A Follow-Up: The German Judges Association's Response to the HCCH Draft Text of a Future Convention on Parallel Proceedings and Related Actions

This post follows up on our earlier observations on the public consultation responses to the HCCH Draft Text of a future Convention on Parallel Proceedings and Related Actions. At the time our overview was prepared, the response of the German Judges Association was not yet available to us among the consultation materials on the HCCH website and could therefore not be included. It has since been made available, and we would like to take this opportunity to briefly add its key points to the discussion, notwithstanding that there are still coming up new responses such as the ones by Jonathan Mance (UK) – „Former Deputy President of UK Supreme Court, Co-Chair of the LC Advisory Committee", the International Association of Consumer Law (IACL) or the Philippine Women Judges Association. We will leave it to others to comment on these.

I. Support in principle

The German Judges Association supports, in principle, the idea of an international instrument on parallel proceedings. This corresponds to the broad overall support for the project identified in our earlier overview. A uniform framework could promote legal certainty and predictability in cross-border litigation beyond the Brussels Ia Regulation.[1]

At the same time, the response is cautious as to whether the current Draft Text can actually meet these expectations, not least in view of constitutional and European standards of access to justice and the right to be heard before the competent court.[2] Its concern is therefore not directed against international coordination as such, but against a coordination mechanism that may rely too heavily on discretion.

II. The core concern: discretion instead of predictability

The central point of the response concerns the relationship between predictability and discretion. From the perspective of German judicial practice, the Draft Text risks replacing the predictability of jurisdiction with judicial discretion. The Association stresses that German and European civil procedure have traditionally relied on clearly defined jurisdictional rules. These rules allow the parties to know in advance which court is competent. According to the Association, this predictability is closely linked to legal certainty, litigation costs, time efficiency and the parties' right to be heard before the court determined by law.[3]

Against this background, the Association views the proposed mechanism of Articles 9 and 10 of the Draft Text with particular scepticism. The "more appropriate court" test is seen as introducing a forum non conveniens-type assessment into a legal environment in which such a discretionary displacement of jurisdiction is not familiar.[4] From this perspective, the concern is also constitutional in nature: jurisdiction should be sufficiently determined by law and should not depend too heavily on a later judicial balancing exercise.[5]

The Association therefore points out that the assessment of the more appropriate forum could establish a time- and cost-consuming preliminary procedure and significantly slow down proceedings, since several examination steps would precede the court's review of the merits.[6] This concern is reinforced by the practical uncertainty surrounding the connecting factors, which are new to German judicial practice and whose application would first have to be developed by the courts.[7] The Association also warns that the connecting factors in Article 10 may lead to an inequality of arms between natural and legal persons, especially in light of changing business relations, complex corporate structures and increasingly globalised transnational operations.[8] Against this background, the Association sees a risk that the mere possibility of another forum being considered more convenient could lead to more satellite litigation and forum shopping than today.[9]

III. What should be done instead?

The German Judges Association therefore pleads for a more rule-based solution. The Draft Text should not replace jurisdictional rules with a broad assessment of the "better" forum, but should preserve the predictability of clear jurisdictional

criteria.[10]

In particular, the Association welcomes the idea that the court first seised should generally be the court to proceed where Articles 6 to 8 of the Draft Text do not resolve the conflict.[11] More specifically, it suggests examining whether the court first seised could be treated as a clearly appropriate forum where its jurisdiction is based on established jurisdictional rules.[12] This would come closer to the Brussels Ia model, which combines priority with foreseeability.

At the same time, if connecting factors are retained, they should be framed narrowly and precisely. The suspension of proceedings under Article 9 should also not be mandatory.[13] Connecting factors should guide the allocation of proceedings, not open the door to a general forum non conveniens-style balancing exercise.

In short: legal certainty should remain the rule; discretionary correction should be limited and exceptional.

IV. Concluding remark

The response of the German Judges Association usefully complements our earlier overview. It confirms support in principle for an international instrument on parallel proceedings, but adds a note of caution from the perspective of German judicial practice. Its central concern is that coordination should not come at the expense of legal certainty and foreseeability. This is particularly relevant for Articles 9 and 10 of the Draft Text, which should remain sufficiently rule-based and compatible with constitutional and European procedural standards.

[1] See Submission by the *German Judges Association*, Response to Question 1.1.

[2] *Ibid*.

[3] *Ibid*.

[4] *Ibid*., Response to Question 8.1.

[5] *Ibid*.

[6] *Ibid*., Response to Question 7.2 and 8.1.

[7] *Ibid*., Response to Question 1.1 and 8.2.

[8] *Ibid*., Response to Question 7.3.

[9] *Ibid*., Response to Question 13.3.

[10] *Ibid*., Response to Question 1.1 and 8.3.

[11] *Ibid*., Responses to Questions 7.1.

[12] *Ibid*., Responses to Questions 8.1.

[13] *Ibid*., Responses to Questions 8.1 and 8.3.