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## A Further Look at a Hague Convention on Concurrent Proceedings

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# A FURTHER LOOK AT A HAGUE CONVENTION ON CONCURRENT PROCEEDINGS

Paul Herrup and Ronald A. Brand

## Abstract

The current project of the Hague Conference on Private International Law has reached a critical juncture that requires careful consideration of the terms that delineate the scope of the proposed convention. Work to date has not followed the mandate of the Council on General Affairs and Policy to produce a convention that would deal with concurrent proceedings, understood as including pure parallel proceedings and related actions. In two previous articles we have addressed the practical needs that should be addressed by the concurrent proceedings project and the general architecture of such a convention. The process is now mired in terminological confusion that has hampered progress on a practical result. Differing interpretations of the directions given to those doing the work has led to situations in which the participants have been speaking past each other. In this article, we provide a reminder of the common law/civil law divergence of approaches to concurrent litigation; review the approach taken in the EU's Brussels I (Recast) Regulation and the problems it has created; and offer suggestions regarding the proper scope and architecture of a global convention addressing the problem of concurrent proceedings.

**Keywords:** Hague Convention; private international law; concurrent proceedings; international law; treaties; comparative law; European Union Law; international economic law; international trade law; conflict of laws; forum non conveniens, lis pendens; jurisdiction, judgments recognition; Hague Conference on Private International Law

## A FURTHER LOOK AT A HAGUE CONVENTION ON CONCURRENT PROCEEDINGS

Paul Herrup and Ronald A. Brand<sup>1</sup>

### I. Introduction

The Hague Conference on Private International Law (Hague Conference) has convened work to produce a convention that, on its present terms, would deal with “concurrent proceedings, understood as including “parallel proceedings” and “related actions.” Both subcategories address cases which have some feature of “relatedness” that are brought in courts in multiple countries.

In two previous articles, we have addressed the concurrent proceedings project. In the first article we discussed the need for rules that would enhance litigation efficiency and fairness by designating a “better forum” in which to concentrate proceedings when courts in more than one state are seized with the same or related claims under their own jurisdictional rules.<sup>2</sup> In the second article we addressed the general architecture of an effective instrument geared to solve the problems actually created by

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<sup>2</sup> Paul Herrup and Ronald A. Brand, *A Hague Convention on Parallel Proceedings*, 63 HARV. INT’L L. J. ONLINE 1 (2022).

“concurrent” proceedings in transnational litigation.<sup>3</sup> Where possible and reasonable, such litigation should be concentrated in a “better forum” determined by criteria understandable to and workable by generalist judges and litigators. This will require criteria to determine the “better forum” in which litigation will be concentrated: and mechanisms to move cases to that forum.<sup>4</sup>

The process at The Hague has continued, but without clear hope for a successful result, making it appropriate to assess further just what might be possible in order to solve problems of cases in the courts of several countries that multiply the costs of litigation, have disproportionate effect on weaker parties, drain court time and resources, and can give rise to conflicting results. Serious terminological confusion has hampered progress from the outset. This is evident in the differing interpretations of the directions given to those doing the work and has led to situations in which the participants have been speaking past each other, assigning different meanings to common terms. In addition, shifting meanings in the use of terms has enabled an exclusive focus on a particular litigation posture (same parties/same subject) that does not constitute the heart of real-world concurrent proceedings problems.

The project has reached a critical juncture that poses inter-related significant questions of Convention architecture and the terms

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<sup>3</sup> Paul Herrup and Ronald A. Brand, *A Hague Parallel Proceedings Convention: Architecture and Features*, 2 CHICAGO J. INT’L L. ONLINE 1 (2023).

<sup>4</sup> We have recommended that the instrument include five architecture elements: (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. *Id.*

that delineate the scope of the Convention. In this article, we address this combination of questions based on the need to consider real problems in real cases, rather than being held captive by theoretical constructs. We begin with a reminder of the common law/civil law divergence of approaches to concurrent litigation, indicating the problem that is the focus of the Hague Conference negotiations. We then briefly set out the institutional context of the negotiations. We follow with a discussion of the principal existing legal instrument with rules designed to address concurrent proceedings: The Brussels I (Recast) Regulation of the European Union.<sup>5</sup> That example, which has provided a template for some aspects of the Hague Conference project, demonstrates serious problems with a focus on only “pure parallel proceedings” (even though the Recast of the Brussels I Regulation in 2012 included related actions as well). Consideration of the Brussels I (Recast) Regulation and the problems it has created, even within the circumscribed ambit of the European Union, allows us to offer suggestions regarding the proper scope and architecture of a global convention addressing the problem of concurrent proceedings.

## II. Current Approaches to Concurrent Proceedings

The problem of concurrent proceedings is addressed differently in different legal systems. The traditional common law approach is to allow parallel proceedings, but to give courts discretion to dismiss a case in favor of a more appropriate forum under the doctrine of *forum non conveniens*.<sup>6</sup> Because *forum non conveniens* operates relatively

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<sup>5</sup>Regulation (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.

<sup>6</sup>RONALD A. BRAND & SCOTT JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS, 3 CILE Studies (Oxford University Press 2007).

infrequently, the result is that cases are adjudicated to judgment, with conflicting results sorted out at the stage of recognition and enforcement of the judgment (usually the first judgment). This can create unnecessary duplication of litigation and a race to judgment – with that judgment then being used to cut off or otherwise curtail further proceedings in the other court. The traditional civil law approach involves the application of “first in time” rules that give preferences to the court first seised, with an obligation on other courts to stay or dismiss proceedings. This predictably results in a race to the courthouse to cut off adjudication in other courts, even if another court is better positioned to dispose of the dispute with lower costs and burdens of litigation.

### III. The Foundations of the Hague Conference Project

After completion of the 2019 Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters (Judgments Convention), the Hague Conference Commission on General Affairs and Policy (CGAP) directed an existing “Experts’ Group on Jurisdiction” to continue its work by reviewing how different legal systems deal with “parallel proceedings and, in particular, issues pertaining to related actions or claims.”<sup>7</sup> Thus, in 2020, the term “parallel proceedings” apparently included “related actions or claims” with related actions or claims as the focus of attention. In 2021, CGAP mandated the establishment of a Working Group to follow up, with a “focus on developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims).”<sup>8</sup> The 2021 mandate shifted the terminological foundations

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<sup>7</sup> Hague Conference on Private International Law, Council on General Affairs and Policy (CGAP) Conclusions & Decisions (3-6 March 2020) paras 12-13, *available at* <https://assets.hcch.net/docs/70458042-f771-4e94-9c56-df3257a1e5ff.pdf>.

<sup>8</sup> Hague Conference on Private International Law, Council on General Affairs and Policy (CGAP) Conclusions & Decisions (March

of the project from a broad understanding of “parallel proceedings” that encompassed “related actions or claims” to “concurrent proceedings,” defined to include “parallel proceedings” and “related actions or claims” as two separate sub-sets. That Working Group has continued its efforts, with its mandate from CGAP being renewed in 2022 and 2023.<sup>9</sup>

The Working Group mandate clearly describes the type of proceedings to be addressed by the Convention as “concurrent proceedings,” with that term then parenthetically defined to include both “parallel proceedings” and “related actions or claims;” terminology that has been consistent in the mandate since 2021.<sup>10</sup> This contrasts with the tendency of many involved in the process to use the term “parallel proceedings” to describe the project as a whole (taken as cases involving the same parties and the same “subject matter” and that are different somehow from “related actions or claims, and that certainly is different from the meaning of “parallel proceedings” in the 2020 direction to the Experts Group”). Indeed, this is how Article I of the current draft text narrowly defines the scope of the Convention (something that is notably contrary to the CGAP mandate to the Working Group).<sup>11</sup> In our discussion, in order

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2021) para 9(b), *available at* <https://assets.hcch.net/docs/94e2d886-1cbf-4250-b436-5c1899cb942b.pdf> (CGAP Mandate).

<sup>9</sup> Hague Conference on Private International Law, Council on General Affairs and Policy (CGAP) Conclusions & Decisions (March 2022) para 7, *available at* <https://assets.hcch.net/docs/e4f07d85-7a2e-4105-970c-1bd93ea6186d.pdf>, and Hague Conference on Private International Law, Council on General Affairs and Policy (CGAP) Conclusions & Decisions (March 2023) para 9, *available at* <https://assets.hcch.net/docs/5f9999b9-09a3-44a7-863d-1dddd4f9c6b8.pdf>

<sup>10</sup> 2021 CGAP Mandate, *supra* note 8.

<sup>11</sup> The 2023 Report of the Working Group to CGAP includes the draft text in the Annex (2023 Draft Text) and contains the following Article on scope:

to reduce confusion, we will refer to the litigation situation involving same parties and same causes of action/subject matter as “pure parallel proceedings.”<sup>12</sup> The concept of “related action” so far remains undefined and unexplored in the Working Group, and the broader concept of concurrent proceedings is nowhere to be found in the Working Group draft text, despite its status as the clear focus of the Working Group mandate, and despite the original charge to the Experts’ Group to focus attention on related actions or claims.

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## Article 1

### Scope

1. The provisions in this text shall apply to parallel proceedings in the courts of different Contracting States in civil or commercial matters. The provisions in this text shall not extend in particular to revenue, customs or administrative matters.

2. [The provisions in this text shall apply to parallel proceedings if [any of] the defendant[s] of [any of] the proceedings in a court of a Contracting State is habitually resident in another Contracting State.]

3. For the purpose of the provisions in this text, “parallel proceedings” means any proceedings in courts of different Contracting States between the same parties [on the same subject matter].

Hague Conference on Private International Law, Working Group on Jurisdiction: Report, Prel. Doc. No 2 of February 2023, *available at* <https://assets.hcch.net/docs/fd997e67-381e-47f1-9ff8-74c28e2faf68.pdf>.

<sup>12</sup> We also will avoid use of the phrase “lis pendens” which at times is used to describe a particular litigation situation, namely, the situation in which two or more courts are presented with cases involving the same parties and the same causes of action, and at other times is used to describe a particular rule that purports to resolve such situations, namely a rigid requirement that the court seized first in



#### **IV. The Brussels I (Recast) Regulation and Concurrent Proceedings**

##### **A. General Framework**

The Brussels I (Recast) Regulation is focused primarily on unifying rules of jurisdiction and the recognition of judgments within and among the Member States of the European Union.<sup>13</sup> Articles 29-34 of the Regulation deal with the matters now being considered at the Hague Conference. They are contained in Section 9 of Chapter II, which is titled “Lis pendens – related actions.” Articles 29 and 30 address litigation involving courts of different Member States. Article 29 addresses situations in which the proceedings involve “the same cause of action and between the same parties,” while 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 several courts. Article 32 provides criteria autonomous to the Regulation for when a court is “seised” of a “proceeding,” which is a critical component of a unified rule based on deference to the first court seised. Articles 33 and 34 provide rules 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. Article 34 applies a similar limited discretionary deferral in related actions in non-Member States.

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time will proceed to adjudication and other courts will stay or dismiss the cases before them.

<sup>13</sup> Chapter 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. *Id.*

## **B. Same Parties and Same Cause of Action**

Section 9 contains two articles addressing the situation “where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States.” 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) provides 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.”

## **C. Related Actions**

Articles 30 and 34 of the Brussels I (Recast) Regulation parallel the rules of Articles 29 and 33, but addresses 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”).<sup>14</sup> If both courts are in EU Member States, Article 30(1) gives the court

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<sup>14</sup> Brussels I (Recast) Regulation art. 30(3).

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.”

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. 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 Member States of a Hague Convention may be more similar to those between States of the European Union and third States than to those among Member States of the Union. Thus, the rules in Articles 29-32 of the Brussels Regulation may be of limited utility in constructing a Hague Convention. Moreover, there are other problems with the Brussels structure to be discussed more fully below.

#### **D. Concerns Raised by the Brussels I Rules on Concurrent Proceedings**

##### **1. The Case Law**

This history of these provisions in what is now the Court of Justice of the European Union (CJEU – formerly the European Court

of Justice (ECJ)) do not afford any encouragement for transplanting such rules into a global convention text.

The early case of *Gubisch Maschinenfabrik KG v Palumbo*,<sup>15</sup> held 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 pure parallel proceedings (same parties, same cause of action), 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 causes of action, would create significant uncertainty and significantly add to the burdens and expense of litigation.

In *The Tatry*,<sup>16</sup> the Court held a negative declaratory action to have 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 seised. This reasoning was extended 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 rules of special jurisdiction.<sup>17</sup> The other half of the same parties/same cause of action creates further problems in light of the Court’s holding in *Drouot Assurances SA v Consolidated Matallurgical Ind.* that an insured and the 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.<sup>18</sup>

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<sup>15</sup> Case 144/86 [1987] ECR I-4861.

<sup>16</sup> Case C-406/92, *The Tatry* [1994] ECR I-5460.

<sup>17</sup> Case C-133/11, *Folien Fischer AG v Ritrama SpA* [2012] ECLI:EU.

<sup>18</sup> Case C-351/96, *Drouot Assurances SA v Consolidated Matallurgical Ind.*, [1998] ECR I-3075.

The Court of Justice further complicated the required analysis in *Gantner Electric GmbH v Basch Exploitatie Maatshappii BV*,<sup>19</sup> by holding that Article 29 may not apply even where there are same parties and 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, and in *Maersk Olie & Gas A/S v Firma M de Haanen W De Boer*, by ruling that an action to establish liability and an action seeking to limit liability were not the same cause of action under Article 29.<sup>20</sup>

The Opinion of Advocate General Lenz in *Owens Bank Ltd v Bracco*,<sup>21</sup> suggested an interpretation of “related actions” under Art 30 that would 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].<sup>22</sup>

. The Recast Regulation 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

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<sup>19</sup> Case 111/01, [2003] ECR I-4207.

<sup>20</sup> Case C-39/02, [2004] ECR I-9657.

<sup>21</sup> Case C-129/92, [1994] ECR I-117, Opinion, paras 74-79.

<sup>22</sup> *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.”

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 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.

That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction.

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 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 the lack of pure parallel proceedings cases that reach judicial decision.

## 2. The Commentary

As noted above, 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 in a manner that results in fairness to the parties involved. The commentary on these provisions identifies one

such problem, that of encouragement to negative declaratory judgments.

In THE BRUSSELS I REGULATION RECAST, edited by Andrew Dickinson and Eva Lein,<sup>23</sup> the discussion of the relevant articles notes the importance of the 1994 decision in *The Tatry*,<sup>24</sup> 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 Brussels I Convention.<sup>25</sup> 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 law equating claims for negative declarations to claims for positive relief in the operation of the Regulation’s rules of jurisdiction.<sup>26</sup>

Concern about the operation of these provisions is similarly stated in the other major treatise on the Regulation, edited by Ulrich Magnus and Peter Mankowski.<sup>27</sup> The discussion in that treatise notes that Articles 19 and 30 “have given fresh impetus to the practice of seeking negative declaratory relief,”<sup>28</sup> going on to state:

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<sup>23</sup> THE BRUSSELS I REGULATION RECAST (Andrew Dickinson & Eva Lein eds., Oxford University Press, 2015).

<sup>24</sup> Case C-406/92, *The Tatry* [1994] ECR I-5460.

<sup>25</sup> Case C-406/92, *The Tatry* [1994] ECR I-5460, para 42.

<sup>26</sup> Dickinson & Lein, *supra* note 23 at 323, *citing* Case C-133/11, *Folien Fischer AG v Ritrama SpA* [2012] ECLI:EU: C:2012: 664.

<sup>27</sup> BRUSSELS IBIS REGULATION: COMMENTARY (Ulrich Magnus & Peter Mankowski, eds., Sellier European Law Publishers, 2016).

<sup>28</sup> *Id.* at 719.

[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.<sup>29</sup>

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. 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."<sup>30</sup> The Dickinson & Lein treatise uses headings with the term "related actions" for its discussion of all of Articles 29, 30, 33, and 34,<sup>31</sup> indicating a view that "pure parallel proceedings" actually are a sub-set of related actions. Thus, there

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<sup>29</sup> *Id.* at 719-20.

<sup>30</sup> Magnus & Mankowski, *supra* note 27 at 713.

<sup>31</sup> Dickinson & Lein, *supra* note 23, at 324, 331, and 346.



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.

#### **IV. Systemic Flaws in the Current Hague Approach**

Thus far the Hague Working Group has confined itself to “pure” parallel proceedings, *i.e.*, those involving the same parties and the same causes of action/subject matter. It is our view that an instrument of such narrow scope is not needed, is of dubious utility, is based on a flawed model from the Brussels I (Recast) Regulation and will distort work on the more important component of the project, related actions.

First, there has been no showing – and no attempt to show -- that pure parallel proceedings so defined pose serious problems in transnational litigation. Indeed, there has been no showing of how many such “pure” situations actually exist, and much reason to doubt their frequency. 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 upon our experience and anecdotal accounts, suits brought in different countries are not likely to have an 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.<sup>32</sup> Furthermore, it is not clear that even where pure parallel proceedings exist, courts have particular problems in dealing with pure parallel proceedings

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<sup>32</sup> See 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).

through application of national law and a dollop of common sense. We do not need an instrument – particularly a complicated instrument – to solve such problems as may be created by pure parallel proceedings in transnational litigation.

Second, a pure 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 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 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, providing preference for exclusive jurisdiction under an exclusive choice of court agreement (except in consumer, employment, and insurance cases).<sup>33</sup> When a rule is based on the time when each court is “seised,” it also requires a further rule to determine just when that occurs. Thus, Article 32 provides for determining when a court is

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<sup>33</sup> Case C-116/02, *Erich Gasser GmbH v MISAT Srl*, [2003] ECR I-14963.

seised, focusing on “when the document instituting the proceedings or an equivalent document is lodged with the court.”

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.

Indeed, there are real dangers in attempting to start with the deceptively simple case of pure parallel proceedings in building an instrument that actually will do useful work. Rules for determining the better forum in simple mirror image cases may not extrapolate easily or well to the more complex but real-world situations of related actions. Those working on the project might well find themselves boxed-in by an improvident starting point. This difficulty in turn may lead to a bifurcated structure of one set of complicated rules for determining the better forum in pure 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. 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 pure parallel proceedings, rather than developing rules for pure parallel proceedings that do not solve significant problems and cannot be generalized to solve problems that actually require solution.

Finally, there is a general, jurisprudential point that must be considered here. We are unaware of any attempt to show that pure parallel proceedings have inherent characteristics that make them a meaningfully different class from related actions. Simply put, they are one type of related action. 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.<sup>34</sup>

Ultimately, a Hague Convention is a “success” only if it is widely ratified and properly applied. Given the flaws in the current approach, prospects for either wide ratification or proper application appear dim.

## V. A Way Forward

The Hague Conference may find itself in a cul-de-sac if the Working Group does not shift to a broader related actions Convention consistent with the CGAP mandate to focus on “concurrent proceedings” and principally “related actions,” (consistent with the 2020 CGAP mandate and directions). Indeed, there may be great benefit in avoiding that cul-de-sac by beginning with a definition of “concurrent proceedings” which does not enshrine the artificial distinction between “pure parallel proceedings” and “related actions.” Such work needs to be considered in a serious, sustained, and open-minded way. An instrument that begins with concurrent proceedings in a broad sense, as discussed below, will address a serious problem in transnational litigation, will not be subject to manipulation by pleading to the same extent as an instrument based upon an artificial category of pure parallel proceedings, is more likely to generate

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<sup>34</sup> 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.

simple rules that are widely applicable, and may succeed in providing some relief of the burdens of transnational litigation to smaller persons and to beleaguered court systems.

A first step in this necessary work on concurrent proceedings is attention to the scope of the concept, and the terms in which the scope is expressed. In particular, the scope term “related actions” needs to be carefully defined based upon the empirical consideration of whether a core set of facts ties the claims and parties together. This already is the approach taken by the European Court of Human Rights in its analogous “ne bis in idem” jurisprudence, which has worked well for decades and was devised to replace more legally-focused criteria that had proven their difficulties.<sup>35</sup>

Given these concerns, we propose to define “concurrent proceedings” as “proceedings in the courts of more than one state involving facts that are the same or so inextricably linked together in time and space that the proper administration of justice weighs in favor of resolution in a single forum.”<sup>36</sup>

Given a concern for the proper administration of justice in the role of the Convention, we also propose that the Convention provide that

Each court should assess all the circumstances of the case before it. Such circumstances may include the burdens on the litigants and the courts resulting from adjudication in its own

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<sup>35</sup> See, e.g., *Case of Sergey Zolotukhin v. Russia*, European Court of Human Rights, Application No. 14939/03, 10 February 2009.

<sup>36</sup> This definition is inspired by and adapted from European instruments and case law, notably Section 9 of the Brussels I (Recast) Regulation, specifically Articles 29 and 34, and paragraph 24 of the Recitals, and the European Court of Human Rights decision in *Case of Sergey Zolotukhin v. Russia*, Grand Chamber, Application No. 14939/03, 10 February 2009. The inclusion of this definitional scope provision may make unnecessary many complicated provisions regarding priority factors otherwise involved in determination of a better forum.

court, the stage to which proceedings have progressed in the case before it, the time required to bring the case before it to judgment, the likelihood that its judgment will result in a full resolution of the claims arising from the facts that give rise to the existence of a concurrent proceeding.<sup>37</sup>

With this terminology, it is our position that the Working Group at the Hague Conference should be developing a Convention on Concurrent Proceedings. As noted above, this is what the clear mandate from CGAP requires of the Working Group. Moreover, that mandate is limited to this subject, and does not go further into the realm of developing rules on direct jurisdiction in this Convention.<sup>38</sup>

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<sup>37</sup> Note that such a provision may not be necessary if the Convention includes a stand-alone provision on recognition and enforcement of judgments from the court determined to provide the better forum. The language is similar to Recital 24 of the Brussels I (Recast) Regulation. The inclusion of a provision on recognition and enforcement is a matter beyond the scope of this article.

<sup>38</sup> See Herrup and Brand, *supra* note 2.