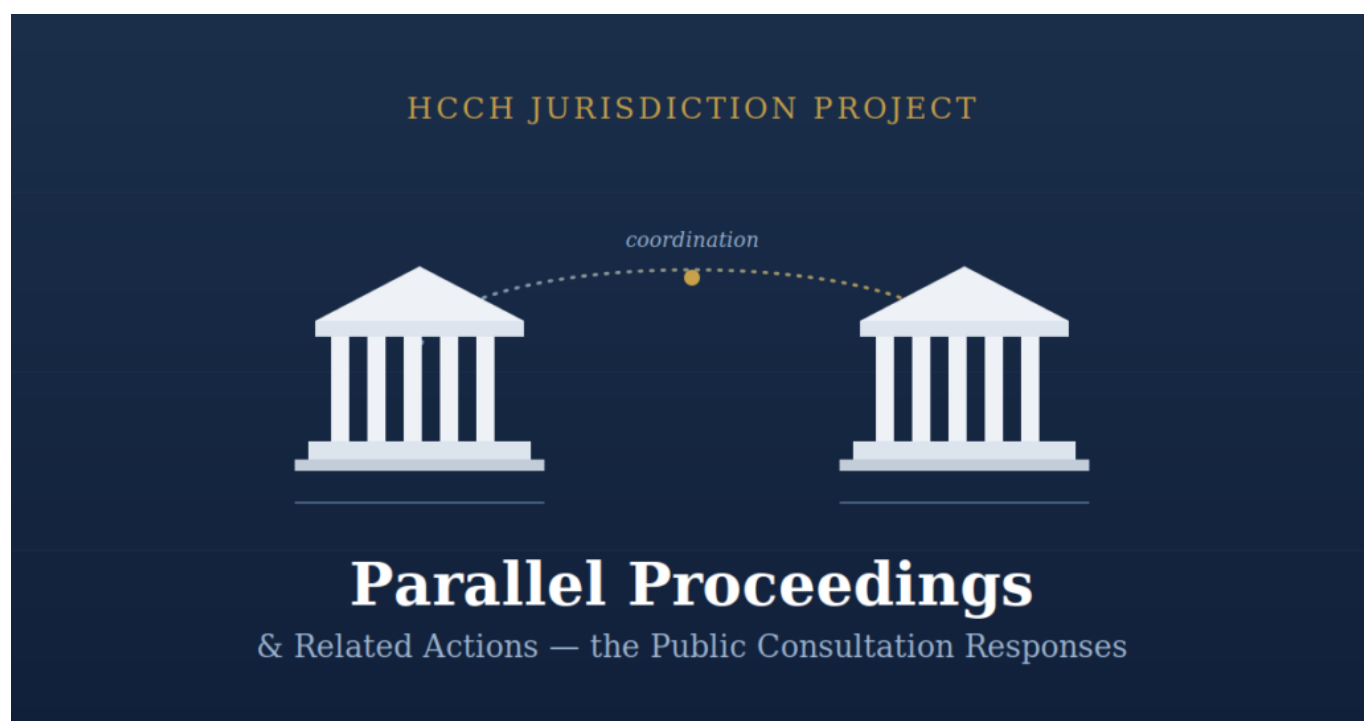


# “Yes, in principle, but not quite there yet...” - Some Observations on the Public Consultation on the HCCH Draft Text of a Future Convention on Parallel Proceedings and Related Actions



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Recently, the Hague Conference on Private International Law (HCCH) published the responses to the public consultation issued in November 2025 (all available on [hcch.net](https://www.hcch.net) here). Whilst each of the 72 reports is valuable in its own right, when viewed collectively they also provide an insight in the general perception of the

HCCH's *Jurisdiction Project*, as it is currently standing. We would like to take this opportunity to highlight certain aspects that are widely agreed upon, as well as others that still remain subject to further debate.

## **I. Broad Overall Support for the Project (in principle ....)**

In principle, the Draft Text received broad support (75% of the responses), but little to none unreserved approval. Roughly 14 submissions are clearly supportive (19.44%),<sup>[1]</sup> whereas the majority of the positive responses (55.56%), while sharing the view that there is a need for a multilateral instrument on the coordination of concurrent court proceedings in general, nonetheless call for further substantive amendments to the Draft Text.<sup>[2]</sup> In contrast, only seven contributions express serious skepticism towards the project (9.72%)<sup>[3]</sup> with seven responses being effectively opposed to its continuation (9.72%).<sup>[4]</sup> Finally, six responses do not take a clear overall stance on the Draft Text (5.56%).<sup>[5]</sup>

## **II. Consensual Points**

### **1. Geographical Scope (Art. 1 (2) Draft Text)**

Almost complete consensus prevailed against the adoption of habitual residency as a further criterion for the geographical scope in Art. 1 (2) Draft Text. It was widely perceived as unjustified, scope-narrowing and impractical. Both, the *Austrian Bar* and *CCBE*, draw the comparison with the difficulties of interpretation regarding the Centre of Main Interest (COMI) in the European Insolvency Regulation. Notably, however, the response from the *Doshisha University* (Japan) defends the requirement as “(1) enhancing the effectiveness and ratifiability of the Convention, and (2) ensuring the predictability for the defendant.”

We share the majority position: As with the HCCH 2019 Judgments Convention, an additional element of habitual residence should be dispensed with. Moreover, it would be counterproductive, as it could jeopardise the applicability of the Draft Text in relation to International Commercial Courts (ICC) as potential proponents of the HCCH Conventions, which regularly promote themselves as neutral dispute resolution centres for non-residents (SIDRA Report 2024, pp. 55 and 57 et seq.).

### **2. Alignment with HCCH 2019**

There is also broad agreement that frictions with the HCCH 2019 Judgments Convention should be avoided, although views differ on the appropriate extent. For example, *Mrs. Justice Julia Dias* (High Court of England & Wales) warns that “any deviation from the Judgments Convention [creates] further complexity and scope for tactical litigation.” In the same vein, the submission from the *PIL Department of the Autonomous University of Madrid* reminds us that the possible future instrument would establish „un sistema internacional completo de Derecho procesal civil transfronterizo.” At the same time, *PEOPIL* states that “[i]t is vital that international legal instruments do not exclude vulnerable parties from the legal certainty that is afforded to commercial parties through international legal instruments and the Hague Convention regime”.

For our part, we read the consistency with the HCCH 2005 and 2019 Conventions as a strength, but consider some of the exclusions premature: in particular, the exclusions of intellectual property and consumer and employment matters should be reconsidered, so that the instrument does not fall short of the very situations in which conflicting decisions often arise. In addition, the jurisdictional filters of Art. 5 HCCH 2019 Judgments Convention cannot simply be transplanted into the framework of Art. 8 (2) Draft Text, but must rather be adapted to the new regulatory context that simultaneously assumes the perspective of two or more courts involved, e.g. through explicit rules on the burden of proof and applicable law for this assessment.

### **3. Addressing Anti-Suit Injunctions**

Furthermore, a significant number of respondents strongly encourage the HCCH to address explicitly anti-suit injunctions in the management of concurrent proceedings under the Draft Text. Yet, while the *German Council on Private International Law* advocates for a complete ban of anti-suit injunctions between Contracting States, *Mr. Justice Andrew Henshaw* (Commercial Court of England & Wales), to the contrary, wants to preserve the ability of the courts to issue such injunctions as an “important means of protecting party autonomy”. As a more nuanced middle ground, the *EAPIL* proposes a provision under which anti-suit injunctions would be excluded only if they conflicted with specific treaty obligations, but would otherwise be permissible (for example, as a procedural remedy in the event that another court itself fails to fulfil its treaty obligations).

In our own response, we suggested an express exclusivity clause. The use of anti-

suit injunctions reflects a deep mistrust in the administration of justice in foreign courts, which is unwarranted between the Contracting States, if not a kind of unilateral judicial “imperialism”. Hence, all Contracting States should be required to refrain from interfering with the functioning of the coordination mechanism – most notably through anti-suit injunctions – thereby putting an end to escalation circles (“ping pongs”) of ASIs, responding AASIs, and again responding AAASIs, which is reality already, and potentially AAAASIs and more in the future. Instead, we should strive for cooperation, perhaps even an adequate degree of mutual trust. A provision implementing such a policy could *inter alia* draw on Art. 13 (2) HCCH 2019 Judgments Convention and Principle 7.1 of the Leuven/London Principles.

#### **4. More Precise Definitions of “Parallel Proceedings”/“Related Actions” (Art. 3 (1) Draft Text)**

Perhaps the most frequently point highlighted in the responses concerns the definitions of “parallel proceedings” and “related actions”. Most commentators are concerned that the drafting of these terms is not precise enough to reliably fulfill their role as gateway questions for the application of the whole legal instrument. For instance, the *ASADIP* and *Özçelik* suggest the inclusion of a “triple identity test” that would also require the existence of the “same object”. With regard to the “same parties”, *Hess* points to the difficulties in the application of that narrow concept in collective redress proceedings. Meanwhile, *Knoll* stresses that a broad wording risks infringing on the privity of contract. Furthermore, the *Australasian Association of Private International Law (AAPrIL)* asks for more clarification on the expression of the “same subject matter”, explicitly, in contrast to the test on “relatedness” test provided for in Art. 3 (1) lit. b) Draft Text. More generally, the *Law Society of Scotland* and *Dasser/Oreiller* emphasise the benefits a formal body vested with the power of authoritative interpretation would bring to the uniform interpretation of the Draft Text.

Here, we agree with most of the arguments put forward. Although the decision to adopt the broader notion of ‘subject matter’ rather than that of the same ‘cause of action’ is to be welcomed, this undoubtedly requires substantial guidance in a future Explanatory Report – potentially, and cautiously, inspired by the case law of the CJEU (*Gubisch*, C-144/86) – so that domestic courts do not simply fall back on the national concepts with which they are familiar. However, given the ambiguities surrounding the interpretation of these gateway terms, we would go

one step further and recommend at least considering replacing the specific frameworks for ‘parallel proceedings’ and ‘related actions’ with an umbrella scheme for ‘concurrent proceedings’ (see below in more detail).

### **III. Contentious Aspects**

#### **1. Need for a Special Instrument**

Some respondents strongly advise against the adoption of an international instrument at all. This sentiment appears to be particularly strong with respondents from common law jurisdictions. For example, *Fentiman* casts serious doubts on whether the issue of concurrent proceedings truly poses a pertinent problem in practice, and argues that, in these rare cases, the provisions existing in national legal systems are more effective than a uniform legal instrument. In this regard, *Rt. Hon. Lord Hamblen of Kersey* (UK Supreme Court) perceives an “increased incentive for parties to instigate tactical litigation”. Complementary, *Dias* expresses the opinion that “all states have their own rules [...] which seem to operate perfectly well in practice”. But commentators from civil law countries, e.g. *Castro* (Mexico) and *Dasser/Oreiller* (Switzerland), also question whether the volume of cases warrants the implementation of a complex instrument. Despite his/her general support for the Draft Text, the *Judge from Korea* also raises the questions whether the project should not better take the form of a protocol to the HCCH 2019 Judgments Convention.

In our view, a binding multilateral instrument is needed precisely to hedge in unilateralistic “weapons” - anti-suit injunctions and torpedo actions - that currently drive unproductive satellite litigation in cross-border disputes. We do, however, share the concern that the practical relevance of the issue should be significant enough to justify yet another HCCH Jurisdiction Convention.

#### **2. Limitation to Contracting States Only (Art. 1 (1) Draft Text)**

Some of the respondents also voiced strong criticism regarding the scope of application. *Fentiman* points to the “incoherent and unacceptable outcome” that the Convention resolves any conflict of jurisdiction “as one between the Contracting States alone [...] without reference to the claim of the non-Contracting State to be the preferable forum”. In addition, *Henshaw* cautions that “[b]ecause the Convention would apply only where parallel proceedings exist in

Contracting States, it would be liable to result in proliferation of litigation”.

In our view, both points of criticism are valid: The second aspect relates primarily to the decision against not to regulate direct grounds of jurisdiction. Nonetheless, a responsible party can still make use of the proposed framework by proactively bringing about a situation of double pendency with another, presumably more appropriate court, thus enabling at least a second-best solution in this regard. The first aspect appears reasonable in the light of the ‘forum non conveniens’ doctrine, which takes into account all potential jurisdictions universally, but is nevertheless applied in a unilateral manner by the court seised. In contrast, the Draft Text strives for the implementation of a common cooperative mechanism that probably requires some degree of reciprocity. Furthermore, the Draft Text, so far, relates only to positive conflicts of jurisdiction. Hence, the courts are not prohibited from declining jurisdiction in favour of a Non-Contracting State under their own rules of procedure.

### **3. Reworking of the List of Connections (Art. 8 Draft Text)**

Few provisions attract such diverse and polarized comments than the list of connections in Art. 8 Draft Text. As this is a “complex provision covering two full pages” that also “entails a double-check of jurisdiction”, *Hess* advocates its complete deletion in favour of a more streamlined version of the mechanism in Art. 9 and 10 Draft Text. Furthermore, *McIntosh* and *Pitel* reject the underlying assumption that a listed connection makes a court the more appropriate forum. Meanwhile, the *Canadian Bar Association* notes that the connection requirements constitute a clear departure from the real and substantial connection test for court to assume jurisdiction. Similarly, *Teo* (Singapore) and *Henshaw*, believe that the list “should certainly be wider”.

For our part, we would retain the list but reconceive its function. The ‘bases for proceedings’ in Art. 8 (2) Draft Text could be drafted to revive *Arthur von Mehren’s* model of a ‘mixed convention’, operating as a ‘white list’ of admissible grounds. Such an approach would remain consistent with the HCCH 2019 Judgments Convention if the catalogue of ‘bases for proceedings’ in Article 8(2) of the draft text were attributed the presumptive effect of being an ‘appropriate jurisdiction’ for the dispute, which could then be rebutted if the parties or the foreign court proved that their jurisdiction was also or even ‘clearly more appropriate’.

## **4. Determination Framework of the “More Appropriate Court” (Art. 9 Draft Text)**

Given that the HCCH itself explicitly recognised the need to ask which of the two mechanisms for determining the more appropriate court was preferred, it is not surprising that the responses differ significantly. First, a plurality leans towards primarily giving the determination to the court first seised, whilst the other courts are reserved the option to depart from that determination under certain conditions at a later stage [Approach 1]. Proponents of this view, such as *Gomaa* and *Tsirat*, underline legal certainty and the avoidance of forum shopping as their reasons. Second, a smaller group prefers to allow any court to primarily carry out that determination while the court first seised is not required to deal with this question at any time [Approach 2]. Among others, the *Pontifical Catholic University of Rio de Janeiro* considers this approach to be more consistent with the principle of sovereign equality of States. Scholars from the *Dalian Maritime University* (China) also warn that the criteria are “very likely to be ‘localized’ interpreted by domestic courts”. Third, a substantial part consider both approaches flawed, as they either embed an ‘irrational’ preference for the court first seised or permit continued parallel determinations. The *Law Reform Institute* (USA) also stresses that the first approach creates tactical incentives to file suit in a slow forum. For these reasons, the *EAPIL* proposes a hybrid approach that combines the strong features of both approaches.

Our own position comes down clearly in favour of the first approach. In our view, it is crucial to the success of the instrument that the courts involved be encouraged to discuss the situation of parallel proceedings pro-actively, and the passive role assigned to the court first seised under the second approach would be detrimental to precisely that objective. On this reading, the court first seised would not enjoy any priority of outcome, but merely the advantage of being the first to give its opinion on the ‘more appropriate court’ – a benchmark with which the other courts would then have to contend. That court should, however, expressly retain the option of concluding that allowing the concurrent proceedings to continue is in the best interests of the administration of justice, subject to a certain threshold so as to prevent its misuse as a simple way out.

## **IV. Outlook**

The HCCH Council on General Affairs and Policy (CGAP) has deliberately decided

to make the future of the *Jurisdiction Project* contingent on the outcome of the public consultation (as reported on *col.net* here). In our opinion, the responses received show that there is still considerable interest from various parts of the world in continuing the project, whilst also indicating that the Draft Text still requires in-depth discussion and substantial amendments before it is finalised. At present, the overall sentiment can probably best be described as: “Yes, in principle, but not quite there yet...”

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[1] See Submission by *María Susana Najurieta* (University of Buenos Aires – Argentina), Question 13.2: “No todas las normas, pero una buena parte de ellas mejorarían el status quo”; Submission by the *Austrian Bar* (ÖRAK – Austria), Question 14; “in most instances, a step towards enhancing legal certainty, predictability, and access to justice”; Submission by *Mohamed Gomaa* (Ministry of Justice – Egypt), Question 13.2: “Yes, significantly.”; Submission by the *German Council on Private International Law* (PIL Council – Germany ), para. 10: “limitations of the existing EU rules highlight the advantages of a multilateral instrument” (Authors: Martin Gebauer, Wolfgang Hau); Submission by *Odín Alberto Guillén Leiva* (National Autonomous University – Honduras), Question 13.1: “La intención de la Convención está bien plasmada y desarrollada en el proyecto”; Submission by *Teresa Sergi* (Attorney at Law – Italy), Question 14: “it is hoped that the Draft Text will be implemented”; Submission by *Takasugi Naoshi/Choi Jaewon/Kawato Yuriko/Shinohara Rena/Yamamoto Taiga* (Doshisha University – Japan), Question 13.1: “[T]his draft Convention ensures legal clarity”; Submission by *M.F.J.N. (Tijn) van Osch* (IAJ/UIIM – The Netherlands), Question 1.1: “I think it is a good and honest effort”; Submission by the *Nigerian Group on Private International Law* (NGPIL – Nigeria) (Authors: Onyoja Momoh, Chukwuma Okoli, Abubakri Yekini, Pontian Okoli, Chukwudi Ojiegbe); Submission by the *Judge from Panama I* (Judge – Panama), Question 13.2: “El Proyecto ayudaría porque ofrece una metodología más clara para identificar el tribunal más apropiado, favorece la coordinación entre tribunales, y refuerza la predictibilidad para las partes”; Submission by *Rosa Lima* (High Judicial Council – Portugal), Question 1.1: “Very positive opinion”; Submission by *Lai Lai-Kuan* (Private International Law Association – Taiwan), Question 1.2: “This integrated approach, which incorporates diverse national legislative practices, is a highly commendable

model for international legislation”; Submission by *Gennadii Tsirat* (Attorney at Law/National University of Kyiv - Ukraine), Question 13.1: “The rules provided for in the Draft should achieve the goals of the future instrument.”; Submission by *Eduardo Vescovi* (Universidad de la República - Uruguay), Question 14: “Corresponde en primer lugar felicitar a la Conferencia de la Haya por el abordaje de un tema de importancia primordial, y cada vez más frecuente en la realidad actual”.

[2] See Submission by the *American Association of Private International Law* (ASADIP - Americas); Submission by *IntLaw LLP* (Argentina); Submission by *María Blanca Noodt Taquela/Carolina Daniela Iud* (University of Buenos Aires - Argentina); Submission by *Australasian Association of Private International Law* (AAPrIL - Australasia); Submission by *Burkhard Hess* (University of Vienna - Austria/Germany); Submission by *Dorothee Vermeiren* (Clifford Chance LLP - Belgium); Submission by *Lotte Vanfraechem* (Business lawyer - Belgium); Submission by the *Brazilian Federal Judge* (Judge - Brazil); Submission by *Nadia de Araujo/ Daniela Vargas/ Lauro Gama/Theophilo Miguel/Lidia Spitz* (Pontifical Catholic University of Rio de Janeiro - Brazil); Submission by *Dalian Maritime University* (DMU - China); Submission by *Chinese legal professional* (Legal professional - China); Submission by *Guojian Xu* (Shanghai University of Political Science and Law - China); Submission by *Du Tao* (East China University of Political Science and Law - China); Submission by the *Council of Bars and Law Societies of Europe* (CCBE - Europe); Submission by the *European Association of Private International Law* (EAPIL - Europe); Submission by *Philippine Blajan/Sandrine Clavel/Fabienne Jault-Seseke* (Paris-Saclay University/UVSQ - France); Submission by *Matthias Weller* (University of Bonn - Germany); Submission by *Stephan Madaus* (Martin-Luther-University Halle-Wittenberg - Germany); Submission by *Hungarian Judge* (Judge - Hungary); Submission by *David Knoll* (AYR - Israel); Submission by *Gaetano Vitellino* (Università Carlo Cattaneo - Italy); Submission by *Vilnius University / MOTIEKA* (Lithuania); Submission by *María Virginia Aguilar* (Practitioner - Mexico); Submission by *Aarushi Sahrawat* (Practitioner - Netherlands); Submission by *Vesna Lazic* (Utrecht University / T.M.C. Asser Institute - Netherlands); Submission by the *(Anonymous) Judge from Panama II* (Judge - Panama); Submission by *Associação Ius Omnibus* (AIO - Portugal); Submission by *Korean Judge* (Judge - Korea); Submission by *Iuliana Boghez* (Legal adviser - Romania); Submission by *Vladimir Kostsov/Ivan Zinovich/Mikhail Galperin* (ICLRC - Russia); Submission by the

*Faculty of Advocates* (FOA - Scotland); Submission by *Alan K Koh/Shouyu Chong* (Nanyang Technological University/University of Leeds - Singapore); Submission by *Marcus Teo* (NUS - Singapore); Submission by the *Department of Private International Law, Autonomous University of Madrid* (UAM - Spain) (Members: Pilar Dominguez Lozano, María Jesús Elvira Benayas, Laura García Gutiérrez, Francisco José Garcimartín Alférez, Iván Heredia Cervantes, José Ignacio Paredes Pérez, Elena Rodríguez Pineau, Elisa Torralba Mendiola y Jaime Vázquez Garcia); Submission by *Gülüm Özçelik* (Bilkent University - Türkiye); Submission by *Law Reform Institute* (NPO Organisation - United States); Submission by *Stutee Nag* (Cross-Border Family Law practitioner - United States); Submission by *William Sullivan* (Practitioner - United States); Submission by *Eugenio Hernández-Bretón/Claudia Madrid Martínez/José Antonio Briceño Laborí* (Academia - Venezuela); Submission by *Tung Xuan Le* (Legal researcher - Vietnam).

[3] See Submission by *Stephen Pitel* (Western University - Canada); Submission by the *Canadian Bar Association* (Canada); Submission by *Leonel Pereznieto Castro* (Retired academic - Mexico); Submission by *Maura McIntosh* (Herbert Smith Freehills Kramer - United Kingdom); Submission by *Academic* (Academia - United Kingdom); Submission by *Sir Andrew Henshaw* (Commercial Court of England and Wales - United Kingdom); Submission by *Sarah Garvey/Sarah Shearman* (Mayer Brown International LLP - United Kingdom).

[4] See Submission by *Janet Walker* (Osgoode Hall Law School- Canada), Question 13.3: “The race to judgment might merely be replaced by a race to the courthouse.”; Submission by *Pan-European Personal Injury Lawyers* (PEOPIL - Netherlands), Question 13.3: “We are concerned by the scope for tactical and satellite litigation which would be introduced by this Convention”; Submission by *Felix Dasser/Sébastien Oreiller* (University of Zurich/Homburger - Switzerland), Question 14 (3): “In sum, the project should be discontinued. We are surprised and frankly dismayed that such notoriously inefficient common-law concepts should be adopted for a global convention. The Hague Conference should know better.”; Submission by *Richard Fentiman* (University of Cambridge - United Kingdom), Question 14: “The avoidance of parallel proceedings may be an issue which is inevitably best left to national law.”; Submission by *Julia Dias* (High Court of England and Wales - United Kingdom), Question 13.1: “The draft convention seems to be a solution in search of a problem.”; Submission by the *Rt. Hon. Lord Hamblen of Kersey* (UK Supreme Court - United Kingdom),

Question 13.2: “Regrettably I am of the view that the convention would not improve the status quo and potentially be to its detriment”; Submission by *Stewarts Law LLP* (United Kingdom), Question 13.2: “[W]e do not think the proposed Convention would improve the status quo.”.

[5] Submission by *Chinese Judge* (Judge - China); Submission by *SUN Jin* (Legal professional - Hong Kong SAR); Submission by *Family Law Bar Association* (England and Wales - United Kingdom); Submission by *Law Society of Scotland* (United Kingdom).