintiff."⁴⁵

Australia diverges somewhat from the other common law doctrines, rejecting what Professor von Mehren called the "convenience-suitability approach" now applied in the other three systems and favoring an "abuse-of-process approach" to forum non conveniens.⁴⁶ Australia has rejected the "appropriate forum" approach applied by the House of Lords in *Spiliada*, and opted to continue the traditional requirement that the defendant demonstrate that the forum chosen by the plaintiff results in vexation or oppression.⁴⁷ This may be demonstrated by a showing that the Australian court is clearly inappropriate.⁴⁸

⁴¹330 U.S. 518 (1947).

⁴²See, e.g., LA. CODE CIV. PROC. ANN. art. 123 (Supp. 2005) (allowing dismissal in circumstances similar to the federal standard enunciated in *Piper, Gilbert, and Koster*).

⁴³571 U.S. 49 (2013) .

⁴⁴[1993] 1 S.C.R. 897.

⁴⁵[1993] 1 S.C.R. 897, 921.

⁴⁶Arthur T. von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems*, 295 RECUEIL DES COURS/COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 326 (2002).

⁴⁷*Oceanic Sun Line Special Shipping Co. Inc. v. Fay*, (1988) 165 C.L.R.

b. International Judicial Comity Abstention

As noted, two other common law doctrines have relevance in situations included within the notion of concurrent proceedings. International judicial comity abstention is a limited but available doctrine by which a court can discretionarily abstain from exercising its jurisdiction in favor of a foreign court in which the same case is already proceeding.⁴⁹ On the other end of the spectrum, a party may seek an anti-suit injunction ordering other parties to refrain from instituting or continuing litigation in a court in another legal system.

The international judicial comity abstention doctrine arises out of basic concepts of judicial comity most often applied in the context of the recognition of foreign judgments. In *Hilton v. Guyot*,⁵⁰ the U.S. Supreme Court dealt with an application for recognition of a French judgment, considering both comity and reciprocity. While the French judgment ultimately was denied recognition based on the lack of reciprocity found in French courts for U.S. judgments,⁵¹ it is Justice Gray's comity analysis in the 1895 case that has survived as the foundation of both judgments recognition and the international judicial comity abstention doctrine in the United States:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard

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⁴⁸*Voth v. Manildra Flour Mills Pty. Ltd.*, (1990) 171 C.L.R. 538.

⁴⁹Judicial comity is distinguishable from legislative (prescriptive) comity. Prescriptive comity concerns the ability and intent of the legislature to have its statutory pronouncements apply extraterritorially beyond the borders of the nation. *See, e.g., Hartford Fire Insurance Co. V. California*, 509 U.S. 764 (1993)(holding that the Federal District Court should not refuse to apply the U.S. Sherman Act to the extraterritorial conduct of foreign reinsurers under principles of international comity); *In Re Vitamin C Antitrust Litigation*, 8 F.4th 136 (2d Cir. 2021) (applying a list of balancing factors to determine whether comity required abstention from the application of the Sherman Act to foreign entities). Judicial comity is "a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *In Re: Vitamin C Antitrust Litigation*, 8 F.4th 136, 142 n 7 (2d Cir. 2021).

⁵⁰159 U.S. 113 (1895).

⁵¹159 U.S. at 210.

both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.⁵²

In the judgment recognition context, Justice Gray's opinion has served as the foundation for all subsequent common law and statutory formulas for the recognition of foreign judgments.⁵³

The U.S. Supreme Court has not explicitly recognized judicial abstention based on international comity. It has said, albeit in a very different context, that federal courts have a "virtually unflagging obligation" to exercise jurisdiction.⁵⁴ Domestically, however, the Court has recognized this obligation to exercise jurisdiction to be tempered in exceptional circumstances, giving federal courts discretion to stay proceedings in order to defer to other federal courts.⁵⁵ This "*Colorado River* abstention" doctrine has been extended in lower federal courts to provide the contours of a doctrine of international judicial comity abstention in international cases.

While *Colorado River* was a case involving parallel state court proceedings, federal courts have embraced the principle that abstention is "the exception, not

⁵²195 U.S. at 163-64.

⁵³*See*, 195 U.S. at 202-03:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.

⁵⁴*Colorado River Water Conservation Dist. V. U.S.*, 424 U.S. 800, 817 (1976). *See also* *Lexmark Int'l, Inc. V. Static Control Components, Inc.* 572 U.S. 118, 126 (2014), quoting *Colorado River*. Note that "virtually unflagging" is not "absolutely unflagging."

⁵⁵*See, Colorado River*, 424 U.S. at 817, describing as a rule "between federal district courts" the statement in *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."

the rule” in cases involving parallel foreign proceedings,⁵⁶ stating that "only the clearest of justifications will warrant dismissal," and the task of the court "is not to articulate a justification for the exercise of jurisdiction, but rather to determine whether exceptional circumstances exist that justify the surrender of that jurisdiction."⁵⁷

While different Federal Circuit Courts of Appeal have applied the international judicial comity abstention doctrine with variations, the widely cited Second Circuit decision in *Royal & Sun Alliance Ins. Co. Of Canada v. Century Int'l Arms, Inc.* is helpful in understanding the international judicial comity abstention doctrine both because the Second Circuit and its Southern District of New York are common fora for international cases and because the court there set out factors to consider in application of the doctrine.⁵⁸ When a Canadian insurance company (RJA) sued a Canadian arms manufacturer (Century Canada) in Canada for reimbursement of defense expenses and deductibles in representing that party, the Canadian manufacturer claimed it was the wrong party. As a result, RJA then sued the U.S. affiliate of the Canadian arms manufacturer (Century America) in the Southern District of New York. The U.S. affiliate moved to dismiss in favor of the action in Canada, and the District Court granted the motion.⁵⁹

⁵⁶*Royal and Sun Alliance Ins. Co. of Canada v. Century Intern. Arms, Inc.*, 466 F.3d 88, 93 (2006).

⁵⁷466 F.3d at 93. The extension of *Colorado River* abstention in the form of international judicial comity abstention has been applied in the Second, Third, Fourth, Sixth, and Seventh Circuits to allow a federal district court to dismiss a case in favor of a pending case in a foreign court if there is a showing of exceptional circumstances. *Royal & Sun Alliance Ins. Co. Of Canada v. Century Int'l Arms, Inc.* 466 F.3d 88, 92-907 (2d Cir. 2006); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 3920394 (3d Cir. 2006); *Al-Abood v. El Shamari*, 217 F.3d 510, 517-523 (4th Cir. 2000); *Genesis of Kentucky, Inc. V. Creation Ministries Int'l, Led.*, 556 F.3d 459, 466-469 (6th Cir. 2009); *AAR Int'l, Inc. V. Nimelias Enters, S.A.*, 250 F.3d 510, 517-523 (7th Cir. 2001). The Ninth and Eleventh Circuits have approved abstention even in the absence of pending concurrent proceedings in a foreign court, and without the need to show exceptional circumstances. *Mujica v. AirScan Inc.*, 771 F.3d 580, 596-615 (9th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-1240 (11th Cir. 2004). A Reporter's note in the ALI RESTATEMENT (4TH) FOREIGN RELATIONS LAW states that "extension of *Colorado River* to permit abstention in the absence of a parallel foreign proceeding appears questionable in light of the federal courts 'virtually unflagging obligation' to exercise jurisdiction." ALI, RESTATEMENT (4TH) FOREIGN RELATIONS LAW § 424, Reporters' Note 9 (2018), quoting *Colorado River*, 424 U.S. at 817.

⁵⁸466 F.3d 88 (2006).

⁵⁹466 F.3d at 91-92.

Upon appeal, Century America argued that the District Court's dismissal of the case was appropriate under the doctrine of international judicial comity abstention.⁶⁰ The Court noted that the doctrine was "'amorphous' and 'fuzzy,'"⁶¹ and then quoted earlier cases for the proposition that "'[p]arallel proceedings in the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other.'" ⁶² The Court went on to state that "[t]he mere existence of parallel foreign proceedings does not negate the district courts' 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" ⁶³

The *Royal & Sun Alliance* court noted that bankruptcy cases are the one discrete category of cases in which dismissal may be *required* in favor of a foreign court, and that, outside bankruptcy "we have yet to articulate a list of factors a district court should consider when exercising its discretion to abstain in deference to pending litigation in a foreign court."⁶⁴ The court then noted that abstention is to be exercised only in "exceptional circumstances,"⁶⁵ and that "while the relevant factors to be considered differ depending on the posture of the case, the starting point for the inquiry remains unchanged: a district court's 'virtually unflagging obligation' to exercise its jurisdiction."⁶⁶

The court went on to note that the application of the doctrine "should be guided by . . .

the proper respect for litigation in the courts of a sovereign nation, fairness to litigants, and judicial efficiency."⁶⁷ It found these three principles to "require an evaluation of various factors, such as the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternate forum, the potential prejudice to either party, the convenience of the parties, the connection between the litigation and the United States, and the connection

⁶⁰466 F.3d at 92.

⁶¹466 F.3d at 92, quoting *JP Morgan Chase Bank v. Altos Hornos De Mexico*, S.A. 412 F.3d 418, 423 (2d Cir. 2005).

⁶²466 F.3d at 92, quoting *China Trade & Dev. Corp. V. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987), quoting *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 926–27 (D.C.Cir. 1984), citing *Colorado River*, 424 U.S. at 817, 96 S.Ct. 1236.

⁶³466 F.3d at 92, quoting *Colorado River*, 424 U.S. at 817.

⁶⁴466 F.3d at 92-93.

⁶⁵466 F.3d at 93.

⁶⁶466 F.3d at 93, quoting *Colorado River*, 424 U.S. at 817.

⁶⁷466 F.3d at 94.

between the litigation and the foreign jurisdiction,” and that this list should not be considered to be exhaustive.⁶⁸

The *Royal & Sun Alliance* decision used the term “parallel proceedings,” but applied a broad definition to that term, finding that “[f]or two actions to be considered parallel [for purposes of application of the abstention doctrine], the parties in the actions need not be the same, but they must be substantially the same, litigating substantially the same issues in both actions.”⁶⁹ It further found that the District Court had not considered factors “sufficient to overcome the virtually unflagging obligation of a district court to exercise” its jurisdiction.⁷⁰

The Second Circuit’s analysis in *Royal & Sun Alliance* appears to be the most detailed and widely cited framework for international judicial comity abstention analysis.⁷¹ The Eleventh Circuit, in the *Dresdner Bank* case, makes a distinction between retrospective and prospective application of comity abstention, using retrospective to encompass situations when there is an existing foreign judgment or an ongoing parallel foreign proceeding.⁷² Prospective application occurs when no action is pending or completed in a foreign court.⁷³ The *Dresdner Bank* case set out three factors for evaluating retrospective abstention: “(1) whether the foreign court was competent and used ‘proceedings consistent with civilized jurisprudence,’ (2) whether the judgment was rendered by fraud, and (3) whether the foreign judgment was prejudicial because it violated American public policy notions of what is decent and just.”⁷⁴ Its three factor test was cited with favor by the Ninth Circuit in *Mujica v. AirScan Inc.*,⁷⁵ but found to offer “no substantive standards for assessing its three factors.”⁷⁶

State courts in the United States also recognize international judicial comity abstention as a discretionary doctrine. The Delaware Supreme Court in *National Industries Group (Holding) v. Carlyle Inv. Management L.L.C.*,⁷⁷ stated that “[i]nternational comity is an ‘abstention doctrine,’ under which a court that has

⁶⁸466 F.3d at 94.

⁶⁹466 F.3d at 94.

⁷⁰466 F.3d at 97.

⁷¹It is widely cited because most of the likely candidates for the doctrine’s invocation will be filed in the Southern or Eastern Districts of New York.

⁷²*Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (2004)

⁷³379 F.3d at 1238.

⁷⁴379 F.3d at 1238. The alternative forum was a claims commission established by Executive Agreement between the U.S. and Germany, and not a court solely established in a foreign country. *Id.* at 1228.

⁷⁵771 F.3d 580 (2014).

⁷⁶771 F.3d at 603.

⁷⁷67 A.3d 373 (2013).

jurisdiction over a person or dispute, after considering the 'relevant factors,' may abstain from exercising jurisdiction and defer to a foreign court."⁷⁸ The court noted that a contractual choice of court clause could override the doctrine.⁷⁹ Michigan courts have characterized international judicial comity abstention as "a doctrine akin to *forum non conveniens*,"⁸⁰ and Illinois courts similarly treat it as discretionary, holding that courts "may, but are not required to, defer to the laws or interests of a foreign country and decline to exercise jurisdiction that is otherwise properly asserted."⁸¹ The Washington Supreme Court treats comity as allowing a court, "acting within its discretion, to give effect to the law and resulting orders of another jurisdiction out of deference and respect, considering the interests of each jurisdiction"⁸² State courts generally do not apply the federal *Colorado River* framework by its terms but arrive at functionally similar analyses, with most treating the matter as akin to *forum non conveniens* and giving substantial weight to the adequacy of the foreign forum, the nature of the parties' interests, and the risk of conflicting judgments.⁸³

Thus, while the U.S. Supreme Court has neither advanced nor prohibited the international judicial comity abstention doctrine, lower courts have applied it and have provided significant discussion of its contours. While the presumption is that concurrent proceedings are to continue until at least one court has reached judgment, and U.S. courts have an obligation to exercise their jurisdiction, in exceptional circumstances they will defer to a foreign court in which a concurrent proceeding has been initiated. At that point, a court may consider

- a) proper respect for litigation in and the courts of a sovereign nation;
- b) fairness to litigants; and
- c) judicial efficiency.

In doing so, a court often evaluates:

- a) the similarity of the parties;
- b) the similarity of the issues;

⁷⁸67 A.3d at 387.

⁷⁹67 A.3d at 387-88.

⁸⁰*Hare v. Starr Commonwealth Corp.*, 813 N.W.2d 752, 762 (Mich. 2011).

⁸¹*In re Marriage of Muruges and Kasilingam*, 2013 IL App. 3d 110228, 993 N.E.2d 1109, 1118 (Ill. App., 3d Dist., 2013).

⁸²*In re Estate of Toland*, 180 Wash.2d 836 (2014).

⁸³Florida courts require that proper statutory procedures (such as those under Florida's Uniform Out-of-Country Foreign Judgment Recognition Act) be followed when a party seeks to give *res judicata* effect to a final foreign judgment, even if that party characterizes the foreign proceedings as "pending" parallel proceedings for purposes of comity. *Garnac Grain Co., Inc. v. Mejia*, 962 So.2d 408 (2007).

- c) the order in which the actions were filed;
- d) the adequacy of the alternate forum;
- e) the potential prejudice to either party;
- f) the convenience of the parties;
- g) the connection between the litigation and the United States; and
- h) the connection between the litigation and the foreign jurisdiction.

c. Anti-Suit Injunctions

An anti-suit injunction is the flip side of international judicial comity abstention. Rather than deferring to the foreign court, in this approach parties to the U.S. proceedings are enjoined from pursuing litigation in the foreign forum in order to keep the proceedings in the U.S. forum.⁸⁴

U.S. Federal Courts of Appeal have taken different approaches to the requirements for granting an anti-suit injunction. Some courts tend to grant injunctions upon a demonstration that the foreign litigation would be either vexatious or oppressive or would involve an inequitable hardship.⁸⁵ Others are more restrictive, focusing more heavily on international comity and requiring that elements of *res judicata* require limiting parties in foreign proceedings or that the foreign litigation impinges on an important public policy of the jurisdiction from which the injunction is granted.⁸⁶ A third group comes down in the middle, using a totality-of-the-circumstances approach and weighing factors such as the procedural stage of each action; considerations of delay, inconvenience, and expense; any possible party bad faith or vexation; and the public policies of both states involved.⁸⁷

⁸⁴ALI, RESTATEMENT (4TH) FOREIGN RELATIONS LAW § 425 (2018).

⁸⁵*See, e.g.,* Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 886 (9th Cir. 2012); Kaepa, Inc., 76 F.3d at 627-28; Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 431 (7th Cir. 1993); Seattle Totems Hockey Club v. Nat'l Hockey League, 652 F.2d 852, 855-56 (9th Cir. 1981).

⁸⁶*See, e.g.,* Gen'l Elec. Co. v. Deutz AG, 270 F.3d 144, 160-61 (3d Cir. 2001); Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1354-55 (6th Cir. 1992); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926-33, 937-39 (D.C. Cir. 1984).

⁸⁷*See, e.g.,* Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 16, 18-19 (1st Cir. 2004) (finding that considerations of international comity establish a rebuttable presumption against the issuance of an anti-suit injunction, but concluding that this presumption can be overcome based on the totality of the circumstances); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 119, 126-127 (2d Cir. 2007) (stating that threats to public policy or the court's jurisdiction are not the only considerations); and China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d

The ALI, RESTATEMENT (4TH) FOREIGN RELATIONS LAW § 425 provides the following regarding anti-suit injunctions in U.S. courts:

A court in the United States may enjoin persons subject to its jurisdiction from pursuing parallel foreign proceedings. An antisuit injunction is an exceptional remedy and is appropriate only if the foreign proceeding threatens the court's jurisdiction, frustrates an important public policy of the forum, is vexatious or inequitable, or would result in delay, inconvenience, expense, inconsistency, or a race to judgment.

The roundtable symposium that includes this article, also includes a much more extensive and valuable discussion of anti-suit injunctions and international judicial comity abstention by Professor Buxbaum.⁸⁸

3. Considering Existing Approaches in Order to Assist in Defining and Addressing the Problem

The problem of potential or existing concurrent proceedings exists because of facts, not because of legal doctrine. Indeed, the fact that different legal systems have different legal approaches to the problem of concurrent proceedings requires that, in a global regime, the problem itself be defined through the facts that present the problem rather than through a priori legal constructs.

A fact-based approach to the problem of concurrent proceedings means that some of the baggage of legal system doctrines simply falls away. It means that mandatory rules that often reflect a systemic approach to law often simply do not work—or work only to produce bad results in some cases. It means that full discretion in one court, without consideration of the interests of other courts, also often leads to results that are difficult to explain in a manner that best serves the interests of multiple legal systems and of the system of resolution of transnational disputes in courts of sovereign states. It means that attention must be given to concurrent proceedings prevention (*i.e.*, dealing with the problem of *potential* concurrent proceedings) along with concurrent proceedings adjustment (*i.e.*, dealing with the problem of *existing* concurrent proceedings).

The problem of concurrent proceedings occurs when one or more courts in different states are faced with determining the same or similar issues (whether another case exists yet in another court or not) that might result in inconsistent decisions (whether for the entire judgment or for necessary issue determinations). Thus, the traditional comparison between the civil law doctrine of first-in-time

33, 35 (2d Cir. 1987) (listing factors to consider).

⁸⁸Hannah Buxbaum, _____.

priority (*lis pendens*) and the common law doctrine of *forum non conveniens* is insufficient to address the problem.⁸⁹

This then brings us back to the necessity of a fact-based definition of the problem in order to apply the goals and concerns expressed at the beginning of this article. At the risk of redundancy in this small subsection, we propose the following as the working definition for this purpose:

the problem of concurrent proceedings occurs when one or more courts in different states are faced with determining the same or similar issues (whether another case exists yet in another court or not) that might result in inconsistent decisions (whether for the entire judgment or for necessary issue determinations).

This, of course, requires text in a convention that comports with traditional drafting conventions, for which we propose the following:

In this Convention "concurrent proceedings" exist when courts of different Contracting must determine the same or similar issues (whether another case exists yet in another court or not) that might result in inconsistent

⁸⁹This is the distinction enshrined in Articles 21 and 22 of the 2001 Interim Text of a comprehensive convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – a text that was left behind because it tried to do too much and had too many brackets and footnotes indicating an inability to reach consensus positions on too many issues. 2001 Interim Text, available at <https://assets.hcch.net/docs/e172ab52-e2de-4e40-9051-11ace7c7be67.pdf>. While the so-called “compromise” found in Articles 21 and 22 of the 2001 Interim Text has at times been suggested as a starting point for a future instrument dealing with concurrent proceedings, any careful analysis demonstrates that it is wholly inadequate. Among other points it

- 1) is based on two existing legal doctrines that address different issues (*lis pendens* addresses existing concurrent proceedings and *forum non conveniens* most often addresses potential concurrent proceedings);
- 2) conflates a single difference between hard-and-fast mandatory rules and single-court discretion in a manner that is blind to the facts that create the problem; and
- 3) ignores other doctrines, particularly in common law legal systems, that also address the problem of concurrent proceedings, but in rather different ways (*i.e.*, international judicial comity abstention and anti-suit injunctions).

decisions (whether for the entire judgment or for necessary issue determinations).

We have provided this definition as an alternative in to the existing definition of “related actions” in the Working Group Draft Text, but to constitute the single umbrella category of “concurrent proceedings.”

IV. Problems with the Working Group Draft Text

A. Our List of Concerns

Before considering our Alternative Draft Text, and the manner in which we believe it more adequately addresses the real problem, we will show that the Working Group Draft Text is inadequate to the task of a proper new convention when we consider what are the real fact-based problems of concurrent proceedings. As noted in the introduction to this article, a workable convention should address five fundamental concerns. It should :

- 1) address the problem of overlapping proceedings in courts of different nations;
- 2) avoid the need to begin any analysis by applying categories and definitions likely to lead to additional litigation;
- 3) avoid the creation of unnecessary litigation issues based on differing approaches to jurisdiction;
- 4) avoid unnecessary definitions and rules dealing with the timing of the initiation of proceedings in each court; and
- 5) encourage courts to work cooperatively rather than competitively in efforts to determine a single appropriate forum for litigation when concurrent proceedings exist.

While the Working Group Draft Text does address the problem of overlapping proceedings in courts of different states, it does so only in a limited and unnecessarily complicated manner and fails on the other four concerns in this list.

The Working Group Draft Text contains definitions for each of “parallel proceedings” and “related actions” in Article 3. Depending on which of these two categories a set of concurrent proceedings falls into, the process for dealing with those proceedings differs. Under Chapter II, parallel proceedings cases are controlled largely by the court first seised. But, before any further action is taken, a set of determinations must be made. First, the determination of which court is first seised is governed by the Article 4 definition of what it means to be “seised.” Each court must also consider whether it and the other court(s) have jurisdiction consistent with a list found in Article 8(1).

The Chapter II process to be applied if the courts can agree that the definition of parallel proceedings is met is not a simple one. Assuming the courts agree

- 1) that the definition of parallel proceedings is met; and
- 2) that both courts are “seised;” and
- 3) on which was first seised; and
- 4) that each (or either) had jurisdiction based on the rules found in Article 8(1); and
- 5) that the case does not involve rights in rem in immovable property under Article 6; and
- 6) that there is no non-exclusive choice of court agreement involved;

then the court first seised applies the rules of Article 9 to determine the more appropriate court. But the rules of Article 9 are a mishmash of two separate approaches suggested in the Working Group, and put together in a manner that is virtually indecipherable and full of bracketed language that both makes the text nearly impossible to understand and leaves it full of uncertainty even if the options suggested are understood. It is not difficult to see the opportunities for vexatious litigation tactics, delay, and confusion that such a process would entail.

At least as important as the complexity and confusion of the process associated with administering parallel proceedings cases under Chapter II, is the simple question of why each of the definitions and other tests must be met for a case to be dealt with properly under the Convention. The simple fundamental fact is that the problem of concurrent proceedings exists when the same or similar case is before multiple courts whether or not any of the six definitions and tests required in Chapter II is applied. Courts are faced with the potential for inconsistent results or avoidable expense or vexation regardless of whether or not the cases are “parallel” or simply “related.” Nor does it matter what the basis of jurisdiction in each court is. If the courts have jurisdiction under their own law, they can render a judgment in the case. The cases will in fact be concurrent regardless of the various definitional and jurisdictional doctrines involved.

The chapter III process for related actions is based on a more cooperative approach and is devoid of many of the definitional and jurisdictional hurdles found in Chapter II. It provides the framework for a more simplified approach that deals clearly with “concurrent proceedings” in their entirety. As we will explain below, it provides the basis for adjustment to what we believe it a more straightforward approach in our Alternative Draft Text.

1. The Problem of Subcategories of Concurrent Proceedings

It was not until the seventh Working Group meeting in the fall of 2024 that a distinction was clearly made in the Working Group Draft Text between parallel proceedings and related actions. Until that time, some delegations had assumed that “parallel proceedings” described a very narrow concept and others assumed that it encompassed the entirety of possible concurrent proceedings. As noted in the discussion of both civil law and common law systems, above, this confusion was not unique to the Working Group, and exists in the courts and commentaries of many legal systems. Obviously, in real-world transnational litigation, an instrument that applies only to situations in which the proceedings in different courts must involve exactly the same parties and exactly the same cause of action or subject matter would be useless and subject to easy manipulation and avoidance. Nonetheless, the option of a single broad category of concurrent proceedings has so far been rejected in favor of dividing types of cases between parallel proceedings strictly defined and related actions.

The problems with the bifurcated-case-type approach of the Working Group Draft Text are quite obvious, and, in our view,⁹⁰ make that Text unworkable on a global basis. First, there has been no showing—and no attempt to show—that strict parallel proceedings so defined pose serious problems in transnational litigation. In the real world of transnational mobility, any transaction or movement across national boundaries is likely to involve multiple persons and multiple possible disagreements. At least based on our experience and on anecdotal accounts, suits brought in different countries are not likely to have a strict identity of parties and causes of action. Indeed, there is no accepted way to establish commensurability of causes of action across legal systems. The situation is not helped by trying to substitute for “same cause of action” the phrase “same subject matter.” There is no coherent concept of “matter” let alone “subject matter” in Hague Convention practice—or anywhere else on an international plane.⁹¹

Second, a strict parallel proceedings instrument will create artificial inducements to manipulative litigation. Lawyers can easily refrain from naming a party or alleging a particular claim, and can easily use national joinder rules and ability to amend pleadings to add parties or claims, and thus break any parallelism that may trigger application of the instrument. Multilateral instruments regulating transnational litigation should not be vulnerable to such easy manipulation, nor should they have their effectiveness held hostage to pleading choices. Moreover, the differences in defining causes of action throughout legal systems makes such

⁹⁰We have stated the explanation that follows in a prior, unpublished, article, *A Further Look at a Hague Convention on Concurrent Proceedings*, that was posted on the SSRN system at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4520164.

⁹¹See the discussion of Art. 2 of the Hague Judgments Convention in Chapter 5 of RONALD A. BRAND, MICHAEL COFFEE, AND PAUL HERRUP, *THE 2019 HAGUE JUDGMENTS CONVENTION* (Oxford University Press, forthcoming 2023).

rules easily avoidable. Parties to litigation could—and likely would—plead their cases in order to avoid rules that would prevent their chosen court from moving forward with the litigation.

Third, the approach followed thus far in the Working Group Draft Text leads to a cascade in complexity of the instrument. When rules like those in the Brussels I (Recast) Regulation are focused on a strict first-in-time rule of deference they create the need for additional rules, compounding the opportunities for further litigation of those rules, and the resulting added cost, complexity, and confusion such litigation can generate. Brussels Article 31(1) provides for a strict first-in-time rule when two Member State courts are seised and both have exclusive jurisdiction. Article 31(2) and (3) make an exception for the *Gasser*-type cases,⁹² providing preference for exclusive jurisdiction under an exclusive choice of court agreement (except in consumer, employment, and insurance cases). When a rule is based on the time when each court is “seised,” it also requires a further rule to determine just what that means and when it occurs.⁹³

Fourth, a first-in-time rule similar to those contained in the Brussels I (Recast) Regulation will result in bad policy outcomes. There is no necessary correlation between the court first seised and the court best able to resolve claims with least burden and cost. Indeed, a rule of deference to the court first seised gives an advantage to the party with the fastest lawyers, and this may tilt the playing field further toward the party with the larger bankroll, able to hire more sophisticated counsel.

Fifth, there are real dangers in attempting to start with the deceptively simple case of strict parallel proceedings in building an instrument that actually will do useful work. Those working on the project might well find themselves boxed-in by an improvident starting point. This difficulty in turn leads to a bifurcated structure of one set of complicated rules for determining the better forum in strict parallel proceedings and another set of rules for related actions. This will be a morass for the uninitiated. Yet, as we have argued in our earlier articles, any instrument will be made to work – or not—by generalist judges and generalist lawyers.⁹⁴ Simplicity is a key to success. It is far more advisable to make the attempt to devise rules for related actions that will encompass the situations of strict parallel proceedings, rather than developing rules for strict parallel proceedings that do

⁹²Case C-116/02, *Erich Gasser GmbH v MISAT Srl*, [2003] ECR I-14963.

⁹³Brussels I (Recast) Regulation, *supra* note 9, art. 32.

⁹⁴*See, e.g.,* Paul Herrup and Ronald A. Brand, *A Hague Parallel Proceedings Convention: Architecture and Features*, 2 CHICAGO J. INT’L L. ONLINE 1 (2023), available at <https://cjl.uchicago.edu/online-archive/hague-parallel-proceedings-convention-architecture-and-features> (“Because the ultimate users of any instrument will be judges and litigators, the instrument should be framed in terms they will understand”).

not solve significant problems and cannot be generalized to solve problems that actually require solution.

Sixth, and finally, there is a general, jurisprudential point that must be considered here. We are unaware of any attempt to show that strict parallel proceedings have inherent characteristics that make them a meaningfully different class from related actions. Simply put, they are one type of concurrent proceeding. As far as we can tell, the justification for treating strict parallel proceedings separately from related actions has nothing to do with their characteristics, and everything to do with a view that strict parallel proceedings are more amenable to solution by a very rigid first-in-time rule. Thus, a legal taxonomy is created to accommodate a solution that demonstrably does not work well.⁹⁵

2. The Problem of Using Jurisdictional Rules to Create Unnecessary Added Litigation

As already noted, under the Working Group Draft Text, if the definition of “parallel proceedings” is met, then each court must review the jurisdictional facts in all courts to determine whether they meet any of the tests found in Article 8(1). Given past Hague Conference work in the 2019 Judgments Convention, at least one test in this list is likely to be met under any national jurisdictional rules. But the time and expense must be applied to make that determination as to jurisdiction in all courts involved. Normally both courts are likely to meet the test. If only one meets the test, then it is given priority. If neither meets the test, the case is outside the Convention and parallel proceedings will continue in all courts without any process for resolution or possible efficiencies under the Convention.

More importantly, Article 8(1) solves no real problem, but creates several. Concurrent proceedings exist as a matter of fact, not as a matter of the jurisdictional connections involved in the courts of each state. Requiring gateway determinations of what set of connecting factors is met in each state creates

⁹⁵ The claim that a rigid first in time rule guarantees certainty is flawed in several respects. First, the justification for the importance of “certainty” is the allegation that a rigid, ex ante certainty is necessary for economic activity. The data shows otherwise. *See, e.g., C.I. Jones, The Facts of Economic Growth*, in 2A HANDBOOK OF MACROECONOMICS 3, 35 figs. 24 & 25, 36 fig. 26 (John B. Taylor & Harald Uhlig eds., 2016). Even if that justification were correct, the “certainty” created by a first in time rule is the certainty that the forum will go to the swiftest, which often is the party best able to hire expensive, aggressive counsel. There has been no effort to show that the alleged benefits of any “certainty” accruing from a first in time rule outweigh the predictable disadvantages – or that it is certainty that has anything to do with achieving justice.

additional litigation complexity and expense, but addresses no problem that cannot be addressed simply by factors to be applied in a determination of the more appropriate forum. The existence of the list in the Working Group Draft Text requires additional decisions to be made that often will have no impact because both (or all) courts will satisfy at least one Article 8(1) test; raises the problem of inconsistent determinations by each court as to which, if any, tests are met in each court; and leaves cases in which both (or all) courts satisfy none of the Article 8(1) tests completely outside the Convention with no opportunity for consolidation efficiencies to occur. It is difficult to justify this additional step in Convention process on any grounds.

3. The Problem of Unnecessary Definitions and Rules Dealing with the Timing of the Initiation of Proceedings in Each Court

The Working Group Draft Text adds another layer of unnecessary complexity and incentive for vexatious litigation conduct by creating a priority for the "court first seised" in Article 9. As already noted, the problem of concurrent proceedings exists when courts in different states are faced with determining the same or similar issues (whether another case exists yet in another court or not) that might result in inconsistent decisions (whether for the entire judgment or for necessary issue determinations). That problem is not changed in any way by determining which court first was asked to address the case or issues in the case.

A priority to the court first seised provides incentive to ratchet up dispute tensions at an early stage through a race to the courthouse that can serve to make consensual dispute resolution more difficult. As already noted in the EU context, it has resulted in a rush to the court to seek a negative declaratory decision favoring the party who probably would be the defendant in an action brought directly on a normal cause of action. Moreover, it also requires a test for when a court is "seised," a concept not always shared in national legal systems, and for which the act considered to formally initiate proceedings may be entirely different. This adds one more definition to the Working Group Draft Text in Article 4 that simply is unnecessary to addressing the problem of concurrent proceedings. That problem exists regardless of whether one court had the case before another, and adding litigation over the definition of when a case began in each court, in order to unnaturally create an advantage for initiating litigation at the earliest possible time, solves no real problem, but adds several in the application of the Convention rules.

The timing element for determining when a court is "seised" also risks locking in traditional doctrine and practice when the world is rapidly moving beyond the

ability of those doctrines and practice to serve useful functions. For example, new electronic arrangements for filing and cyber-service, including virtual notice, may create difficulties in determining the timing sequence of events and exacerbate issues regarding requirements of actual and constructive notice, and of due process rules. All of this can have effects on the ability of rigid timing rules and definitions to work in a clean and transparent fashion—predictably generating yet more, and more intricate, litigation.

4. Encouraging Courts to Work Cooperatively Rather than Competitively

Chapter IV of the Working Group Draft Text is titled “Cooperation and Communication.” This is potentially one of the most valuable possible contributions of a potential new legal instrument. It provides the foundation for court-to-court communication that may well allow problems of duplicate decision-making to be avoided early in the proceedings in each court. The problem of concurrent proceedings naturally suggests that having each court proceed blindly without considering the actions and processes of other courts is simply a bad idea. Transparency should enhance process in every court. And communication should enhance transparency.

The problem with the Working Group Draft Text in Chapter IV is that it does not go far enough. This is understandable when one considers the different role of judges and courts in civil law and common legal systems when they address civil and commercial cases. While common law legal systems are in general comfortable with a certain measure of judicial discretion and communication, civil law legal systems generally—as a matter of doctrine—are not. This is an area in which significant good work can be done in the Hague Conference process. That work can be based on the advances in judicial cooperation and communication already made by UNCITRAL and other bodies, particularly in the area of insolvency proceedings.⁹⁶

B. Problems in Meeting the Goals

As noted earlier, we believe the goals of any new concurrent proceedings instrument should be to:

- 1) clearly identify the existing problem;

⁹⁶For a discussion of judicial cooperation in insolvency proceedings, see the accompanying article by John Pottow, _____.

- 2) provide clear solutions to the existing problem that can be understood and efficiently applied by generalist lawyers and judges;
- 3) avoid creating new problems that either prevent the efficient resolution of disputes or encourage strategic manipulation; and
- 4) be readily acceptable to states in order to achieve ratification and implementation.

Our concerns with the Working Group Draft Text, discussed above have obvious correlation to the goals we have defined. The bifurcated approach that has separate procedures for parallel proceedings and related actions is based largely on existing doctrine in the European Union, and not on a fact-based approach to the problem. There simply is no need to make the problem complex in the way the Working Group Draft Text has done. The starting point should be a simple fact-based definition of the problem: the existence of concurrent proceedings. Theoretical contortions regarding the timing of when proceedings were commenced, the jurisdictional basis for the proceedings in each court, legal system rules on what commences proceedings, or even exclusive bases of jurisdiction, may have relevance to determining which court is the more appropriate forum, but they need not be established as gateway considerations that each can become one more hurdle for strategic litigation posturing.

Multiple paths to a solution to concurrent proceedings does nothing to make that solution either clear or easily applied. Simplicity, clarity, and generalist application all favor a single mechanism that is cooperatively applied by courts.

As already noted, not only do unnecessary determinations of what it means to be “seised” of a case; when a court is seised; what type of concurrent proceedings exist; what connections each court has at the outset; and how each legal system may deal with “exclusive” bases of jurisdiction reduce the clarity and ease of application of a possible convention, but they add new problems that both prevent the efficient resolution of disputes and encourage strategic manipulation of legal process.

We offer a particular note here regarding the fourth goal (acceptability to states). This goal will be defeated by any provision that allows a court in one State to determine whether a court in another State may proceed to adjudicate a case before it. Thus, we move from what we consider to be the possibility of a pure first-in-time rule in the Working Group Draft Text to a clear system of communication and cooperation in our Alternative Draft Text.

The goal should not be to produce one more document that becomes nothing more than grist for academic discussion of legal theory. It should be to produce a

convention States are likely to join. Excessive complexity and opportunities for increased litigation and strategic manipulation will not produce that result.

V. Our Proposed Alternative Draft Text

A. Advancing the Goals of a Good Convention

By simplifying the structure of the convention in order to avoid convention rules that will be magnets for additional litigation and more directly addressing the actual problem of concurrent proceedings, we believe the Alternative Draft Text achieves the four general goals we set out in the introduction to this article.

1. The Alternative Draft Text demonstrates clarity about what the existing problem is

The Alternative Draft Text avoids the complexity of compartmentalizing types of concurrent proceedings and subjecting them to different sets of unnecessarily complicated rules. It provides for a single category of concurrent proceedings cases. The definition of “concurrent proceedings” in Article 3 begins with the Working Group Draft Text definition of “related actions” but eliminates the bracketed alternatives in opting for a fact-based definition:

In this Convention "concurrent proceedings" means any proceedings in courts of different Contracting States that involve:

1. parties at least some of which are the same, or substantially the same, or in some way related to each other; and
2. issues at stake that are substantially the same, such that the outcome in one court on one or more issues could be inconsistent with the outcome in the other, or create the risk of inconsistent judgments.

We have no doubt that the definition of “concurrent proceedings” can be improved upon for the final text, but have avoided a heavy focus on this definition in order here to deal primarily with the important operative provisions of the convention. The important point is that there is a single class of “concurrent proceedings,” which would encompass both the “parallel proceedings” and “related actions” categories found in the Working Group Draft Text. We caution that any changes to the definition should retain a fact-based understanding of the concept of concurrent proceedings.

2. The Alternative Draft Text provides clear solutions to the existing problem that can be understood and efficiently applied by generalist lawyers and judges

By combining categories into a single concept of concurrent proceedings, our Alternative Draft Text avoids the complexities and confusion of the Working Group Draft Text. By focusing the definition of “concurrent proceedings” on fact-based concepts rather than legal ideology it removes differences in legal systems that can create non-uniformity of interpretation and application of the convention provisions. This makes the text more accessible to lawyers and judges from differing legal systems, whether or not they are accustomed to dealing with transnational matters.

3. The Alternative Draft Text avoids creating new problems that prevent the efficient resolution of disputes or strategic manipulation by legal counsel

By providing for a single comprehensive category of cases in the definition of “concurrent proceedings” the Alternative Draft Text avoids rules that require difficult determinations regarding timing or jurisdictional connections. This eliminates the Working Group Draft Text complexity regarding “parallel proceedings” that would require all courts involved to determine:

- 1) that the definition of parallel proceedings is met; and
- 2) that both courts are "seised;" and
- 3) which court was first seised; and
- 4) that each (or either) court had jurisdiction based on the rules found in Article 8(1); and
- 5) that the case does not involve rights in rem in immovable property under Article 6; and
- 6) that there is no non-exclusive choice of court agreement involved;

This list of six unnecessary determinations demonstrates the Working Group Draft Text potential for confusion and unnecessary litigation. The elimination of each of these required determinations in the Alternative Draft Text avoids the creating of problems that need not exist in a final convention.

4. The Alternative Draft Text can be readily acceptable to states in order to influence actual ratification and implementation

The Alternative Draft Text focuses on a fact-based single category of cases and a process of communication and cooperation. This will allow each court that must apply the convention, and each Contracting State, to retain sovereign integrity while at the same time reducing inefficiencies of time and cost.

C. Addressing the Concerns raised by the Working Group Draft Text

1. Making clear the problem of overlapping proceedings in courts of different states

Our Alternative Draft Text includes a single definition of “concurrent proceedings” in Article 3:

In this Convention "concurrent proceedings" means any proceedings in courts of different Contracting States that involve:

1. parties at least some of which are the same, or substantially the same, or in some way related to each other; and
2. issues at stake that are substantially the same, such that the outcome in one court on one or more issues could be inconsistent with the outcome in the other, or create the risk of inconsistent judgments.

This definition is developed from the Working Group Draft Text of related actions and is provided provisionally. Our purpose here is first and foremost to focus on the operative sections of an Alternative Draft Text.⁹⁷

⁹⁷This definition avoids rigid legal tests, instead focusing on fact-based matters about the proceedings. Most importantly, it avoids the bifurcation of concurrent proceedings into parallel proceedings and related actions. There must be parties who are “in some way related to each other.” This avoids a strict “same parties” definition that can be easily gamed by naming other parties in one or more of the proceedings. The definition includes not only the possibility of fully inconsistent judgments, but of inconsistent outcomes on one or more issues. This allows courts to determine the level and extent of deference to a single court through cooperative proceedings.

2. Avoiding the need to begin any analysis by applying categorical definitions likely to lead to unnecessary additional litigation

In terms of the definition of “concurrent proceedings” at this stage of development, our major goal is to remove the unnecessary and unhelpful bifurcation of concurrent proceedings into “parallel proceedings” and “related actions.” Our Alternative Draft Text thus treats what is naturally a single category—“concurrent proceedings”—as such, without artificial divisions and distinctions. This unified approach to a natural category prevents the opportunity for additional litigation over just which category is involved as well as efforts to game the system in order to place the proceedings in one category or the other for the litigation-strategic benefit of one of the parties. It also removes the need for Chapter II of the Working Group Draft Text, which simply adds too many rigid rules that would tend to encourage further litigation expense and judicial time.

3. Avoiding the creation of unnecessary litigation issues based on differing approaches to jurisdiction

By omitting Chapter II of the Working Group Draft Text, the Alternative Draft Text removes the unnecessary complexity of the Article 8(1) “Jurisdiction/Connection” factors. Using a fact-based approach to the problem being addressed means that the connections a given court has to the case that might in some way be considered jurisdictional in other systems is meaningless. The problem exists when each of two or more courts has a concurrent proceedings case pending before it. The basis for that court’s jurisdiction has nothing to do with whether the problem exists in fact. When each court has jurisdiction under its own legal system of a concurrent proceedings case, the problem exists. The character of the connections between a forum state and the case may have relevance to the decision regarding which is the more appropriate court to determine one or more issues in the case (or the entire case), but it does not remove the problem. Thus, we include reference to that factor in our Article 5 factors for “determination of the more appropriate court.”

Article 6 of the Working Group Draft Text is similarly unhelpful as part of a solution to the problem of concurrent proceedings. Article 6 has multiple brackets and notes, indicating the problems already encountered through nine sessions of the Working Group in determining just how to structure such an article. It would give special priority to a court having certain rules of exclusive jurisdiction, in

particular when the case deals with rights in rem in immovable property. This concept has created continual litigation under the Brussels I regime in the European Union and there is no reason to believe that it will operate better in the more complicated global environment. Once again, the extent to which each judicial system involved considers its connection to the case to result in exclusive jurisdiction is a matter for cooperative determination of the most appropriate court. In complex international litigation, it is likely that one or more issues may involve what may be considered to be exclusive jurisdiction on these grounds but that other matters in the case are better addressed in the courts of another jurisdiction. Our approach allows that to happen while avoiding unnecessary litigation cost and time in determining whether one element of the case that may be a minor matter will automatically require that the case be decided in a court that really is not the more appropriate court.

Article 7 of the Working Group Draft Text as currently drafted would provide a rule giving preference to choice of court agreements that are non-exclusive, but giving no preference to exclusive choice of court agreements. This simply makes no sense. If there is to be a “party autonomy” preference, it should give at least the same weight to exclusive choice of court agreements as it gives to non-exclusive choice of court agreements. It is, of course, possible that all of the States whose courts are involved in concurrent proceedings are also party to the 2005 Hague Convention on Choice of Court Agreements, in which case that Convention would govern the matter. That is a matter for the later article on relationship with other conventions, not a complete omission of the matter from the scope of the Convention. States have already demonstrated that some will become party to some Hague Conventions but not others, and each must have a free-standing operation that can be overridden if all states involved are party to all treaties that might be affected.

Perhaps most significantly, our Alternative Draft Text omits the confusing and conflicting language of Article 9 of the Working Group Draft Text. That provision is intended to state options for determining which court or courts is to make the determination of the more appropriate court in a strict parallel proceedings set of cases. Article 9 is not only difficult to decipher (it is an effort to conflate two totally different proposals), but contains so many brackets and notes as to make it something of a Rubics Cube without colors. It is hard to imagine that anyone who has not been in the Working Group (as well as many who have been) can easily understand that Article.

4. Avoiding unnecessary definitions and rules dealing with the timing of the initiation of proceedings in each court

Article 3(2) of the Working Group Draft Text provides a definition of the habitual residence for “an entity or person other than a natural person.” Once again, this factor has nothing to do with a fact-based approach to whether the problem of concurrent proceedings exists and is thus unnecessary to the Convention. It simply adds nothing useful to the rules to be applied. We have accordingly omitted such a definition from our Alternative Draft Text.

Similarly, Article 4 of the Working Group Draft provides a timing rule for determining when a court is “seised.” A fact-based approach to concurrent proceedings requires no review of when a court became formally engaged in proceedings before it. Moreover, creating a race-to-the-courthouse in order to gain advantage under the Convention is something that should not occur. Providing preference for a race that has the effect of racheting up tensions and making consensual dispute resolution unlikely should not be the work of any good legal instrument. For that reason, we have no rule that gives any preference to getting to the courthouse first (as does one of the complex options under Article 9 of the Working Group Draft Text). The problem exists when two or more courts need to decide the same or similar issues. That is a simple factual situation. We do believe that if one court has progressed significantly with the case before a similar case becomes lodged in another court, that is an important factor that should be considered in determining the more appropriate court, particularly in terms of avoidable expense and vexation. Thus, it is included in our Article 5(2) list of such factors.

5. Encouraging courts to work cooperatively rather than competitively in efforts to determine a single appropriate forum for litigation of common issues

Articles 15-18 of the Working Group Draft Text do provide language leaning toward judicial cooperation and communication. We have kept those provisions in our Alternative Draft Text, but believe something more is necessary. That something more is found in part in removal of the Chapter II provisions of the Working Group Draft Text that tend to set courts at odds with one another by creating unnecessary priorities in terms of connectional rules at the outset and time-based considerations. We believe that, in addition to the beneficial results already described by removal of those rules, their removal will enhance the possibility of judicial cooperation and communication. That does not mean we believe those rules in the Convention are yet what they should be. There should

be further consideration in light of other international legal instruments that have made progress through judicial cooperation and communication. Real conduct of courts in past cases and real rules in existing legal instruments have much to offer in this regard.

VI. Conclusion

The current effort at the Hague Conference on Private International Law offers the possibility of serious real world benefits from a successful convention. However, that convention must clearly identify the existing problem in a fact-based manner; provide clear solutions to the existing problem that can be understood and efficiently applied by generalist lawyers and judges; avoid creating new problems that either prevent the efficient resolution of disputes or encourage strategic manipulation; and be readily acceptable to states in order to achieve ratification and implementation. As we have shown, the Working Group Draft Text has multiple failures and raises unnecessary concerns. We have tried to strip out all those failures and deal with those concerns in our Alternative Draft Text. and put together what can be a building block for successful future work.