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The application of Brussels I (Recast) in the legal practice of EU Member States Synthesis Report

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1. Introduction

The ‘Brussels regime’ on international jurisdiction and recognition and enforcement is the oldest and most used EU instrument on private international law, now headed under the judicial cooperation in civil matters of Art. 81 of the Treaty on the Functioning of the European Union (TFEU). Starting 50 years ago with the adoption of the Brussels Convention in 1968 and having undergone a number of changes on the occasion of the accession of new Member States, the Brussels I Regulation and now the Brussels I recast Regulation, no 1215/2012 (hereafter Brussels I-bis Regulation)⁶ has acquired a firm place in European litigation. Following the evaluation of the Brussels I in the Heidelberg report⁷, the Commission proposal of 2009 and intensive negotiations, the Brussels I bis Regulation was adopted on 12 December 2012. It became applicable on 10 January 2015, allowing Member States and legal practitioners two years to prepare for the necessary implementation of and familiarization with the new rules. Key issues and the subject of this study are the extension of some of the jurisdiction rules (in particular consumer and employment rules), amendments to the choice of forum provision and

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⁶ 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, Official Journal L 351, 20.12.2012, p. 1–32. See Article 81 for the entry into force.

⁷ B. Hess, T. Pfeiffer and P. Schlosser, *The Brussels I Regulation 44/2001. The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03)*, Munich: Verlag C.H. Beck 2008.

the *lis pendens* rules, and the abolition of *exequatur* for the purpose of the enforcement of judgments. The aim of this study on ‘The application of Brussels I (Recast) in the legal practice of EU Member States’ is to evaluate how these amended rules function in practice, to map the problems national legal orders face when applying new EU legislation on private international law and to identify any obstacles to the application of the Brussels I-bis Regulation. This report is a synthesis of the results and findings of the study. The project was funded by the Justice Programme (2014-2020) of the European Union.

The project used various approaches to pursue these objectives. Data collection took place in various ways. Case law from the national courts on Regulation 1215/2012 was collected primarily from databases that are publicly and freely accessible. The case law collected was indexed and integrated into a database that was made available over the internet for free. The opinion of stakeholders was gathered by various means. The method which required the most minimal involvement of respondents was a web questionnaire distributed in four languages. Personal contact with respondents was made by telephone interviews. Another method ventured was the creation of a discussion platform, offering a possibility for anyone interested to make comments.

Initially the project was scheduled to conclude in 2017. The plan was to focus on the situation experienced in Member States during the first two years of application of Regulation 1215/2012, i.e. from January 2015. The project was extended when problems were encountered in creating the first and important building block of the project, the database on case law. This extension also influenced the focus of the project. In the beginning of 2015 courts rarely applied the Brussels I-bis Regulation, as it is only applicable to proceedings commenced from 10 January 2015. Most cases decided by the national courts during the course of 2015, or even the first half of 2016, were still subject to the now replaced Regulation 44/2001. By the time an effective method had been set in place to construct a database on case law, the number of reported cases on the Brussels I-bis Regulation had begun to rise. Proceedings had also begun to move up to the level of appeal courts or even the national supreme courts. The increase of the case law available meant that the work on indexing and analysing the case law exceeded the assessments made at the time the proposal for the project was drafted.

The extension also meant that experiences of legal practice that once were ‘fresh and new’ had switched to being ‘matter of fact’. Somewhere during 2016, or possibly 2017 for some, the Brussels I-bis Regulation must have become the ‘actual law’ for most practitioners, making them less and less aware of the changes the current instrument had brought to its predecessor. This may explain, also taking into account the many respects rather subtle changes brought to the European rules on civil jurisdiction by the Brussels I-bis Regulation that the project suffered greatly in attracting respondents to the actions that were taken to obtain their points of view.

Assuming that from 2015 to 2018 legal practice was probably still mainly dealing with the rules on jurisdiction, the Brussels I-bis Regulation may have been experienced by many practitioners as a continuation of the old instrument. The most radical change brought by the new instrument is without doubt the abolition of *exequatur*. The issue of *exequatur*, or rather the abolition thereof, mostly comes into play when the judgment is final. Many (contested) proceedings that are subject to the Brussels I-bis Regulation may still be continuing at this moment. And even when a judgment is enforced that subject to Regulation 1215/2012, cross-border enforcement of such a judgment may not be necessary at all. The report contains some indications that the issue of enforcement is prone to lead to problems, but for many practitioners these problems are still in the future. This may explain the difficulties encountered when attracting the interest of stakeholders.

The methodology is elaborated in Section 2. Section 3 provides an overview of the key changes brought about by the Brussels I-bis Regulation and that are the subject of this study. In Section 4 the findings of the empirical research are presented and in section 5 selected case law based on case law studies and the database is presented to illustrate some of the problems. Section 6 contains the conclusions and recommendations.

2. Methodology

The new rules introduced following the amendment of the Brussels I Regulation (Regulation (EC) No. 44/2001)⁸ have been applicable since 10 January 2015. For the last almost four years since the entrance into force of the new rules, scholarly contributions have addressed the provisions of the Brussels I-bis Regulation (Regulation (EU) No. 1215/2012)⁹ from mainly a theoretical perspective,¹⁰ debating particular provisions, procedural elements, and case law of the CJEU. Analysis and insight into national case law is often punctual, limited to specific cases and/or Member States. Literature and research provide limited information from a cross-border perspective into national case law and practice of courts and legal practitioners called to make the application of this instrument. Additionally, little is known about the way courts and professionals handle the claims that required the application of the provisions of the Brussels I-bis across Member States, how are the provisions actually applied, and whether certain difficulties are encountered prior or during court proceedings and/or at enforcement stage.

The present research focuses on the four main amendments introduced by the Brussels I-bis Regulation: namely, (1) the application of jurisdiction rules vis-à-vis third country defendants (in particular in regard of consumer and employment contracts); (2) the application of the choice of forum rule; (3) the application of the lis pendens rules; and (4) the functioning of the enforcement rules, abolishing exequatur (including judgments granting provisional and protective measures). In order to assess how the Brussels I-bis provisions in the four main areas of amendments have been applied across the Member States since the new rules became applicable in 2015 a series of actions have been undertaken. The research brings together several perspectives by intertwining classical doctrinal analysis with case law and empirical research to create a scenario that depicts the way the analysed provisions contribute to cross-border debt-recovery litigation.

The collection of data for the analysis has relied on empirical methods. These combine quantitative and qualitative methods. The quantitative empirical research was conducted on the basis of an online survey opened to all interested stakeholders in the EU Member States.¹¹ The quantitative research relied on two sources of information. First, the collection of data based on semi-structured interviews conducted with specialists in the field and survey respondents that gave their

⁸ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 12, 16.1.2001, p. 1–23.

⁹ 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, Official Journal L 351, 20.12.2012, p. 1–32.

¹⁰ For example, see Vesna Lazic and Steven Stuij (eds.), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (T.M.C. Asser Press 2017); Gheorghe-Liviu Zidaru, *Competența în materie civilă potrivit Regulamentului Bruxelles I bis (nr. 1215/2012)*, (Editura Hamangiu 2017); Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015); Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: Brussels Ibis Regulation* (Verlag Dr. Otto Schmidt KG 2016); Inga Kacevska et al., Effective adoption, transposition, implementation and application of European Union legislation in the area of civil justice (Latvia, Hungary, Germany, Sweden and the United Kingdom), Recommendations and Guidelines, 2015; Emmanuel Guinchard (ed.), *Le nouveau règlement Bruxelles I bis* (Editions Bruylant 2014).

¹¹ A sample of the survey used is available in Annex II of the present report.

availability for an in-depth discussion.¹² Second, the collection of feedback and experiences shared by a focus group discussion organised as a Roundtable encounter to debate with specialists (practitioners and academics) the interim results of the present study. Additionally, the empirical findings were subsequently triangulated¹³ with findings resulting from the national case law collected for the creation of the project's database.¹⁴

National web surveys (questionnaires) on the application of Brussels I (recast) have been created with the program Qualtrics. These have been available online since December 2017. The surveys are available in four different languages, English, French, German and Dutch. These languages were chosen in order to seek to reach as many legal practitioners as possible across the EU and reflect the project teams linguistic competences. A sample in English of the used survey is available in Annex II to the present Report. The surveys were structured around five sections. The first section sought to gather general information on the participants and their professional experience such as their Member State of origin, their legal profession, and their professional experience with Brussel I-bis. After these general questions, the respondents were asked to give their opinion on different aspects of the changes brought by Brussels I-bis. The next four sections of the survey focus on the main investigation topics of the project: (1) jurisdiction rules vis-à-vis third country defendants (consumer and employment contracts); (2) choice of forum rule (lis pendens – validity); (3) application lis pendens rules; (4) functioning enforcement rules – abolition exequatur. At the end of the survey, the respondents were given the option to make any additional remarks they retain useful with regard to the functioning of any other aspects of the Brussels I-bis Regulation. The survey questions were all multiple-choice questions and compulsory for participants to answer. Additionally, the respondents were often given the possibility to give further explanation in an open text field, if desired. Some questions relied on a Likert-scale approach to collect information on the opinions of the respondents on specific changes introduced by the new Regulation. For most questions, the respondents could only choose one answer. This was the case for the majority of the multiple-choice question and for the questions using a Likert-scale. Some multi-choice questions allowed multiple-answers.

The surveys questions are identical, except for the Dutch one. The Dutch survey contains two additional questions relevant for the Dutch law practice (question 12 and 13). These questions were not included in the other surveys. The first question seeks to find out whether the Dutch legal practice was sufficiently aware of the transition from Brussels I to Brussels I-bis and the corresponding amendments to the national Implementing Act.¹⁵ The second question sought to obtain information on the practice of a party from another Member States wanting to execute a decision in the Netherlands.¹⁶ In addition, compared to the other surveys the Dutch survey does

¹² A sample of the list of questions used for the semi-structured interview see Annex III of the present report.

¹³ The triangulation allows a combination of the qualitative method and quantitative data gathered in order to crosscheck the consistency of results and to increase confidence in the overall validity of the findings. This is an analytical technique used to corroborate findings with evidence from two or more different sources. See further also, Robert K. Yin, *Qualitative Research from Start to Finish* (The Guilford Press 2011), p. 81–82 and 313

¹⁴ For more detailed information on the Case Law Database, see also Annex I of the present report.

¹⁵ ‘The Brussels I-bis regulation (1215/2012) was adopted on 12 December 2012 and became applicable on 10 January 2015. The Dutch Implementing Act EU Enforcement Order and the Lugano Convention have also been adapted. In your opinion, was the Dutch legal practice sufficiently aware of the transition from Brussels I to Brussels I-bis and the corresponding amendments to the Implementing Act?’ (in Dutch, *De Brussel I-bis verordening (1215/2012) werd op 12 december 2012 vastgesteld en werd op 10 januari 2015 toepasselijk. Daarbij is ook de Nederlandse Uitvoeringswet EU-executieverordening en Verdrag van Lugano aangepast. Was naar uw oordeel de Nederlandse rechtspraak voldoende op de hoogte was van de transitie van Brussel I naar Brussel I-bis en de bijbehorende wijzigingen van de Uitvoeringswet?*)

¹⁶ ‘In Brussels I-bis (Article 42) it is determined that the competent authority can be contacted for the enforcement of judgements. This is the bailiff in the Netherlands. What is your view of the practice when a party from another EU

not contain the question about the (member) state of origin. This entails the restriction that there might be Dutch-speaking legal practitioners from Belgium or other countries that responded to the Dutch survey. The origin of the respondents to the Dutch survey is therefore not clear. For the resulting data it has been assumed that all the respondents to the Dutch survey are from the Netherlands, but in reality there might be some error margin as the number might be slightly lower.

At the end of the surveys, before concluding and submitting the answers, the respondents were asked whether they wanted to provide their contact details in order to be subsequently contacted for a brief discussion regarding their views and experiences with the Brussels I-bis Regulation. The respondents were able to provide their telephone and Skype contact details. Additionally, they were given the possibility to choose a preferred language to be interviewed in among the following options: English, French, Dutch, Italian, and Romanian.

The surveys were brought to the attention of legal practitioners and academics through various channels. First, legal professionals from the top 100 law firms in Europe (by revenue in 2014)¹⁷ were asked to participate in the survey. These law firms have offices in all EU Member States, except for Greece and Malta. Big law firms with large number of lawyers are supposed to be involved more often in cross-border cases and are more mobile than smaller local law firms. The five largest law firms in the Netherlands were also contacted as part of this top one hundred law firms in Europe. In total, 27,285 lawyers were contacted directly by e-mail. Second, the surveys links were sent to targeted specialists in the field in various Member States. Third, the survey links were published several times on online professional profiles, networks and discussion groups to attract the attention of practitioners and academics familiar with the Brussels I-bis.¹⁸ Together with the online survey, practitioners were informed also about a discussion platform that was created to facilitate the exchange of experiences, dialogue among legal practitioners from different Member States, and information about various aspects of the application of the Brussels I-bis Regulation. The discussion platform has not taken up a significant role in providing input on national insight into the functioning of the Brussels I-bis within the EU Member States. A total number of 158 survey answers were collected and compiled in one dataset for the analysis carried out in Section 4 of the present report.

Member State wants to enforce a decision?’ (in Dutch, *In Brussel I-bis (art. 42) wordt bepaald dat men zich voor de tenuitvoerlegging van uitspraken kan wenden tot de daarvoor bevoegde autoriteit. In Nederland is dat de deurwaarder. Wat is uw beeld van de praktijk als een partij uit een andere EU lidstaat een beslissing ten uitvoer wil leggen?*)

¹⁷ Garrigues, Fidal, Loyens & Loeff, Cuatrecasas Gonçalves Pereira, Hengeler Mueller, Gide Loyrette Nouel, Noerr, Uría Menéndez, Gleiss Lutz, Roedl & Partner, Bonelli Erede Pappalardo, NautaDutilh, Stibbe, De Baruw Blackstone Westbroek, Chiomenti Studio Legale, Mannheimer Swartling, Kromann Reumert, Egorov Puginsky Afanasiev & Partners, Arthur Cox, Heuking Kühn Lüer Wojtek, Gianni Origoni Grippio Cappelli & Partners, Bech-Bruun, A&L Goodbody, McCann FitzGerald, Houthoff Buruma, Matheson, Flick Gocke Schaumberg, Arendt & Medernach, Wikborg Rein, Luther, Vinge, Plesner, Goerg, Thommessen, Bredin Prat, Lenz & Staehelin, Beiten Burkhardt, NCTM, Elvinger Hoss & Prussen, Gorrissen Federspiel, Schjødt, Wolf Theiss, Baer & Karrer, Wiersholm, Homburger, Schellenberg Wittmer, Lindahl, William Fry, BA-HR, Schoenherr, Roschier, Lett, Gómez-Acebo & Pombo, Schultze & Braun, Hannes Snellman, Capstan, Liedekerke Wolters Waelbroeck Kirkpatrick, Setterwalls, Legance, P+P Pollath + Partners, GSK Stockmann + Kollegen, De Pardieu Brocas Maffei, Darrois Villey Maillot Brochier, Arntzen de Besche, Mason Hayes & Curran, Niederer Kraft & Frey, Walder Wyss, Cremades & Calvo-Sotelo, Roca Junyent, August & Debouzy, Selmer, Castren & Snellman, Kappellmann und Partner, FPS, Jeantet Associés, Delphi, Buse Heberer, Fromm, Steenstrup Stordrange, Pestalozzi, Haavind, MLGTS, Fromont-Briens, Borenus, Kluge, Vieira de Almeida & Associados, Vischer, Eubelius, Dillon Eustace, CHSH, Boekel de Nerée, De Gaulle Fleurance & Associates, PLMJ, Graf von Westphalen, UGGC, Bruun & Hjejle, Krogerus, Racine, SKW Schwarz, MAQS, Pavia e Ansaldo.

¹⁸ For example, www.xandrakramer.eu, Academia and Research Gate profiles, lawyer’s dedicated groups.

The survey respondents that provided their contact details and their availability for an interview, have been contacted for brief discussions in the period August-October 2018. In addition, a number of interviews have been carried out with specialists in the field. Following the semi-structured interview-discussions, summaries were drafted in order to prepare the material for the qualitative data analysis. In total, 17 interviews have been conducted by the Erasmus University and T.M.C. Asser Institute researchers in English, French, Dutch, and German. The questions of the in-depth interviews focused on the overall questions regarding the amended provisions of the Brussels I-bis, with a focus on the four main novelties the research project is addressing: namely, the abolition of *exequatur* and enforcement, the choice of forum rules, the *lis pendens*, and the jurisdiction rules concerning third-country defendants (see further Appendix 2). The responses gathered during the interviews were compiled together to facilitate the analysis. This data was then analysed together with the dataset collected on the basis of the online surveys, triangulating the survey and interview data for further validation of obtained results.

The discussion platform was set up with the intention to analyse the discussion on the platform and include this as part of the study on the application of the new provisions of the Brussels I-bis. In practice, this did not prove useful for the analysis because it did not lead to significant results.

The Roundtable discussion that was organised on 23 August 2018 with practitioners and academics from different Member States (Belgium, Bulgaria, Ireland, Italy, Latvia, The Netherlands, Poland, Romania, Slovakia) have served as additional mean of triangulating and verifying data resulting from surveys and collected case law. During the event, the findings related to national experiences were discussed with practitioners, national policymakers, and academics. Following the Roundtable, minutes of the discussion have been drafted and subsequently used for the analysis in Section 4.

Lastly, insights from the collected national and European case law available in the created database¹⁹ completed the analysis of the findings. More detailed information about the created database, its aims, and use are available in Annex I of the present report.

3. Brussels I-bis: Goals and Innovations

This section provides an overview of the goals of and innovations brought by the recast of the Brussels I Regulation. The first part contains a brief history of the recast Regulation and the goals of the latest amendments. The second part focuses on three of the most important amendments regarding jurisdiction rules vis-à-vis third country defendants, the choice of forum and *lis pendens* rules, and the new enforcement rules abolishing *exequatur*. This section serves as an introduction to the following sections of this Study, which contain a more detailed analysis.

3.1. Goals and principles

The recast of the Brussels I Regulation was adopted on 12 December 2012 and became applicable on 10 January 2015.²⁰ It builds on the experience of its predecessors, the Brussels Convention²¹

¹⁹ Available at <http://www.asser.nl/brusselsibis/>.

²⁰ 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, Official Journal L 351, 20.12.2012, p. 1–32. See Article 81 for the entry into force.

²¹ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), Official Journal C 27, 26/01/1998, p. 1–33.

and the Brussels I Regulation²². A rich case law from the Court of Justice complements these regulations to create what is known as the Brussels regime of private international law in the EU.

Goals. As mentioned in Recital 3 of the recast Regulation, it is within the Union's objectives to maintain and develop an area of freedom, security and justice. It is of fundamental importance for this objective to foster mutual trust between Member States so that a mutual recognition of judicial and extra judicial decisions could be achieved. Thus, the Brussels I recast Regulation, as an instrument, aims at unified rules of conflict of jurisdictions in civil and commercial matters, and a rapid and simple recognition and enforcement of judgments given in a Member State.²³

Principles. The Regulation should be interpreted autonomously, which means that the interpretation of the Regulation does not depend on national law but has to be uniform throughout the Union.²⁴ In the interpretation regard should be given to its objective, its role in the EU legal structure, and the objectives set out in the Regulation.²⁵

In addition to the interpretation principles, the functioning of the Regulation relies on three important principles. First, the defendant should be sued in the court of his domicile.²⁶ This principle protects defendants from being dragged to foreign and maybe hostile jurisdictions by aggressive claimants or predatory tactics. In addition, it provides more legal certainty to businesses and commercial entrepreneurs. Second, the first principle can be, or should be disregarded to protect weaker parties, especially in matters related to insurance contracts, consumer contracts, and individual employment contracts. This principle finds application in many parts of the Regulation, in particular in the changes incorporated in the recast Regulation. Third, parties' choice of court should be respected in as much as it does not violate the second principle.²⁷

3.2. From Brussels I to the Brussels I-bis Regulation

Article 73 of the Brussels I Regulation required the Commission to present to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Regulation, and proposals for possible amendments.²⁸ In 2009, after careful considerations, the Commission prepared a Report²⁹ and a Green Paper,³⁰ which identified seven areas for improvement. As listed by the Report, they are: (1) the abolition of exequatur in all matters covered by the Regulation; (2) improving the Regulation's operation in an international legal order, in particular in disputes involving parties domiciled in third States; (3) choice of court, and in

²² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 12, 16.1.2001, p. 1–23.

²³ Recital 4, recast Regulation.

²⁴ See also Recital 15, 21 of the recast Regulation.

²⁵ Andrew Dickinson, 'Background and Introduction to the Regulation' in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015) p. 17; Ulrich Magnus, 'Introduction' in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: Brussels Ibis Regulation* (Verlag Dr. Otto Schmidt KG 2016) p. 45.

²⁶ Recital 14 and 15, and Article 4 of the recast Regulation.

²⁷ Xandra Kramer and Erlis Themeli, 'The Party Autonomy Paradigm: European and Global Developments on Choice of Forum' in Vesna Lazic and Steven Stuij (eds.), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (T.M.C. Asser Press 2017) p. 34.

²⁸ A similar article can be found on the Brussels I (recast) Regulation. Article 79 requires the Commission to present before the European Parliament, the Council and the European Economic and Social Committee an evaluation of the possible need for further extending the rules on jurisdiction to defendants not domiciled in a Member State.

²⁹ COM (2009) 174: Report from the Commission to the European Parliament, the Council and THE European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

³⁰ COM (2009) 175: Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

particular the (a) law applicable to these agreements, (b) *lis pendens*, (c) the relation to Hague Convention; (4) the operation of the Regulation in cases of industrial property matters; (5) actions related to *lis pendens*; (6) provisional measures; (7) the interface between the Regulation and arbitration.

In December 2010, the Commission published a proposal for a recast of the Brussels I Regulation.³¹ The document proposed (1) the abolition of exequatur, (2) the extension of the Regulation's jurisdictional rules to third country defendants, (3) the enhancement of the effectiveness of choice of court agreements, (4) the improvement of the interface between the Regulation and arbitration, (5) a set of modification to improve the coordination of legal proceedings in the Member States, (6) a set of amendments to improve access to justice.

After the legislative process, the approved recast Regulation retained some of the proposals made by the Commission, and in particular (1) the abolition of exequatur, (2) the application of jurisdictional rules to non-Member State defendants, and (3) the regulation of *lis pendens* in case an agreement on choice of court exists.

3.2.1. The abolition of exequatur

Exequaturs are procedures needed to be followed in case the execution of a foreign decision is sought in a particular jurisdiction. The EU has tried to simplify to the point of abolition exequatur procedures for decisions taken in any Member State. The roots of the abolition of exequatur can be traced back to the Brussels Convention, which provided uniform rules for the recognition and enforcement of civil and commercial decision, but also limited the grounds on which recognition and enforcement could be denied.³² The successor of the Convention, the Brussels I Regulation, further simplified the recognition and enforcement procedure.³³ According to the Regulation, if a judicial decision is enforceable in the Member State where it was given, it shall be enforceable in any other Member State. The application for enforcement should be submitted to the court (or local authority), which practically means the court of first instance. The enforcement could be appealed by any party; usually, the appeal could be lodged before a court of second instance by any of the parties.

However, exequatur procedures have been considered a burden to the free movement of judicial decisions in the EU, or an expeditious resolution of cross-border conflicts; and the idea to simplify or remove them has always been present. This idea was galvanised at the Tampere Summit in 1999. On that occasion, the European Council sent a strong message to the European Commission to further reduce the measures needed for the recognition and enforcement of civil and commercial decisions within the Union.³⁴ A first stage for this, was considered the reduction of recognition and enforcement measures in respect of small consumer or commercial claims and for certain judgements in the field of family litigation. In fact, a series of regulations abolished exequatur

³¹ COM (2010) 748: Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

³² Article 27 and 28 of the Convention provide a list of situations, which can make a judgment not-recognisable. Furthermore, Article 34 provides the legal ground for refusing the enforcement of judicial decisions given in one of the Contracting states.

³³ Xandra Kramer, 'The Recognition and Enforcement of Member State Judgements' in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015) p. 404.

³⁴ Tampere European Council 15 and 16 October 1999: Presidency Conclusions (Nr. 200/1/99, 16.10.1999) paragraph 33 and 34.

within their respective areas.³⁵ Further impetus to the abolition of exequatur for civil and commercial cases was added by the The Hague³⁶ and Stockholm³⁷ Programme, which called for the elimination of the exequatur process for business cases. In addition, the Hess-Pfeiffer-Schlosser study (Heidelberg Report) requested by the Commission concluded, in line with the growing trend, that the exequatur procedures should be simplified.

Considering this background in 2009, the Commission proposed to abolish exequatur in the new recast Regulation. Recital 26 of the recast Regulation considers that the principle of mutual trust between Member States, and the need for making cross-border litigation less time-consuming require the abolition of special procedures for the enforceability of decisions. Article 39 of the Regulation provides that judgements given in a Member State do not need any declaration of enforceability to be enforced in any Member State. In other words, a judgment given in Member State can be executed without the need of a special procedures by the Member State where the execution is being requested. The abolition of exequatur is a direct expression of the goals and principles which create the foundation of the recast Regulation; it is carried by the same spirit that created and upholds the free movement of persons, services, goods, and capital. However, the current formulation of Articles 45 and 46 does not reflect the intention of the Commission. It is less radical as a result of the legal as well as a political compromise between the different views of Member States.

3.2.2. Application to non-Member State defendants

As mentioned by Recital 18 of the recast Regulation, weaker parties should be protected by more favourable jurisdictional rules in relation to employment and consumer contracts. In this regard, the recast Regulation brings two protective measures for weaker parties compared to the Brussels I Regulation. First, Article 18(1) gives consumers the right to bring proceedings against the other party in the courts where the consumer is domiciled, which can be done regardless of the other party's domicile, and in addition to the option to start proceedings at the court where the other party is domiciled. Second, Article 21 (1)(b) provides that an employer not domiciled in a Member State may be sued in the Member State where the employee carries out his work. If this jurisdiction cannot be established, the employer may be sued in the jurisdiction where the business which engaged the employee is located.

Article 18(1) is similar to Article 16 of the Brussels I Regulation, however, it reflects the intention of the Commission to protect consumers in situations where merchants are domiciled in a non-Member State, which would pose the risk of exposing consumers to an inadequate level of

³⁵ These regulations are: Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Official Journal L 338, 23.12.2003 p. 1 – 2; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Official Journal L 143, 30.4.2004, p. 15–39; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, Official Journal L 399, 30.12.2006, p. 1–32; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, Official Journal L 199, 31.7.2007, p. 1–22; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Official Journal L 7, 10.1.2009, p. 1–79.

³⁶ The Hague Programme: Strengthening freedom, security and justice in the European Union, Official Journal C 53, 3.3.2005, p. 1–14.

³⁷ The Stockholm Programme: An open and secure Europe serving and protecting citizens, Official Journal C 115, 4.5.2010, p. 1-37.

protection. According to the Commission's Report³⁸ and Green Paper³⁹, consumers may face situations where they are unable to bring proceedings against non-Member State defendants based on the jurisdictional rules of their Member State. The same situation was considered in relation to employment contracts. A reflection of these considerations can be found in the wording of Recital 14 of the recast Regulation, which suggests that certain rules of jurisdictions should apply regardless of the defendant's domicile in order to ensure the protection of consumers and employees. Thus, in light of an ever globalising world and the dangers associated with it, the recast Regulation extends consumer and employee protection in an aggressive way.⁴⁰

3.2.3. *Lis pendens*

Lis pendens are situations where proceedings between the same parties and involving the same cause of action, but also closely related proceedings, are presented before judges in different Member States. Apart from inefficient adjudication of cases this inherently bears the risk of conflicting judgments. The Brussels I Regulations approached the problem from two directions. First, it regulated situations where the same proceeding is presented before different courts, in which case it required all the courts other than the court first seised to stay proceedings. Only if the court first seised does not assume jurisdiction, the other court may start proceedings. Second, in cases where related proceedings are pending in the courts of different Member States, all the courts other than the first seised may stay proceedings. So while in the first case the courts are obliged to wait for the first court seised, in the second case courts may consider the stay of proceedings as an option.

The recast Regulation inherited this same provisions from its predecessor. However, practice showed that *lis pendens* rules were abused to avoid choice of court agreements entered between parties; while local courts were trying to counter this by relying on national measures. The *Gasser*⁴¹ case was the prime example that required a new approach to *lis pendens* in cases involving a choice of court agreement.⁴² In the *Gasser* case, an Austrian and an Italian company had agreed on a court to solve their disputes in the courts of Austria. Despite this, the Italian party seised an Italian court, which was slow and possibly more favourable to it. Later, the Austrian party started action before the Austrian court, which was the one designated in the choice of court agreement. According to the Court of Justice of the European Union (CJEU), the court seised second had to stay proceedings – despite being the chosen court in the agreement – and wait for the court first seised to decide on the validity and effectiveness of the choice of court agreement. This was what the Brussels I Regulation required. It is obvious that this approach would create uncertainty as to the validity of the choice of court agreement, and would encourage delay tactics, or 'torpedo actions'. This problem was identified in the Commission's Report on the Brussels I

³⁸ COM (2009) 174: Report from the Commission to the European Parliament, the Council and THE European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

³⁹ COM (2009) 175: Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁴⁰ Peter Mankowski and Peter Nielsen, 'Jurisdiction over Consumer Contracts' in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: Brussels Ibis Regulation* (Verlag Dr. Otto Schmidt KG 2016) p. 511.

⁴¹ Case C-116/02 *Erich Gasser GmbH v MISAT Srl* 2003 European Court Reports 2003 I-14693 9 December 2003 (Court of Justice).

⁴² Francisco Garcimartin, '*Lis Pendens* and Related Actions' in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015) p. 336.

Regulation.⁴³ According to the Report, tactics such as that used in *Gasser* are potential sources of delays and may be detrimental to the proper functioning of the internal market. To make things worse, the CJEU considered incompatible with the Regulation national measures taken to ensure a choice of court agreement, but which interfere with procedures to determine the jurisdiction of other Member States' court.⁴⁴

A solution to this situation came with the new Article 31(2) of the recast Regulation, which requires the court chosen by the parties to decide on its own jurisdiction first, despite not being the first court seised. While the current formulation of Article 31(2) is not the classical example of *lis pendens* rules, it is a good example that shows the Commission's intention to reassure party autonomy as a core principle of the recast Regulation. Recital 22 is clear on this. It affirms that the chosen court should continue proceedings even if the other court has not stayed proceedings. Providing better protection to party autonomy is considered to contribute to a more efficient dispute resolution,⁴⁵ but also to the general predictability of cross-border proceedings based on the recast Regulation.

4. The Application of Brussels I-bis Regulation in Practice:

The analysis of this section is based on information that was gathered from various sources: (1) an online survey available in Dutch, English, France, and German; (2) in-depth interviews with a number of practitioners and specialists in this area of European law; (3) a focus group discussion organised as a Roundtable event; and (4) findings from national and European case law collected for the establishing of a database dedicated to the Brussels I Regime.⁴⁶

4.1. Introduction

As previously mentioned in Section 2, the present study sought to provide a European perspective on the way the most important changes brought by the Brussels I-bis apply in the EU Member States. The research pursued its aim to include views and experience of practitioners from all Member States. Surveys, as well as requests for interviews, and the focus group discussion looked to achieve this objective or when not possible secure a regional representativeness of data used.

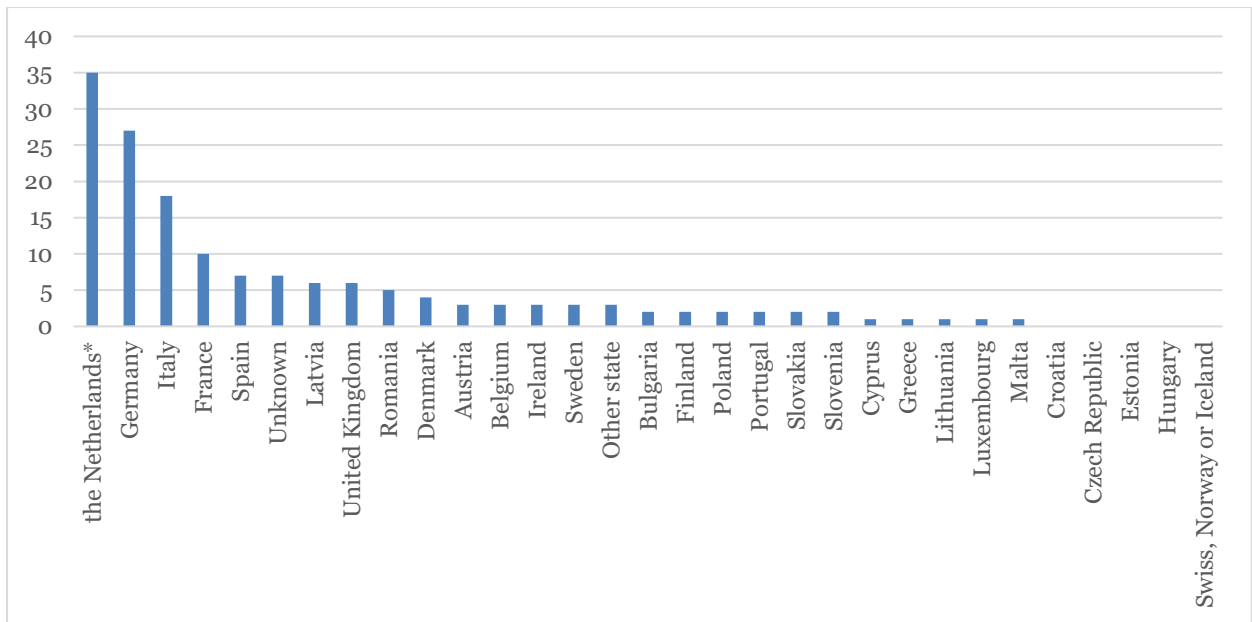
Figure 1 below provides a distribution map of survey replies across Member States. This part of the collection of empirical data has the broadest coverage across the Member State together with the analysed case law included in the project's Database. However, the majority of survey respondents come from four Member States: the Netherlands, Germany, Italy, and France (Figures 1 and 2).

⁴³ COM (2009) 174: Report from the Commission to the European Parliament, the Council and THE European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁴⁴ Case C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*. European Court Reports 2004 I-03565 27 April 2004 (Court of Justice)

⁴⁵ Xandra Kramer and Eris Themeli, 'The Party Autonomy Paradigm: European and Global Developments on Choice of Forum' in Vesna Lazic and Steven Stuij (eds.), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (T.M.C. Asser Press 2017) p. 42.

⁴⁶ A more extensive explanation of the methodology regarding the collection of data is available in Section 2 of this report.

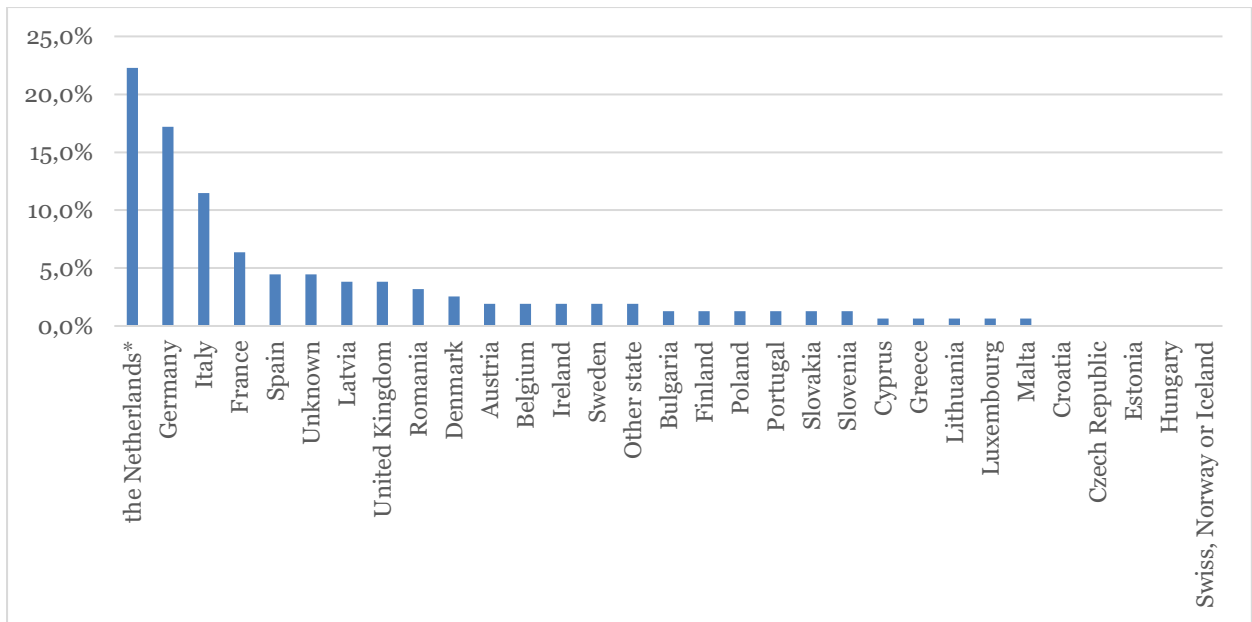


Total amount of replies: 157

Figure 1: Number of survey respondents per Member State of origin⁴⁷

The survey representativeness is matched by the interviews that were subsequently conducted with practitioners and scholars specialists in this area. The focus group participants had a strong representatively for scholars and practitioners for two of the Member States from which most replies have been collected: namely, the Netherlands and Italy. Together with these, participants from other Member States such as Belgium, Bulgaria, Ireland, Poland, Romania, and Slovakia contributed to the discussion and triangulation of collected data.

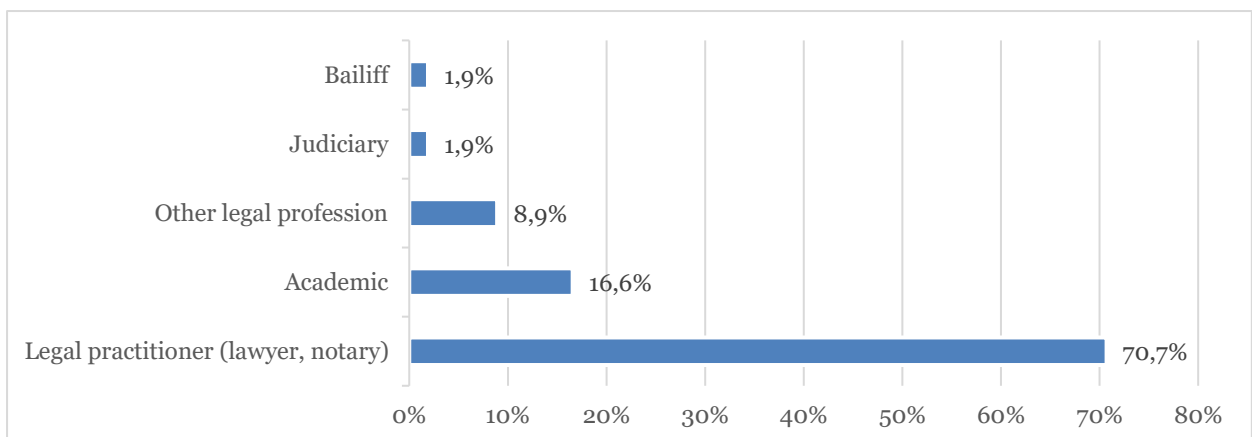
⁴⁷ * The amount of persons from the Netherlands is determined by the amount of persons that completed the Dutch survey.



Total amount of replies: 157

Figure 2: Percentage of survey respondents per Member State of origin⁴⁸

Most participants sharing information and experiences about the application of the new provisions of the Brussels I-bis that are part of this study are legal practitioners and academics that have a practical and/or theoretical perspective on the functioning of the analysed rules (Figure 3). This professional profile corresponds also to the profile of the professionals that participated in interview. They also combine at times practice with an academic position. This enriches their perspective on the functioning of the main new rules introduced by the Brussels I-bis. They are able to indicate when certain scholarly criticisms and doctrinal point of views have materialised in the practice of the courts and other legal practitioners and whether these actually represent an issue for the application of the Regulation.

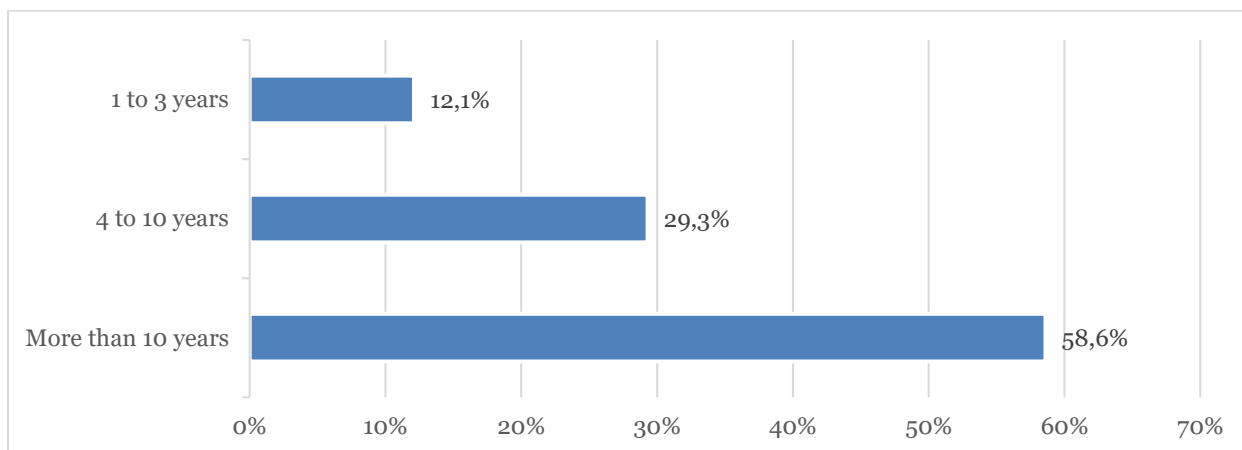


Total amount of replies: 157

Figure 3: Professional background of survey respondents

⁴⁸ Ibidem.

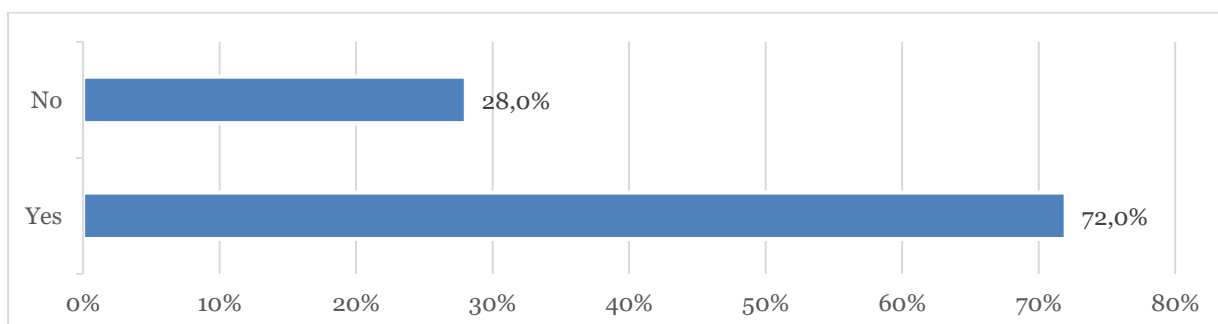
Furthermore, the majority of the survey participants are practitioners with a significant number of years of experience in their profession. Almost 59% of the respondents have more than ten years of experience in their legal profession (see Figure 4). This level of professional experience is replicated by the participants that agreed to share their views on the subject of the present analysis in an in-depth interview and by the focus group participants. Most of them having a professional experience going beyond ten years of activity in the legal field.



Total amount of replies: 157

Figure 4: The number of years of activity in the legal profession

Additionally, most of the survey respondents, interview participants, and focus group participants have had the opportunity to gain practical experience with the application of the new provisions that are analysed or have advised clients or colleagues on these matters. According to Figure 5, this is the case for 72% of the respondents. This makes their input particularly relevant and representative for what the application of the new provisions leads to in practice, as well as the possible problematics encountered.

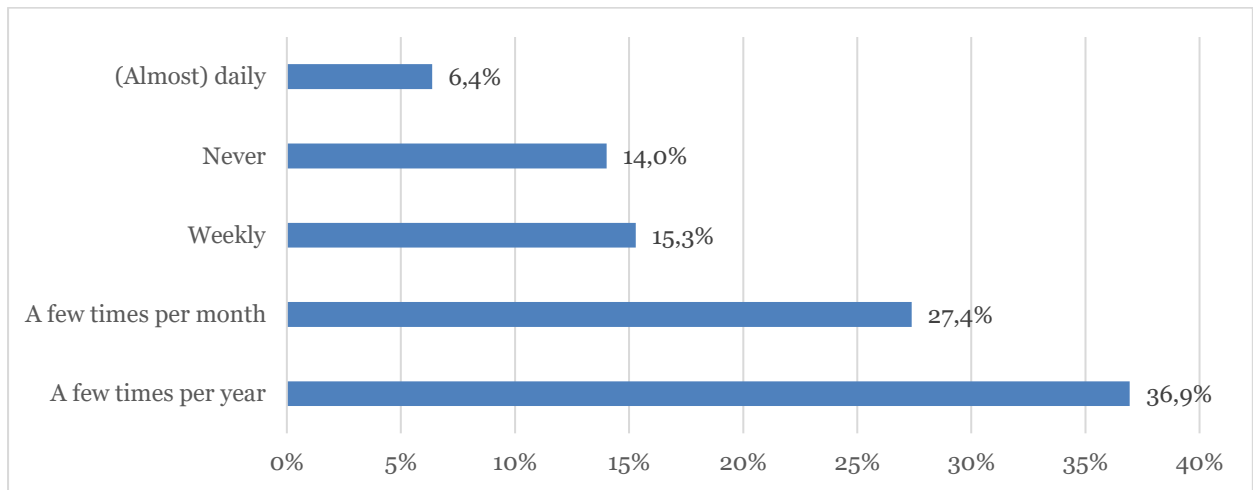


Total amount of replies: 157

Figure 5: Practical experience with the application of the new Brussels I-bis Regulation (1215/2012)

In terms of frequency of applying the provisions of the Brussels I or Brussels I-bis Regulations, Figure 6 indicates that most of the survey participants have to deal on average with the analysed

rules a few times per year (almost 37% of the respondents) or a few times per months (almost 28% of the respondents). The respondents who have to make the application of these provisions on a weekly or daily basis are more modest: namely, over 15% and, respectively, 6.4%.



Total amount of replies: 157

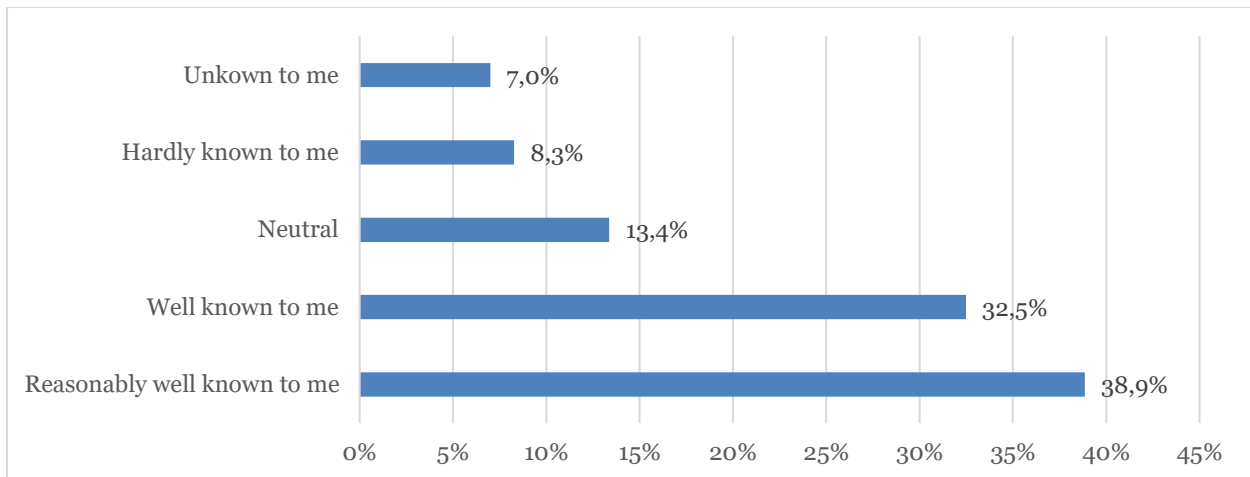
Figure 6: Average amount of times when dealing with the Regulation Brussels I (44/2001) or Brussels I-bis (1215/2012) on a yearly basis

The extent of practical experience with the application of the new provisions of the Brussels I-bis also varies among interview and roundtable participants. Some of them deal with the instrument on a weekly base, other more rarely. Additionally, some of the participants have more of a scholarly perspective on the analysed rules or have indicated that they had not yet had the opportunity to handle particular type of procedures under the new rules except from providing some advice (e.g. recognition and enforcement requests).⁴⁹

4.2. A practice overview on the changes brought by the Brussels I-bis Regulation

The changes introduced by the Brussels I-bis Regulation are mostly ‘well known’ or ‘reasonably well known’ for the survey respondents and in-depth interview participants. This is the case for over 71% of the survey respondents (Figure 7). The rest of the survey respondents have a neutral perspective on their knowledge (13.5% of the respondents), or expressed doubts about their knowledge (over 15%). From conducted interviews, it results that at times national courts are less knowledgeable of the topic and inclined to prefer to apply or rely on national provisions that have the same object as the provisions of the Brussels I-bis Regulation (e.g. Latvia, Romania). As some of the interviewees indicate, this situation has to do also with a number of aspects encountered in various Member States in the application of the Regulation such as the limited time courts have to dedicate to study issues of private international law when receiving files that involve cross-border claims, limited amount of information and materials that are easily accessible (and free access) to consult on the topic, and a bit of reluctance towards judgments coming from other Member States.

⁴⁹ At times practitioner indicate that to a certain extent they are still dealing with cases initiated under the application of the Brussels I.

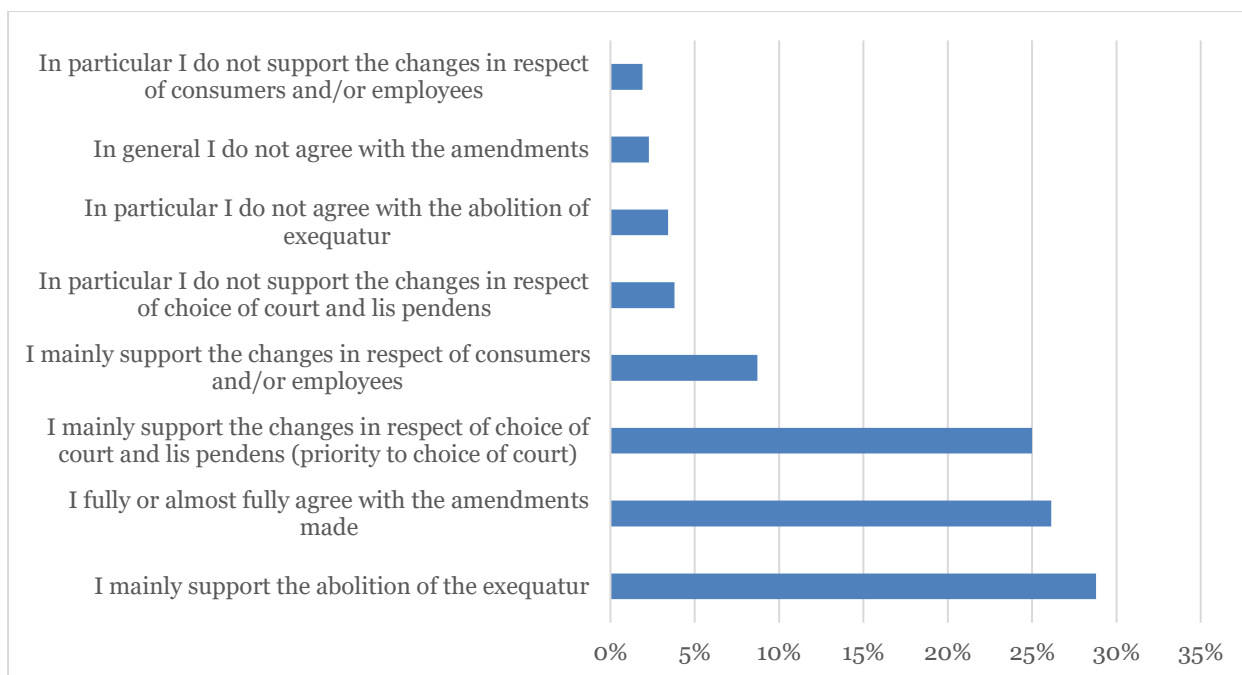


Total amount of replies: 157

Figure 7: Knowledge of survey respondents with regard to the changes brought by the Brussels I-bis to the rules of its predecessor Brussels I (44/2001)

When asked about specific areas of changes that the Brussels I-bis Regulation brought that the respondents support or disagree with, more than 26% of respondents indicated that they ‘fully or almost fully’ agree with the amendments made by the new text (Figure 8). According to additional comments made by respondents, the changes brought by the new text of the Regulation are ‘sensible’ and of ‘good sense’. They mostly reflect the developments of the case law and clarify certain provisions that revealed to be problematic or not sufficiently clear in practice. The same perspective is matched by the opinion of the interviewed practitioners. Furthermore, most of the respondents positively value the abolition of the *exequatur* (almost 29% of respondents) as change brought by the new text together with the amendments made to the choice of court and *lis pendens* rules (25% of respondents). The abolition of the *exequatur* is perceived as a simplification of the process of recognition and enforcement. Survey respondents, interviewed stakeholders, and national experts who participated in the Roundtable discussion often refer to these abolition of the *exequatur* as one of the most important amendments. Furthermore, the new provisions related to choice of court (Article 25) and *lis pendens* (Articles 31-32) are also often referred to by respondents. Putting an end to situations that are generally known as ‘the Italian torpedo’ are considered to be a welcomed improvement that limits abusive behaviour and favours parties’ autonomy. The amendment of Article 25(1) that establishes that the substantive validity of the choice of forum clause is governed by the law of the Member State having jurisdiction is perceived as a welcomed addition. However, the reference to the conflict-of-law rules (Recital 20 in conjunction with Article 25(1)) for assessing the substantive validity of the choice of court agreement has been criticised by a number of respondents as making the rule more difficult and ‘virtually inapplicable’.⁵⁰

⁵⁰ See further Sub-section 4.4.



Total amount of replies: 157 (Total amount of answers: 264)

Figure 8: Survey respondents opinion on the changes brought by Brussels I-bis (1215/2012) (selecting more than one answer was possible)

Some positive support is shown also for the changes concerning weaker parties such as consumers and employees (almost 9% of respondents). From some of the additional comments of the survey respondents and from the in-depth interviews carried out it appears that often the practitioners contributing to the study do not deal with consumer or employees cases. This aspect might influence to some extent the results of the present data, but further research would be necessary in order to determine the rate of support the new Brussels I-bis rules register with practitioners and courts that deal with this type of claims involving consumer and employees. During the round table, a Romanian lawyer told that many cases in Romania involve consumers and the jurisdiction of the local courts. In one case, the company Amazon accepted the Romanian jurisdiction of Romanian courts and then settled the cases. Some of the participants referred to this situation as a practice of certain companies. They settle their cases with consumer in order to avoid the publicity of a court ruling that would possibly incentivise more consumers to take court action for similar claims. In the same context, experts also referred to cases of air carriers' passengers regarding delays and the definition of these subjects as "consumers". One of the Roundtable participants referred to flight compensation cases that contain a choice of court clause in favour of court in a Western Europe Member State (e.g. of the Irish courts), while the flight took place between airports in Eastern Europe. Under Brussels I-bis passengers are not 'consumers', but they are 'consumers' under other EU instruments. There are also problems regarding the relation with the applicability (or not) of the Montreal Convention and the law applicable to the contract (and the jurisdiction clause). In this area, further consideration should be given to the possibly of improving the present text.

The rate of dissatisfaction or disagreement with the new rules abolishing exequatur, changes in respect of choice of court and lis pendens, or weaker parties such as consumer or employees remains below 4% of choices made by survey respondents. Therefore, according to available data

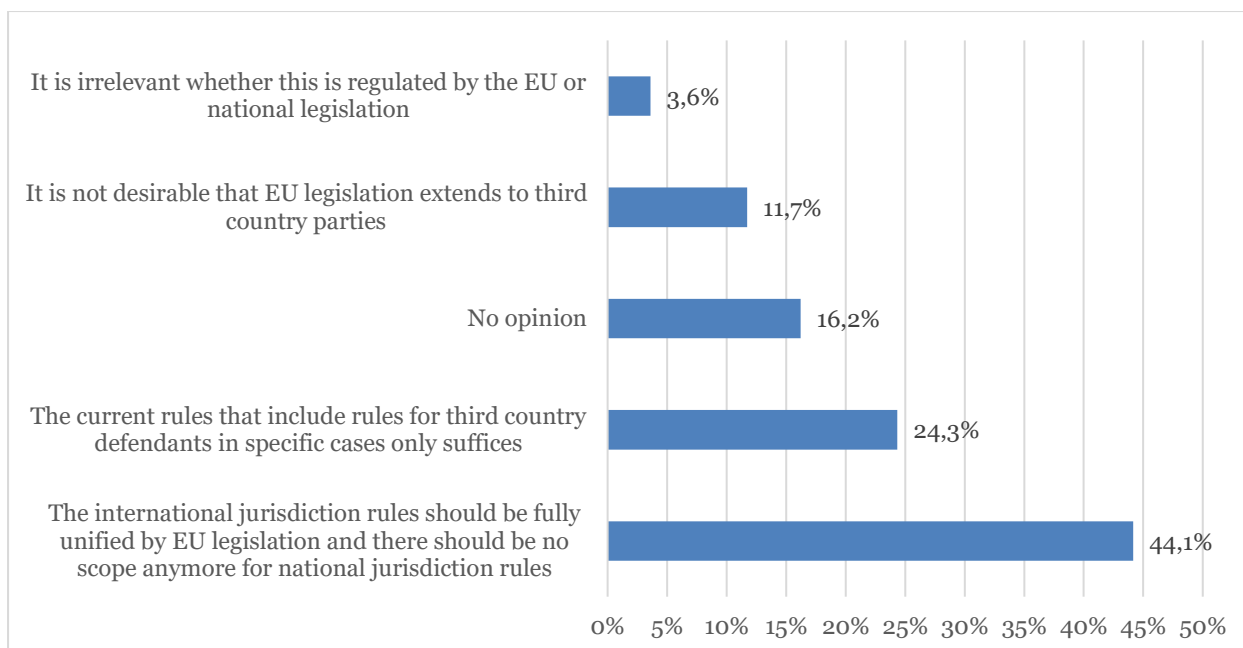
the changes introduced by the Brussels I-bis with regard to the analysed topics benefit from a welcomed level of approval from stakeholders applying or using these rules.

4.3. Jurisdiction Rules and Third Country Defendants

Most of the survey respondents (over 44%) consider that the international jurisdiction rules should be fully unified at the level of the EU legislation even when it comes to situations that concern jurisdiction rules with regard to third country defendants (Figure 9). Among the reasons that appear to determine respondents to favour this option which would lead to a further harmonisation of the jurisdiction rules are: (1) further simplification and clarification of rules, (2) unification of jurisdiction rules in all cases in order to facilitate the recognition and enforcement, (3) conflicting national rules, (4) and preventing the application of exorbitant national jurisdiction rules. Interviewed participants are also positive about the usefulness of these more protectionist rules with regard to weaker parties such as consumers and employees, and the simplification they bring, but also for supporting party autonomy, and avoiding the application of exorbitant jurisdiction rules.

Further, almost a quarter of the survey respondents are of the opinion that the present rules concerning third country defendants in specific cases suffice (Figure 9). As one interviewee pointed out: 'we need to have some rules available in this area'. Survey respondents and interviewees support the present text solution as they consider that the EU Member States are not yet ready for further harmonisation steps and more extensive jurisdiction rules for third country nationals. This would pose possible recognition and enforcement issues when these need to take place subsequently in the third country.

Practitioners who participated in the interviews or were part of the Roundtable focus group discussion have not often encountered in practice situations that required the application of Brussels I-bis special jurisdiction for third country defendants. Some limited circumstances led interviewed practitioners to advise some clients on possible litigation scenarios that would have resulted in the application of these jurisdiction rules. However, none of the situations materialised in a subsequent litigation. With regard to labour jurisdiction cases involving third country defendants, very few information became available during the discussions. In one case reference was made to a recent Dutch judgment concerning a flight attendant of Ryanair (ECLI:NL:GHSHE:2018:2826). Although there is a provision in the GDPR about infringement of privacy, most practitioners do not find the rule very attractive and continue to prefer the Brussels I/I-bis rules.



Total amount of replies: 111

Figure 9: Respondents' views on the extension of the geographical scope of the Brussels I-bis for parties in third countries (extending the provisions beyond the present rules concerning parties from outside the EU, in particular for situations covered by Article 25 on choice of court, Article 18 on consumer contracts and Art 21 on employment contracts)

Quite a significant number of survey respondents did not have an opinion (over 16% of respondents) with whether the geographical scope of the Brussels I-bis provisions on parties from third countries should be extended. This neutrality might be determined by fact practitioners tend not to encounter often such situations in the cases they come to handle.

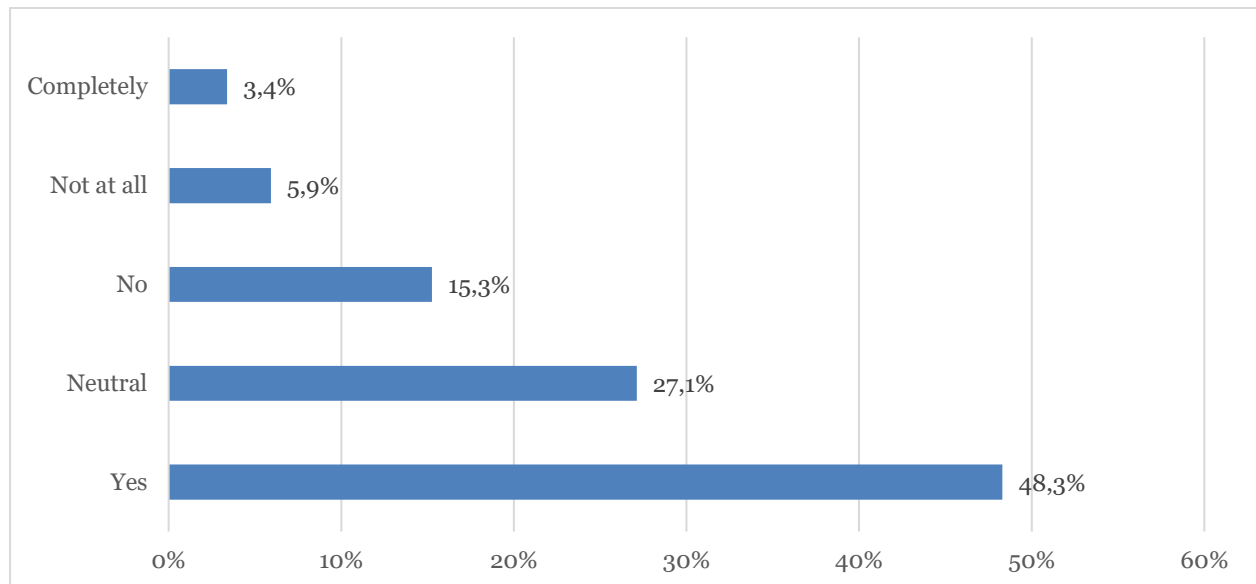
Furthermore, a similar number of respondents consider such extension irrelevant or not desirable (over 15% of respondents). During the Roundtable, a Belgian academic also queried the need for dealing with third country defendants in EU legislation.

4.4. Choice of Forum Rules

Article 25 is 'one of the most important provisions of the Regulation'.⁵¹ The new Article 25(1) deals with the formal validity as well as with the material requirements of a jurisdiction agreement. In seeking to clarify further this provision, the recast formulation of Article 25(1) added that the court chosen by the parties will have jurisdiction 'unless the agreement is null and void as to its substantive validity under the law of the Member State'. According to the provisions of Article 25(1) in conjunction with Recital 20 of the Brussels I-bis Regulation, the substantive validity will have be assessed in accordance with the national law of the Member State of the court designated in the agreement 'including the conflicts-of-law rules'.

⁵¹ Ulrich Magnus, Peter Mankowski, *European Commentaries on Private International Law. Brussels Ibis Regulation* (Verlag Dr. Otto Schmidt KG 2016) p. 591.

In consideration of the significance of this rule, the research sought to verify whether the new rules are retain to be a workable provision for practitioners across the EU. According to Figure 10 below, this is the case for almost 52% of the respondents. The remaining respondents have either a ‘neutral’ view on the ‘workability’ of the new provision (over 27% of respondents) or are distrustful of the recast text (over 21% of respondents).



Total amount of replies: 118

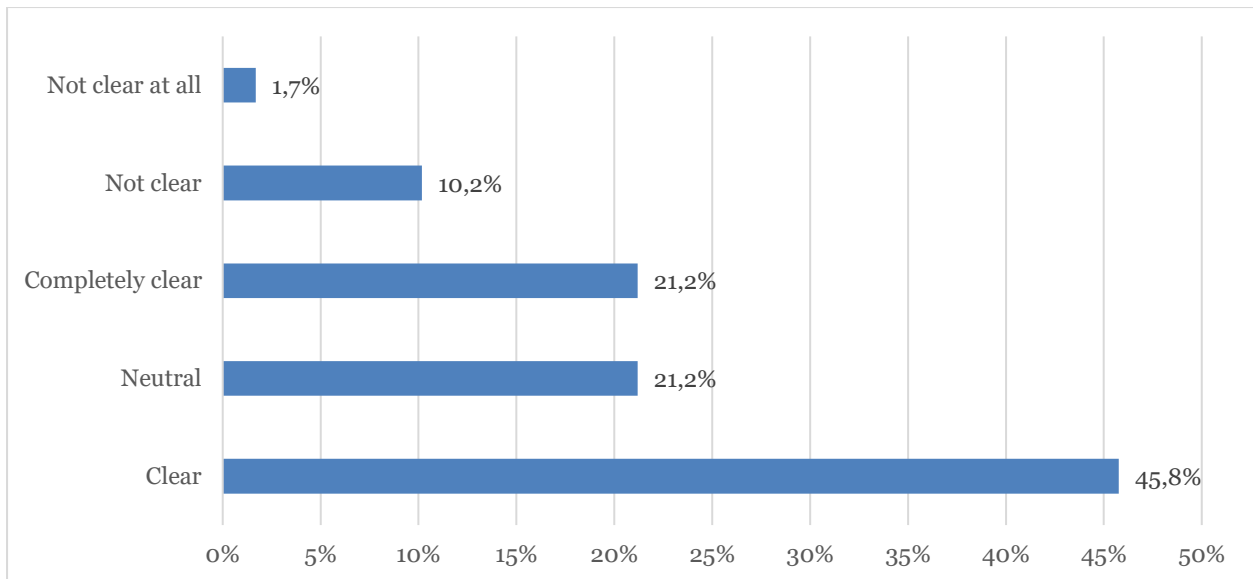
Figure 10: Survey respondents view on the workability of the new rule in Article 25(1) stating that the substantive validity of the choice of forum clause is governed by the law of the chosen forum (including its conflict of law rules)

An interesting point the empirical research reveal is that regardless of the respondents’ position on the workability or not of the new provision of Article 25(1) of the Brussels I-bis, they all share a common concern with regard to the interpretation and application of this rule. This has to do with what would be consider to be a matter of ‘substantive’ or ‘formal validity’ under national law. Additionally, the national conflict-of-law rules are not uniform and add potential uncertainty as to how national law and/or national conflict-of-law rules would reflect on the validity of the agreement made by the parties. Some of the survey respondents and interview participants do point out that a clear hard uniform rule would have been more desirable to a provision sending to national substantive law and conflict-of-law rules. Although in the long term, the rule might prove easy to apply, for the moment, in practice, courts in certain Member States are not very comfortable with the application of conflict-of-law rules, especially when these type of cases are not the most significant share of their daily practice. For parties and their representatives, it is not clear upfront which rules would be considered to be of ‘substantive’ or ‘formal’ validity within a national system. This leads to possible 28 different outcomes based on the law of the Member State whose jurisdiction was agreed upon as part of the parties’ agreement. During the Roundtable discussion, an Italian participant pointed out to a number of possible problems in considering the validity of the choice of court clause: namely, through the absence of uniform choice-of-law rules for choice of court clauses. The distinction of ‘formal’ and ‘substantive’ validity are perceived as unclear, since the scopes of ‘substantive’ and ‘formal’ are not clear. The lack of uniform conflict-of-law rules adds to this problem (e.g. in the Netherlands and in Italy the rules of Rome I are

applied outside their scope). According to the Roundtable experts, substantive law harmonization could be considered. The Granarola case (C-196/15) is mentioned as an example for problems in respect of court clauses. There could be situations in B2B contracts where there is a weaker party, wishing to avoid the choice of court mandated by the other party. In contrast, some experts express doubts as to the nature of the indicated problems, which do not appear so unsurmountable in respect of choice of court clauses and the lower probability of disputes involving small size companies ending up in court. A Dutch lawyer with the Ministry of Justice and Security mentioned that the same discussion with regard to the validity of the clause and the applicable law had previously taken place in the Netherlands but with regard to arbitration clauses. This national discussion led to a statutory provision that would maintain material validity under a number of legal systems connected to the arbitration (Article 10:166 Netherlands Civil Code). A Latvian scholar and practitioner pointed out during the Roundtable discussion that some of the problems encountered in practice have to do with the fact parties seem to rely on hastily agreed terms set out in an email. Pointing to case law from Latvia included in the project database, he explained that due to differences between the Latvian texts of Brussel I and I-bis, a Latvian court had wrongly assumed that the law had changed. In looking at various practical situations and national case law from different countries, he had the impression that in practice there are differences between the Member States as to the level of knowledge and development of private international law; in these circumstances, only a simplification of the applicable rules would improve that situation. This problem also plays in other areas outside the Brussel I-bis. This led to a discussion whether corporations from third states would gain a benefit by setting up a subsidiary in one of the EU Member States that was considered to be ‘weaker’ in dealing with sophisticated private international law provisions, using contracts more tailored to the law of the mother company in a third state.

The situation can become more complex when the choice of jurisdiction is not exclusive and several courts might be indicated as chosen potential jurisdictions (e.g. contracts that include a variety of choice for one of the parties or for both parties). A clarification of what should be understood by ‘substantive validity’ and what this would encompass would be a welcomed step either through the CJEU interpretation or through an amendment of the text of the Regulation. A Belgian participant to the Roundtable discussion mentioned that he advises parties to exclude *renvoi* to the applicable law in the choice of court clause. Especially when it comes to complicated contracts or parties outside the EU. Furthermore, some practitioners pointed out that when it comes to the assessment of a choice of court agreement the discussions concern often aspects of formal validity and not so much challenges that have to do with elements of substantive validity. These identified problematic aspects as well as the limited practical experience at times are possible reasons why some of the survey respondents had a neutral or negative opinion of the workability of this new rule in Article 25(1) Brussels I-bis (Figure 10).

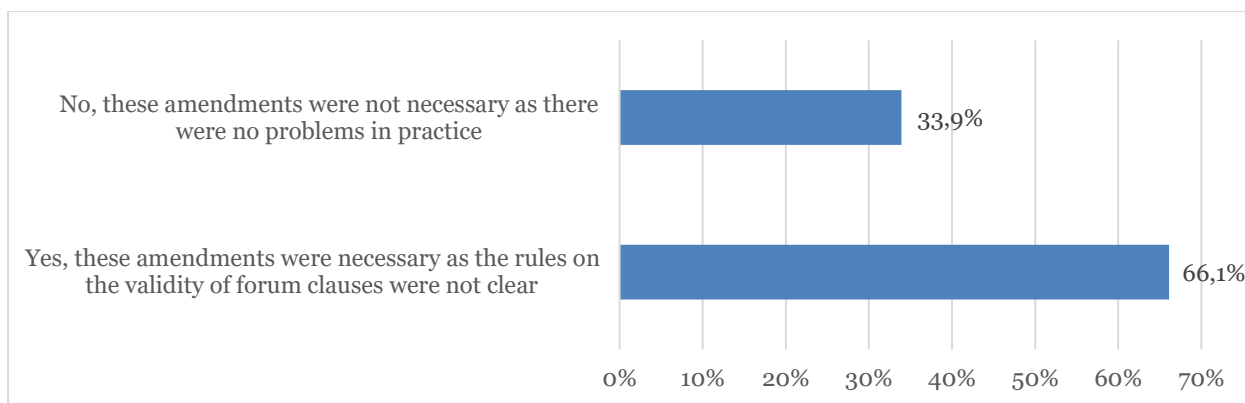
With regard to the clarity of the new rule in Article 25(5) that expressly provides the jurisdiction agreement should be ‘treated independent of the other terms of the contract’, the majority of the respondents agree (68%) (Figure 11). The separate assessment of the validity of the jurisdiction agreement from the rest of the contract appears to be a general accepted approach for some of the Member States. This is especially the case with common law respondents, while for others respondents it might appear a bit artificial and difficult to apply and explain.



Total amount of replies: 118

Figure 11: Survey respondents view on the clarity of the rule introduced by Article 25(5) stating that the validity of the jurisdiction agreement shall be determined independent of the other terms of the contract

Over 66% of the respondents consider that the amendments introduced by Article 25 were necessary, as the rules on the validity of the forum clause were not clear (Figure 12). Most of the interviewed practitioners and roundtable participants share the same view. Furthermore, respondents point out that the new rules are actually a codification of the case law of the CJEU on this matter, and although the practice made the interpretation of the former rules clear, a clarification of these provisions and an express reference made included in the text of the Regulation are always a welcomed step. Also during the Roundtable discussion, most respondents supported the amendments in respect of the choice of court agreements brought by Brussels I-bis. Some interview respondents pointed out that although the case law of the CJEU was already helpful and clear, national judges are not always aware of the extensive CJEU case law and they do not follow it constantly. Therefore, it is desirable to have clearer and easier to identify rules addressing these issues. Furthermore, some of the interviewed practitioners and scholars remarked that they consider the wording of the new Article 25 fine from a theoretical perspective, but that many aspects of its application are yet mainly untested in court in order to see whether the application of the article significantly improved with the new wording. Some of the identified potential issues remain for the moment a scholarly discussion that have not materialised in their daily practice or national case law.



Total amount of replies: 118

Figure 12: Survey respondents view on whether these changes introduced by Brussels I-bis Regulation on the choice of court agreements were necessary in practice

The respondents that considered that the new Article 25 rules were not necessary are of the opinion that these provisions (1) remain still unclear; (2) difficult to apply in view of the separation of the choice of court agreement and the agreement of which it forms part; and (3) matters of formal validity are more often subject to dispute compared to issues of substantive validity that the text addresses.

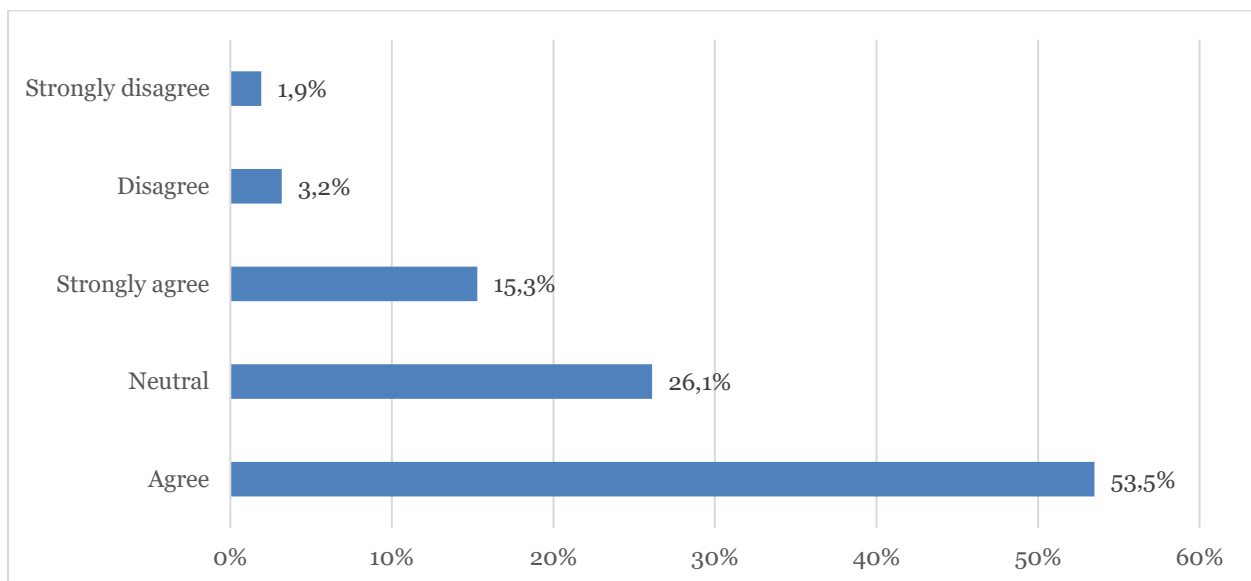
4.5. Lis Pendens

Practitioner who participated in the study were positive about the new provisions giving priority to the chosen court over the first court seized. They consider it the right approach to put an end to abusive behaviours and to so called ‘torpedo action’ situations. Although practitioners did not encounter many situation in practice dealing with the new provisions of the *lis pendens*, and not many cases on this aspect were identified at national level in the Member States, some of the respondents expect that new arguments will be invoked by parties and their representatives. They expect this to lead to a rise in litigation over jurisdiction. One of the interviewed practitioners indicated that the amended rules have resulted in practice to a reverse Gasser (C-116/02) situation: namely, the defendant will raise before the chosen court an exception of existence of another choice of court agreement before the court of some other Member State. This drags the claimant before the court of the other Member State who will have to verify whether the invoked choice is a valid choice. Until the court decides on the validity of the other choice of court agreement, the first action is paralysed.

Other aspects related to *lis pendens* that were raised during the interviews related to Articles 33 and 34 Brussels I-bis. Although most practitioners do not have much experience with the application of these provisions in practice, the articles are considered to be a welcomed addition to the Brussels I-bis regime. Questions remain for practitioners as to how the national courts will interpret the ‘may stay proceedings’ and the situations that fall within the scope of Articles 33 and 34 and whether indeed they will stay proceedings or not for situations covered by these provisions.

4.6. Enforcement and Abolition of Exequatur

The abolition of the exequatur is one of the most referred and supported change brought by the Brussels I-bis Regulation. As previously indicated in Figure 8 above, the abolition of the exequatur is one of the changes that is most often indicated as a positive amendment of the regulation by respondents (29%). This change has made the enforcement of judgments coming from other Member States easier to handles and to a certain extent faster for the creditors as some of the previous administrative steps have been eliminated. Some practitioners are also underlining it as an advantage of the EU in view of the United Kingdom leaving the EU process. Almost 69% of respondents are of this opinion (Figure 13), although national enforcement related activities may still create some difficulties in practice. This is because a number of domestic procedures remain to be undertaken in order to successfully enforce a judgment and some of these might not be immediately obvious when action needs to be taken in another Member State. In some instances national courts requested or enforcement authorities do not routinely receive requests of enforcement from other Member States, therefore, the process might be a bit slower and additional checks are performed by involved authorities or members of staff. Additionally, some of the respondents and interviewed participants did not yet have the opportunity to proceed themselves to the recognition and enforcement of court decisions in accordance with the new rules of the Brussels I-bis. The amended provisions have been applicable only for a few years; hence, although considering the new rules a welcomed change, practitioners did not often have the opportunity to test their effectiveness in practice. This aspect can contribute to the high level of ‘neutral’ perception results of survey respondents when asked whether enforcement has become easier following the abolition of the exequatur (over 26% of respondents) (Figure 13).



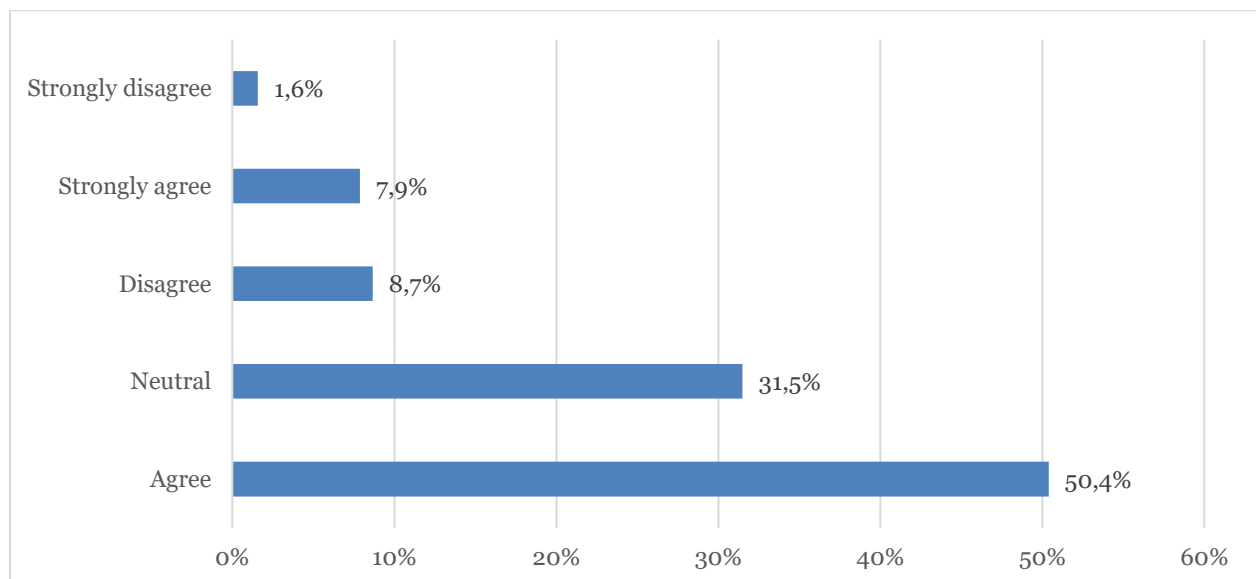
Total amount of replies: 157

Figure 13: The enforcement of judgements coming from other Member States has become easier due to the abolition of the exequatur

A remaining number of survey respondents (over 16%) consider that the abolition of the exequatur has not made enforcement of incoming judgment easier. Although additional explanations provided by survey respondents are limited on this, some of the causes of this perception can be related to the language requirements and difficulties, and delays related to the fact that national

requirements related to enforcement differ across the Member States. These national specificities have also to be complied with in order to secure the execution of the judgments. Thus, national enforcement procedures remain to a certain extent cumbersome and expensive.

With regard to the protection the Brussels I-bis rules offer to parties against which enforcement is sought, the Regulation puts in place a system of safeguards some of which were included in the Brussels I as well (e.g. the ground of refusal for recognition and enforcement, communicating the decision before its enforcement). These mechanisms regard: (1) the duty to communicate the judgment together with the certificate to the person against whom enforcement proceedings will be initiated prior to the any such measure being undertaken (Article 43(1) Brussels I-bis); (2) the possibility of the person against whom enforcement is sought to request a translation of the documents when these are communicate in a language he does not understand or in another language than that of the Member State he is domiciled in (Article 43(2) Brussels I-bis); (3) the possibility to request the limitation or suspension of the enforcement measures when an action for refusal of enforcement has been filed (Article 44 Brussels I-bis) by the person against whom the enforcement measures are thought; and (4) the grounds of refusal that can prevent enforcement requests when any of the expressly provided means is fulfilled. The research carried out has revealed that most of the survey respondents and interviewed participants consider this system of measures sufficient to guarantee the defendant’s rights. This is the case for over 58% of the survey respondents (Figure 14). According to discussion with practitioners, among the reasons most often raised in order to prevent the recognition and enforcement of foreign judgment are the public policy exception and the fact the documents instating the proceedings were not properly served or not in sufficient time in order to enable the defendant to arrange to his defence. Sometimes, these reasons are raised just to frustrate and delay the process of enforcement, as national courts appear to be particularly sensitive to these issues. However, from the data available it is not clear how often these grounds of preventing recognition and enforcement are successfully raised.



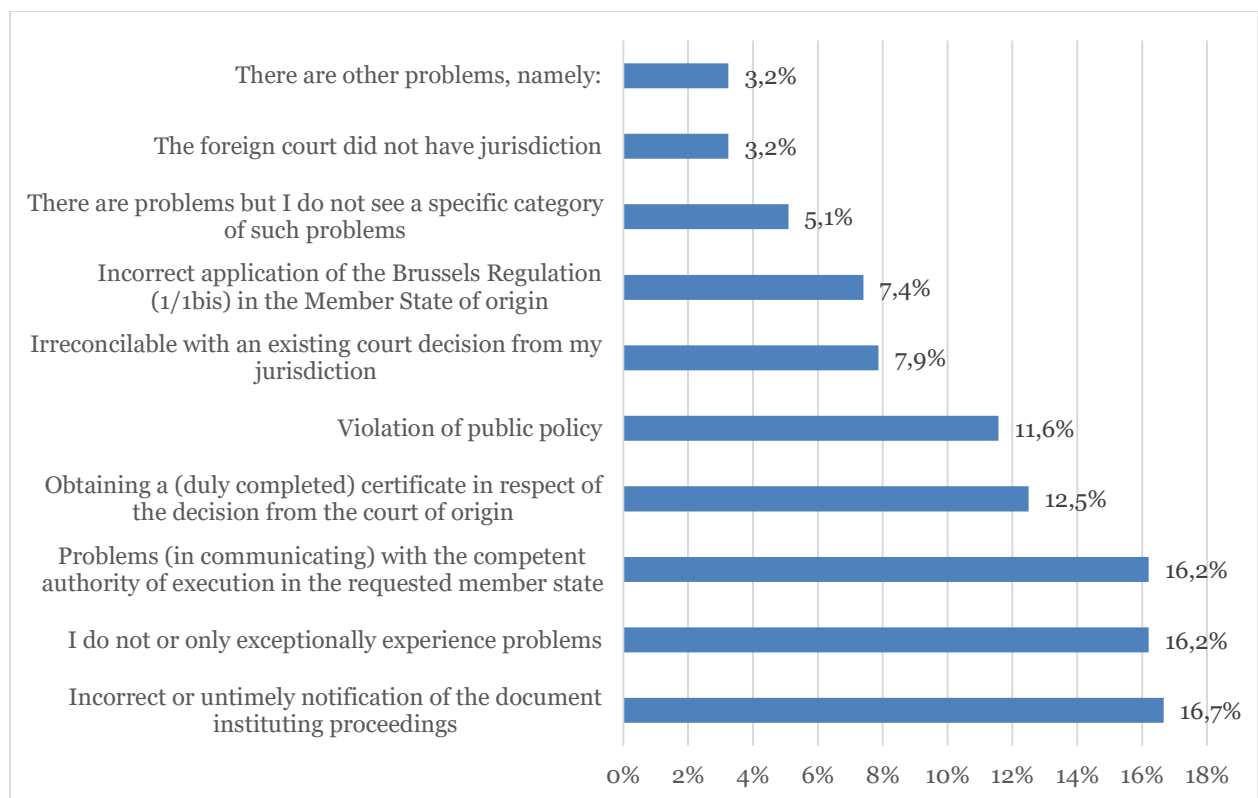
Total amount of replies: 127

Figure 14: The new rules for the enforcement of judgements and the possibility to appeal (Article 43-46 Brussels I-bis) offer sufficient legal protection to the party against whom enforcement is sought

Furthermore, at times, an opposition to enforcement under national procedural law can also be problematic according to practitioners. A Romanian judge remarked that there should be a specific uniform timeframe set by the Regulation or alternatively by national legislation with regard to the period within which the defendant should be able to contest enforcement.

The significant number of ‘Neutral’ positions (almost 32% survey respondents) seems to be correlated with the fact that respondents indicate to have still a limited amount of practical experience with the analysed rules. Some of the cases they are handling require still the application of the previous provisions of the Brussels I Regulation.

The number of survey respondents who consider the new rules for enforcement and the possibility to appeal the Regulation as not offering sufficient protection for the party against whom enforcement is sought is just above 10%. Some of the additional explanations provided by respondents point out to the fact the system put in place concentrates the appeals mostly before the court of origin. This is seen as being burdensome for the defendant together with the fact the defendant is usually not informed with regard to the mechanisms available for him to seek to protect his interests.



Total amount of replies: 127 (Total amount of answers: 216)

Figure 15: The main problems encountered when enforcing court decision from other Member States in own jurisdiction (more answers could be selected)

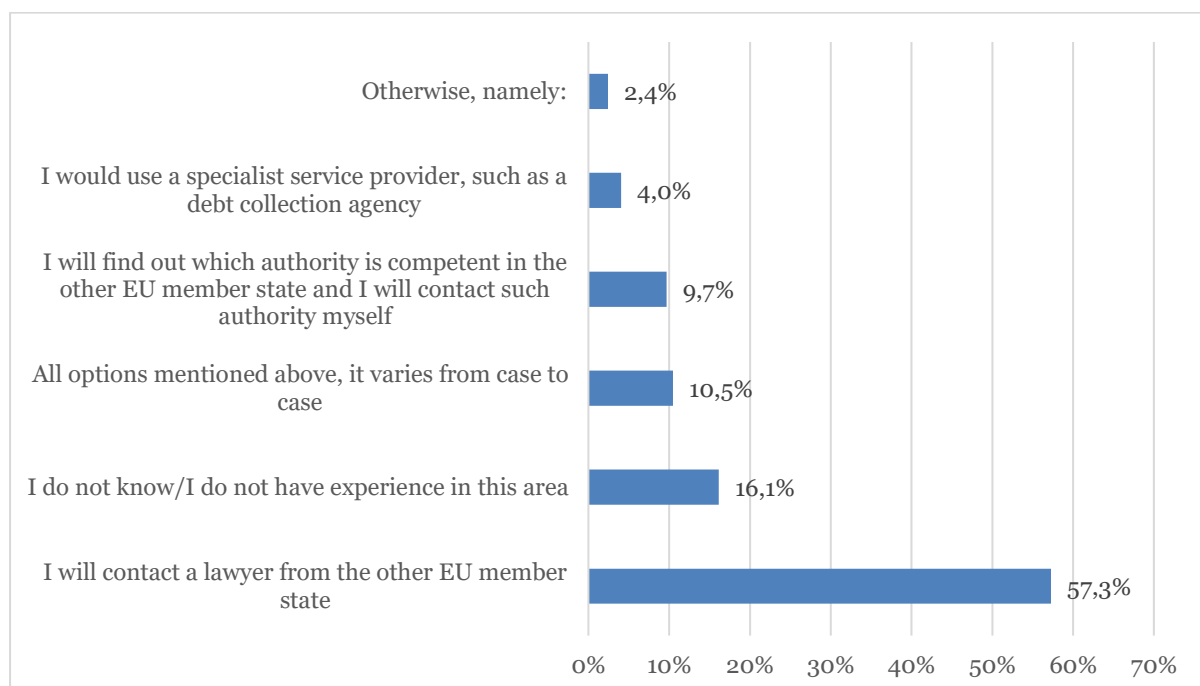
Enforcement remains problematic in practice. According to survey respondents, the most often encountered problems related to the enforcement of decisions issued by courts in other Member States are: (1) the fact the documents instituting the proceedings were incorrect or untimely

notified to the defendant (almost 17%); (2) problems (in communicating) with the competent authority of execution in the requested Member State (over 16%); (3) obtaining a (duly completed) certificate in respect of the decision from the court of origin (almost 13%); and (4) violation of public policy (almost 12%). Other problems encountered in the enforcement of a foreign judgment in accordance with Figure 15 are the irreconcilability of the decision with an existing domestic judgment, issues related to the correct application of the Brussels Regulation, jurisdiction, and other issues. In practice, there are situations where question of validity of the title are raised and additional documents have to be provided by the creditor. Some of the issues that the respondents indicate have to do with the limited knowledge some national practitioners have with regard to the Brussels I regime, with the practical aspects of enforcement, and with the differences between national legal instruments and systems. For example, certain awarded remedies are country specific and the legislation of the country in which they have to be enforced does not have an exact equivalent measure, other times the enforcement authority does not receive sufficient information in order to be able to proceed to enforcement (e.g. interest is awarded 'according to law' but without indicating what the value of the interest is). The interviews and Roundtable discussion point out also towards difficulties related to the issuance of the certificate. A Swedish practitioner was underlining that they often receive the wrong certificate from abroad (e.g. Brussels I instead of Brussels I-bis certificate), or this is not filled in properly resulting in a difference of information between the certificate and the judgment, the interest is not expressly indicated (e.g. interest according to the law), or some information is missing (e.g. the name of the defendant or of the claimant, costs, the judgment, the amount that the court has ordered). Others, point out also to issues of translation of the certificate. Some practitioners wonder about the language in which the certificate should be issued and filled in or whether a certificate can be issued in relation to decisions concerning provisional and protective measures ordered by the court having jurisdiction on the merits and who has to draft the certificate (e.g. the court, the lawyer and submitted with the request to the court). With regard to the responsibility of issuing the certificate, Roundtable participants and interviewed practitioners consider that the court should be responsible for drafting it. However, in practice it might be at times that practitioners requesting the issuance of the certificate provide the form to the court together with the request or even submit a draft of the document to the court for the judge to approve.

Not all practitioners encounter difficulties when having to enforce a decision from a foreign jurisdiction in their own country. A relevant number of survey respondents (over 16%) indicate they have not experience problems or rarely encounter difficulties in practice (Figure 15).

When it comes to enforcement of a domestic judgment in another Member State, practitioners usually prefer to rely on the services of a local lawyer (over 57% of respondents) (Figure 16). Alternatively, a small number of respondents (4%) prefer to use the services of a special company such as debt collection agencies. Lawyers, regardless of the Member State where they come from, normally choose to involve a local lawyer from the country in which enforcement is set to take place. A Dutch practitioner participating in the Roundtable discussion indicated that he would never contact a foreign enforcement officer directly; he would normally involve a lawyer from the jurisdiction where enforcement needs to be undertaken. When enquiring with some of the interviewed practitioners why do they choose to rely on the services of a local lawyer they indicated that: (1) it is difficult to find the necessary information and enforcement authority in the other Member State; (2) they think they would not be able to carry out the activities on their own; (3) they would be professionally liable, if something goes wrong; (4) they are not sure whether their professional insurance covers their actions when undertaken in a different Member State than the one in which they are a registered practitioner. Furthermore, a Bulgarian Roundtable participant indicated that the national enforcement provisions changed and the enforcement

officers had to adapt to the new legislative environment (e.g. foreign creditors could directly contact enforcement officers to enforce a foreign judgment) and the tasks to perform. They had to manage to coordinate their activity between adapting to the domestic procedural requirements and the provisions of the Brussels I-bis. In more Member States, there are indications that the enforcement authorities (i.e. enforcement officers or courts) need a period of adaptation and understanding of new instruments and rules they have to apply. A Belgian Roundtable participant emphasised the need for practitioners to take time to educate enforcement officers in dealing with cross-border cases. Cross-border cases might be only a limited part of their activity and they might not always be properly equipped in dealing with these requests. This might explain also some of the reluctance lawyers encounter with the enforcement authorities (e.g. request for clarifications and/or additional documents containing information not available in the foreign certificate but necessary according to national procedural rules) when these have to enforce a foreign decision.



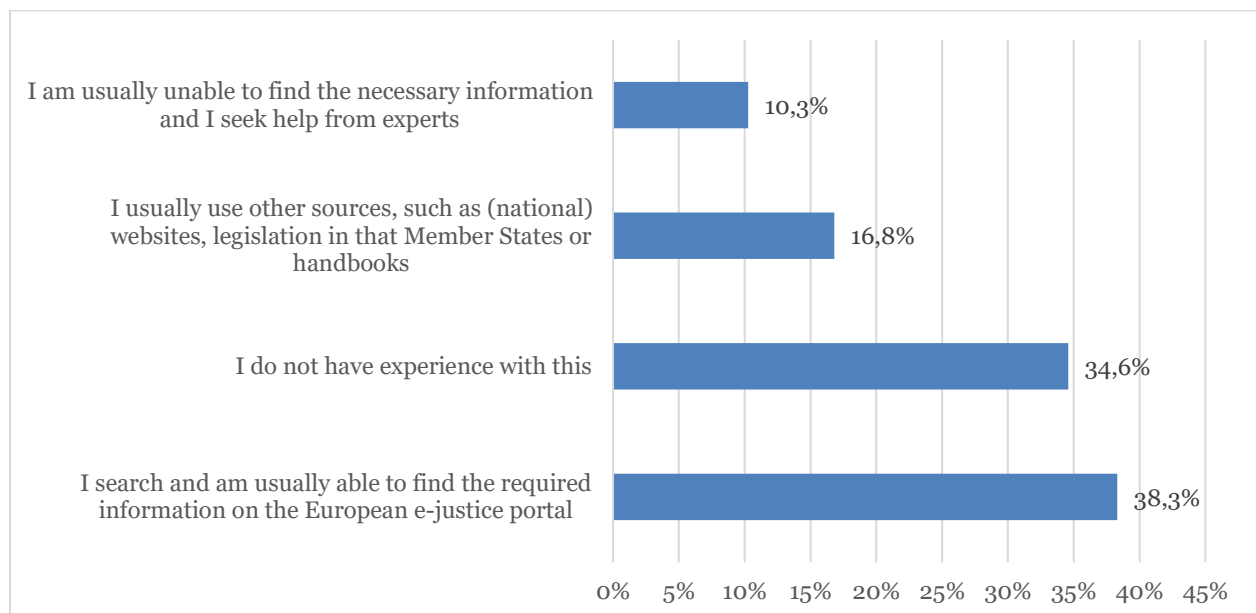
Total amount of replies: 124

Figure 16: Actions undertaken when having to enforce a judgment in another Member State under the Brussels I-bis regime

An Italian practitioner remarked that courts and practitioners in the border areas and regions appear to be knowledgeable and well prepared to handle cross-border cases because of their constant need to deal with commercial and contractual relationships that include a foreign party. The differences in the legal culture and approach can also represent a great challenge in practice.

Some of the survey respondents (almost 10%) will take steps themselves to find out who is the national enforcement authority competent in the Member State of enforcement and contact them in order to proceed to the necessary execution actions (Figure 16). Additionally, some respondents (almost 11%) indicated that based on the circumstances of the case, their ability to communicate with the requested authority, etc. they would consider whether to proceed to the execution stage themselves or rely on the services of a local lawyer/co-council or service provider.

Information about competent enforcement authorities in other Member States can be found on several national or European sources. Survey respondents indicate that they usually search and are able to find information on the European e-Justice Portal (over 38% of respondents) (Figure 17). However, some of the respondents and interviewed practitioners do indicate that the information they can find on the e-Justice Portal is not always complete (e.g. missing contact details of the enforcement authorities) and precise in order to allow them to act only on the basis of this information to enforcement in another Member State. Another significant part of respondents (almost 17%) is able to find the necessary information on national websites, in the legislation of the Member States where enforcement actions has to be taken or in relevant handbooks (Figure 17). At times, the enforcement information is required not for actually undertaking enforcement proceedings, but in order to be able to assess the risks of a possible enforcement action in a certain Member State and properly advice the client *ex ante* before undertaking court proceedings or initiating enforcement requests.



Total amount of replies: 107

Figure 17: Ways used to identify the competent authority in accordance with Article 42 Brussels I-bis when having to enforce a judgment in another Member State

In view of the identified limitations of information available with regard to enforcement authorities in other Member States, some of the respondents indicate they are unable to find the necessary information and therefore choose to seek assistance from experts and colleagues from the jurisdiction of interest (over 10% of respondents) (Figure 17). Using the services of a local lawyer is at times a compulsory action in order to be able to communicate with the enforcement authority (e.g. there are situations in which enforcement authority staff or bailiffs are unable to communicate in a foreign language) or to find out the necessary information. Whenever possible, international law firms rely on their local offices to find out the necessary information. The interviewed practitioners confirm this practice and explain it by referring to a number of aspects: namely, issues of professional responsibility and diligence towards their client, limited knowledge of the foreign system, ability to identify the enforcement authority in another Member States, and communicate with these enforcement authorities.

Practitioners taking part in the present study did not often refer to situations of refusal of enforcement. When this was the case the reason were related to the content of the certificate that showed only part of the claim or the fact that the court of enforcement considered the decision to be already executed and enforcing was no longer necessary.

4.7. Other points of interest

Besides the main points this research investigated, participating practitioners wanted to raise also a number of additional aspects related to the Brussels I-bis Regulation they encounter in practice. This has to do mainly with the following: (1) the structure of the regulation and the renumbering of the articles in the new text; (2) the uncertainty of the way Article 8(1) would be interpreted by the national courts; (3) the extensive application of Article 17 to all consumer situations by national courts; (4) the unsatisfying application in practice by some courts of the exclusive jurisdiction rule in Article 24(2); (5) the codification in Article 24(4) of a criticised CJEU case law; (6) interim and protective measures (Article 35); (7) relation between the provisions of the Regulation and arbitration proceedings (e.g. arbitration procedures and interim measures ordered by the court in relation to the arbitration).

In addition, as previously mentioned in Section 2 of the present report two additional point of research have been verified in relation to the Netherlands. This had to do with finding out whether the Dutch legal practice sufficiently aware of the transition from Brussels I to Brussels I-bis and the corresponding amendments to the Implementing Act and the national enforcement practice in relation to requests relying on decisions issued by courts in other Member States. To the question concerning to awareness of Dutch practitioners with regard to the transition from Brussels I to Brussels I-bis and the corresponding amendments to the Implementing Act,⁵² 42% of the respondents replied that they are well aware of these changes,⁵³ 31% were neutral, and 27% were not aware or had limited awareness of these changes. The fact that more than a quarter of survey respondents were not familiar with these amendments in a system that is mostly considered to be knowledgeable of EU law is a worrying perspective several years after the new provisions of the Brussels I-bis became applicable. With regard to the enforcement practice in the Netherlands,⁵⁴ the Dutch results are in line with results concerning other Member States in Section 4.6 above. Most of the respondents (40%) had no experience in this regard.⁵⁵ Another significant share of the survey respondents (36%) indicate that a foreign party wanting to enforce a decision in the Netherlands will usually turn towards a Dutch lawyer who will take care of the process. Only 8% of the survey respondents indicate that the foreign interested party will directly contact a Dutch bailiff. The remaining 16% of the survey respondents indicate that based on the case the party will decide to proceed directly or rely on the assistance and service of a local practitioner, enforcement officer or other specialised entity.

⁵² In Dutch *De Brussel I-bis verordening (1215/2012) werd op 12 december 2012 vastgesteld en werd op 10 januari 2015 toepasselijk. Daarbij is ook de Nederlandse Uitvoeringswet EU-executieverordening en Verdrag van Lugano aangepast. Was naar uw oordeel de Nederlandse rechtspraktijk voldoende op de hoogte was van de transitie van Brussel I naar Brussel I-bis en de bijbehorende wijzigingen van de Uitvoeringswet?*

⁵³ 26 survey respondents replied to this question.

⁵⁴ In Dutch, *In Brussel I-bis (art. 42) wordt bepaald dat men zich voor de tenuitvoerlegging van uitspraken kan wenden tot de daarvoor bevoegde autoriteit. In Nederland is dat de deurwaarder. Wat is uw beeld van de praktijk als een partij uit een andere EU lidstaat een beslissing ten uitvoer wil leggen?*

⁵⁵ 25 survey respondents replied to this question.

5. Illustrations from Case Law

5.1 Temporal scope of application (Articles 66 and 80 Brussels I-bis)

Almost 100 cases concern the temporal scope of application. Most of these decisions are no more than a correct statement that the proceedings are subject (or not) to the new instrument, but in some cases courts have erred when dealing with the temporal scope of application.

An example where the old regulation (44/2001) was applied by the lower court while the new regulation 1215/2012 was already applicable offers Rīgas apgabaltiesa 21 October 2015, Case No. CA-3506-15/25 (CELEX:82015LV1021(51)). The appeal court accepted the complaint that the lower court, when deciding on the issue of an application, should have applied not Article 5 Brussels I but Article 7 of the Brussels I-bis Regulation. This correct complaint was however in itself insufficient ground to allow the appeal and to return the case to the court in first instance. The higher court made reference to Article 80 of the Regulation, which says that references to the repealed Regulation Brussels I are to be understood as references to the new Brussels Ibis Regulation and must be read in accordance with the correlation table in Annex III. In the case that was to be decided there was no material difference between the relevant provisions of Brussels I-bis and Brussels I. The difficulty was the application of the rule on special jurisdiction in contractual matters in respect of the place of performance under a loan agreement. The appeal court would decide that the defendant was obliged to repay the loan to an account the lender held in Latvia, even though the lender had paid out the loan on an account held by the borrower in Finland. This meant jurisdiction of the Latvian courts could be established and that the case was returned to the court in first instance for further judgment.

A decision from the Polish Supreme Court, that had to rectify the erroneous application of Brussels I-bis by courts in first instance and in appeal, suggests the lower courts had assumed that since the current EU law has direct effect in all member states, Brussels I-bis was applicable irrespective of its provisions on temporal application. See Sąd Najwyższy, 30 June 2017, Sygn. akt I CSK 668/16 (CELEX:82017PL0630(51)). The court of first instance applied Brussels I-bis and the court of the second instance accepted this basis. The Polish Supreme Court is forced to explain that the direct effect of an EU regulation does not mean that any current regulation should be applied, as the regulations also contain their own intertemporal provisions. The lower courts had overlooked Article 81 Brussels I-bis. As the proceedings had been initiated on 10 December 2014, Brussels I-bis did not apply.

An appeal court in the Netherlands had to deal with intertemporal issues of a different nature. In the circumstances of the case, the document instituting proceedings was sent to the receiving agency in Belgium on 7 January 2015 but actual notification to the defendant in Belgium took place on 15 January 2015. The appeal court considered that under Article 9(1) of Regulation 1393/2007 the latter date was the date of service. This meant that date had to be considered as the date on which proceedings had been instituted. As a consequence the proceedings were subject to the new regime of Regulation Brussels I-bis. See Gerechtshof 's-Hertogenbosch, 22 December 2015, ECLI:NL:GHSHE:2015:5348.

The reported case law mainly concerns the temporal scope of application of rules on jurisdiction. The discussion during the Round Table pointed out a different problem, the temporal application and the enforcement of judgments. The Brussels I-bis Regulation does not differentiate between the temporal application of the rules on jurisdiction or the rules on enforcement. Judgments given in legal proceedings instituted instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 still fall under the enforcement regime of the Brussels I Regulation. The solution offered by Article 63(2) of the Lugano

Convention 2007, which allows the application of the enforcement regime of the new instrument in respect of proceedings that were commenced at the time the old instrument was still in force, has not been followed. Consequently, whether a judgment can profit from the new enforcement regime, depends on the date the proceedings were instituted that resulted in the judgment that is to be enforced. The certificate does not require information on the date of institution of proceedings. Much relies on the court or the member state of origin, which has to ensure, when issuing the certificate that the judgment falls under the temporal scope of application of Brussels I-bis. There now appears to be a concern in some regions that certificates are issued in respect of 'old' judgments. Such judgments will be dated after 10 January 2015 but are the outcome of proceedings that were commenced before the entry into force of Brussels I-bis. As such information does not have to be provided in the certificate and is apparently in some member states often also not mentioned in the judgment itself, there is no possibility for verification in the Member State of enforcement.

5.2 Other issues regarding the formal or territorial scope of application

An Irish decision demonstrates the present limits of the formal scope of the Brussels I-bis Regulation. High Court 3 October 2016,⁵⁶ concerned carriage of goods by sea from Dublin to a port in the United Arab Emirates. The claimant sued in tort against the defendant carrier from South Korea and unsuccessfully relied on Article 7(2) of the Brussels I-bis Regulation. The Irish court rightly held that this provision can only be applied to defendants domiciled in another Member State. Although some member states have adopted national rules on international jurisdiction that resemble those of the Brussels Regulations, such is apparently not the case in Ireland.

In an elaborate analysis, the Luxembourg Cour d'Appel, 10 May 2017,⁵⁷ had to determine that Regulation I-bis does not apply in respect of defendants domiciled on the Isle of Man.

The Ljubljana Higher Court, 11 April 2018,⁵⁸ had to determine that a dispute between parties domiciled in Slovenia concerning a sales contract for the purchase of real estate in the Republic of Croatia was an internal case, not subject to the Brussels I-bis Regulation.

The Maribor Higher Court, 4 October 2016,⁵⁹ corrected the view of the court in first instance that Brussels I-bis applies to a claim in tort against the police of another Member State (Austria). The plaintiff claimed compensation for property (loss of income) and non-material damage (fear and mental pain) which she alleged was caused by the conduct of police officers in Austria. As the claimant sought compensation for the inadequate conduct of the State authorities of another State, Article 1 excluded application of the Regulation.

A decision of the English High Court of 26 January 2017^[60] had to make a rather elaborate analysis of earlier case law to hold that there was no scope for the application of the English doctrine of forum non conveniens, or any remnant thereof, to the claim against RDS, as it is domiciled within the jurisdiction. The case concerned a claim for environmental damage sustained in Nigeria directed against a corporation domiciled in England. The decision demonstrates the frustration of the judge, who was clearly unhappy with the approach of both parties in respect of the matter of jurisdiction. Hearings concerning jurisdiction took three days

⁵⁶ [2016] IEHC 537 Castlelyons Enterprises Ltd -v- Eukor Car Carriers Inc & another.

⁵⁷ No. JUDOC 100034845.

⁵⁸ VSL sklep I Cp 2534/2017.

⁵⁹ VSM sklep I Cp 900/2016.

⁶⁰ HRH Emere Godwin Bebe Okpabi and others v Royal Dutch Shell plc and another, Queen's Bench Division 26 January 2017, [2017] EWHC 89 (TCC).

in court, at great cost to the parties and approached the putative trial itself. The English judge considers this approach as being diametrically opposed to that required under the overriding objective of his own procedural rules (the Civil Procedure Rules). The approach, in so far as the hearings on jurisdiction concerned the application of Article 4 Brussels I-bis, is also difficult to reconcile with the approach of EU law. A main objective is that rules of jurisdiction are highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. That the defendant was a corporation domiciled in England was not in discussion. This should have meant, in the absence of a choice of court clause, that there should never have been any discussion on the jurisdiction under Brussels I-bis, irrespective of where the events that led to the claim had taken place.

In another UK case,⁶¹ there was a possible scope for the application of the doctrine of *forum non conveniens* when allocation had to be made between the separate legal jurisdictions within the United Kingdom. Under Brussels I-bis, proceedings were possible in UK or in France, and claimants had opted to bring proceedings in England. The defendant's submission that under the pertinent UK legislation the case should be stayed or stricken out in England, as Scotland would be the more convenient forum, was rejected. The defendant was domiciled in England but the events leading to the claim had taken place in Scotland.

5.3 Choice of Forum Agreements

A high proportion of cases concern jurisdiction on the basis of a jurisdiction agreement. In proceedings in Bulgaria, a sales contract contained a jurisdiction clause in favour of a court in Austria. When the appeal court had determined that a party had given its consent to the general conditions of the manufacturer and that the requirements of Article 25 of Regulation No 1215/2012 had been met, the Bulgarian Supreme Court⁶² concluded in cassation proceedings that the alleged contradiction with the judgment in Case C-543/10 (*Refcomp SpA*)⁶³ did not exist. The Bulgarian Supreme Court held that the factual question whether an agreement has been correctly concluded in accordance with the conditions of Article 25 of Brussels I-bis cannot be discussed at the stage of cassation.

In a case still subject to Brussels I, the Czech Supreme Court applied the *lex fori* to determine the validity of a jurisdiction agreement in favour of 'the general court of the contractor', which was understood to be in the Czech Republic.⁶⁴ The decision refers, *inter alia*, to the rule of Article 25 Brussels I-bis.

When there was a valid jurisdiction agreement 'in favour of the courts of the Czech Republic', without mention of a specific place in the Czech Republic, the Czech Supreme court found that the provisions on allocation of local jurisdiction of the Czech Code of Civil Procedure did not offer a solution. The Supreme Court determined that the case against the defendant domiciled abroad could therefore be brought before the court where the registered office of the Czech claimant was located.⁶⁵

In an Irish case⁶⁶ the validity of the following jurisdiction clause had to be determined:

⁶¹ Queen's Bench Division 19.7.2016 [2016] EWHC 1794 (QB) *Le Guevel-Mouly v AIG Europe Ltd.*

⁶² Supreme Court of Cassation, 21 November 2017, No. 689 21-11-2017.

⁶³ ECLI:EU:C:2013:62.

⁶⁴ Nejvyšší soud, 17 December 2014; ECLI: CZ: NS: 2014: 30.CDO.2626.2014.1.

⁶⁵ Nejvyšší soud, 20 May 2016, ECLI:CZ:NS:2016:30.ND.384.2015.1 and Nejvyšší soud, 19 October 2016; ECLI:CZ:NS:2016:30.ND.230.2016.1.

⁶⁶ High Court 20/02/2018 [2018] IEHC 190 *Leinster Stone Suppliers Ltd. -v- OMAG Spa.*

“Competent court: If the parties fail to agree on a competent court should any disputes arise over the interpretation or execution of these sales conditions, it is understood that the competent court will be that of Bergamo Italy”

In the proceedings in Ireland much of the discussion centered on the construal of the jurisdiction clause, whether the plenary proceedings involve a dispute relating to the “interpretation” or “execution” of the contract, such that the exclusive jurisdiction clause was triggered. It is somewhat remarkable that the submissions of parties and the considerations of the court only deal with case law from Irish and English courts. Apart from a reference to the ECJ decision *Besix*, which is somewhat out of context,⁶⁷ much attention is given to an English decision dealing with the following clause: ‘And the buyer hereby submits to the jurisdiction of the English courts’. Eventually the Irish court would decide that the clause is sufficiently broad to cover the proceedings instituted in Ireland. Meaning that the clause is effective and jurisdiction is with the court in Bergamo, Italy. In its deliberations on jurisdiction, the Irish court also gives weight to the fact that the dispute has to be decided in accordance with Italian law. Article 25(1) Brussels I-bis is quoted in the Irish judgment but there is no discussion at all as to the relevance of Italian law (or of the law that would be applicable according to the conflicts of law rules of the Italian court).⁶⁸ The case turns on the construction of the wording the clause, and in this process the law of the court indicated in the clause and which is also applicable to the contract in dispute does not play a role for the Irish court. Continental legal writing offers support for the view that the material and substantive validity mentioned in Article 25(1) Brussels I-bis, which is subject to the law of the chosen court, also means that the interpretation of this clause is subject to that law.⁶⁹

5.4 Enforcement on the basis of the certificate

Proceedings that took place in Lithuania in 2016 demonstrate that at that time legal practice still had to become familiar with the new regime for enforcement. The applicant already disposed of a certificate drawn up by a court in Latvia that had issued a judgment in his favour. In Lithuania an application was made for enforcement under the certificate. This application was made to a Lithuanian court. The court⁷⁰ was required to explain that the court is not the competent authority for enforcement in Lithuania and referred the applicant to a web link of the Judicial Officers in Lithuania.

An example of a party that clearly wanted to try every possible remedy to obstruct enforcement can be taken from proceedings in Spain. A certificate was issued in Italy in respect of an Italian judgment. In Spain enforcement was opposed in first and second instance, with the unsuccessful arguments that notification had not taken place properly and that the Italian court had wrongly assumed jurisdiction under Article 7 Brussels I-bis. Both assertions were rejected by a Spanish court,⁷¹ the first on the basis of the revised Service Regulation (Regulation No. 1393/2007) and the other on the basis of Article 45(3) Brussels I-bis, the provision that, with the exception of consumer, insurance and employment cases, does not allow review of the jurisdiction of the court of origin and which is already known in the 1968 Brussels Convention. The outcome of the

⁶⁷ The court refers to ECJ 19 February 2002, *Besix*, ECLI:EU:C:2002:99, a case on Article 5(1) Brussels Convention, to emphasize that interpretation should take place in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than that of his domicile, he may be sued.

⁶⁸ Consideration 20 Brussels I-bis.

⁶⁹ See for Germany: MüKoZPO/Gottwald, 5. Aufl. 2017, Brüssel Ia-VO Art. 25 Rn. 21; for The Netherlands: T&C Rv, commentaar op art. 25 Brussel I-bis, aant 15.

⁷⁰ Court of Appeal 20-12-2016 Case No. 2T-101-370-2016.

⁷¹ Roj: AAP LO 493/2017 - ECLI: ES:APLO:2017:493A.

Spanish proceedings is in accordance with what is to be expected under the new regime. The concern would be that there was still scope for delaying enforcement with arguments that were on the brink of the unsustainable in two instances.

In unreported proceedings in the Netherlands, the Rechtbank Oost-Brabant, a court of first instance, was requested during the summer of 2018 to issue a certificate in respect of a judgment handed down by it in summary proceedings. These proceedings concerned the sale of a house in the Netherlands. The buyer, resident in Switzerland but owner of immovable property in Belgium, had been in breach of his obligations under the sales contract. One of the members of the project team assisted at a hearing held by the Rechtbank, which was clearly in doubt whether it could issue the certificate. Eventually the certificate was issued. It never transpired what the basis was for the hesitations of the court. Perhaps these were linked to the circumstance that proceedings had taken place in summary proceedings ('kort geding'). Under Article 7(1) Brussels I-bis there would be jurisdiction in the main proceedings for the Rechtbank Oost-Brabant, if instituted by the claimant seller, but the main proceedings had not been instituted. Another reason could be that the defendant was habitually resident in Switzerland (a state party to the 2007 Lugano Convention), while enforcement was to take place in Belgium under the Brussels I-bis Regulation. It would however appear that the 2007 Lugano Convention does not block the application of the more recent enforcement regime of the Brussels I-bis Regulation within the EU (Article 64 2007 Lugano Convention; Article 73 Brussels I-bis). Whatever the cause for the hesitation, the way things went does give the impression that legal practice is still unfamiliar with certain aspects of the certificate. To give an example, it may not be clear how tasks are divided between parties and the courts. From information offered by the lawyer involved it is understood that the applicant party completed the form for the certificate (using the online tool available on the European e-Justice Portal) and then submitted it to the court. During the Round Table, others believed the certificate would need to be drafted in full by the courts, and a party would only need to apply for a certificate. There is also the question to what extent a court issuing a certificate can assume that it has jurisdiction over the main proceedings, as long as these have not commenced.⁷²

5.5 Some tentative remarks

The case-law above and the information obtained from legal practice that is discussed are only indications of possible problems and do not support an argumentation that there is a clear pattern of problems with the application of the Brussels-Ibis Regulation.

Nevertheless, there is some support for the view that there is not a seamless adjustment to the new regime. Overlooking the entry of force of the Regulation will often not have consequences in respect of the rules of jurisdiction, as in many circumstances there will not be a material difference. In respect of the enforcement the change to the new regime always means that there is a material difference. There is a concern that in the future there will be attempts to bring 'old' judgments under the enforcement regime of the Brussels I-bis, an option that was clearly not accepted by the drafters of the Brussels I-bis Regulation.

There is also a concern that the novelty in respect of choice of court clauses does not really help a court that is not the court chosen in the jurisdiction clause but still has to decide upon the validity thereof. In the Irish case discussed above, it appears that the novel regime of the Regulation means that the Irish court should have applied Italian law to determine the consequences of the jurisdiction clause. This never happened. The English case on the jurisdiction of the English court in respect of a claim from Nigerian claimants against a

⁷² Article 2(a) Brussels I-bis.

corporation clearly domiciled in England raises the question whether application of national procedural law can be detrimental to the application of the Brussels I-bis Regulation. It would appear that in the English case the result of the application of the jurisdiction rules was highly predictable from the very beginning. Nevertheless much time of is spent by parties and the courts to determine the obvious answer.

6. Conclusions and Recommendations

Over the past 50 years the system of the 1968 Brussels Convention has followed a path of gradual change, finally leading to the current Regulation Brussels I-bis. The study aimed to evaluate how these amended rules function in practice, to map the problems national legal orders face when applying new EU legislation on private international law and to identify any obstacles to the application of the Brussels I-bis Regulation. This study focused on four key changes in the Regulation are the extension of some of the jurisdiction rules (in particular consumer and employment rules), amendments to the choice of forum provision and the *lis pendens* rules, and the abolition of *exequatur* for the purpose of the enforcement of judgments.

A general remark that is made concerns the use of this path of gradual change. The current Regulation stuck to the path of gradual change in respect of the rules on jurisdiction. In respect of the rules on enforcement the Regulation opted for a more radical change. It abolished ‘*exequatur*’, the need for a declaration of enforceability that under the previous instruments had to be issued by a court from the EU Member State where enforcement takes place. The latter solution is clearly the result of a desire to further European integration and to do away with formalities considered superfluous in the present day considering the experience with the previous versions of the Regulation and the level of mutual trust.

The impression gained during this project is that with respect to the awareness of the new instrument, stakeholders were across the board well aware that a new regulation had been drawn up by the end of 2012 and that this entered into force in 2015. It may well be that the long period for entry into force supported this awareness. On the other hand, some of the case law suggests that the entry into force in 2015 has not taken without a hitch. Some courts applied the new Regulation to all proceedings before it from 10 January 2015, irrespective of the transitional provisions of the Regulation, for which the date of commencement of proceedings, on or after 10 January 2015, is essential. There are also examples in the case law where the current Regulation was applicable but its applicability was overlooked during the application of the rules on jurisdiction. Often this did not have material consequences in view of the similarity of many rules on jurisdiction of the current Regulation and its predecessor.

In respect of jurisdiction the research carried out so far does not yet make it possible to identify problems connected to the amendments. In the empirical part of the project there was in general support for these amendments, which by many respondents were seen as welcome solutions to problems that had been identified. However, the question whether the solutions really function in practice requires more analysis of the case law, and may also become more apparent when case law has developed further. Not all amendments in respect of jurisdiction have as yet been put to serious tests in the case law of the lower courts.

But the case law does show that one amended provision, Article 25 on choice of court clauses, is applied regularly.⁷³ As a possible example of the problems that may lie ahead it appears necessary to point to the decision of an Irish court, discussed above,⁷⁴ that had to determine the validity of a jurisdiction clause in favour of a court in Italy. The understanding of the amended

⁷³ See the data in Annex I about incidence of application of provisions of the Regulation. 155 decisions out of 957 concern Article 25.

⁷⁴ Par 5.3, High Court 20/02/2018 [2018] IEHC 190 *Leinster Stone Suppliers Ltd. -v- OMAG Spa*.

provision is that it required the Irish court to apply Italian law to this question, including the Italian choice of law rules (which are not unified or harmonised in the EU in respect of the law applicable to jurisdiction agreements). If this understanding is correct, the new rule appears to have made the task of a court deciding upon a jurisdiction clause in its favour easier. E.g. a court in London that has to determine the validity of a choice of court clause ‘the buyer hereby submits to the jurisdiction of the English courts’ will know what to do. But for a court in the Czech Republic, who is pointed to the same clause by a party that contests jurisdiction of the Czech courts, it will be much harder to determine the validity of the clause.

And the realisation that the gradual changes to the rules on jurisdiction do not appear to have led to difficulties, leads to a remark in respect of jurisdiction that has nothing to do with the amendments as such.⁷⁵ On the total number of cases collected, some 25% of the cases concerned the application of the special jurisdiction under Article 7. This in itself still says nothing, as courts are required to determine their jurisdiction. However, the impression gained is that this process of application of e.g. Article 7 places a heavy burden on the courts, as this matter is not readily resolved.⁷⁶ Which raises the more fundamental question whether this is still acceptable within an integrated European Union. Within EU Member States the problem of local jurisdiction appears to become less important.⁷⁷ Another example is provided by the decision of an English court, that had to spend a great deal of time to jurisdiction in case where jurisdiction appeared to be highly predictable.⁷⁸

With respect to enforcement, where there was a radical change with the system that had been known for almost 50 years, the project has indicated some practical problems. There is a concern in respect of the calculation of interest, as this has to be calculated during enforcement by a judicial officer who is unfamiliar with the calculations applied in the Member State of origin of the judgement. There may be questions in respect of the issuance of the certificate, who has to complete the form, the applicant party or the court, and there may be questions on the issuance of a certificate in respect of a decision in summary proceedings, when the summary proceedings are not followed up by main proceedings. There was also a concern that attempts are made to obtain a certificate for a judgment dated from 10 January 2015 but decided in proceedings that are still subject to the previous instrument (Regulation Brussels I (44/2001)).

Therefore one conclusion would be that in respect of the gradual changes in respect of jurisdiction, that the stakeholders are accepting and understanding these changes in similar gradual fashion. But bigger question remains whether the issue of jurisdiction has not become far too important and demands too much attention of the courts. Which is against the desire that jurisdiction should be highly predictable. The other conclusion would be that in respect of the radical change brought by the Regulation, stakeholders have more difficulty in accepting and understanding this change. The difficulties do not concern the radical change as such, the abolition of *exequatur*. That appears to be well accepted and understood. The difficulty appears to lie in ‘working with’ the system of the certificate.

And when it comes to making recommendations, especially to law makers, the recommendation, if the preceding conclusions are supported (which may need further research) would be to consider whether it is option to find solutions by further harmonizing or unifying the rules of procedure. In respect of jurisdiction such harmonization or unification may be conducive to further judicial co-operation. E.g. when the validity of a choice of court has to be determined,

⁷⁵ Reference is made to the list in Appendix I, of the incidence of the provisions applied.

⁷⁶ See e.g. a case from Malta, Civil Court, First Hall 20/06/2018 622/2015, with abundant references to EU case law and application of Article 7/1(a) Brussels I-bis when the contractual term was delivery ex works in Greece.

⁷⁷ Recently a court in the Netherlands dismissed the problem of local jurisdiction, as all proceedings were taking place in writing.

⁷⁸ See par 5.2, Queen's Bench Division 19.7.2016 [2016] EWHC 1794 (QB) *Le Guevel-Mouly v AIG Europe Ltd.*

there would be some sense in passing this question on to the court identified by the clause. Appropriate rules may also help parties (and courts) realize that they are applying unified rules that aim to be predictable, not intended to complicate matters. Some of the experiences witnessed indicate that further harmonization or unification of the rules of procedure will also be welcome in respect of enforcement, as there appears to be some need for clarification in respect of the roles of courts and parties in respect of the issuance of the certificate.

In summary:

- The Brussels I-bis Regulation and the amendments it brought about are generally known in legal practice
- The four key amendments studied for the present research are generally considered to be improvements
- The gradual changes to the rules on jurisdiction do not appear to have led to difficulties for the stakeholders;
- Questions remain as to the ease of application of the rules on jurisdiction as a whole;
- The radical change in respect of enforcement may not have been fully understood by stakeholders on the practical level (courts, lawyers enforcement officers);
- To remedy the situation, further harmonisation or unification of procedural law, to support application of the Brussels regime, should be considered.

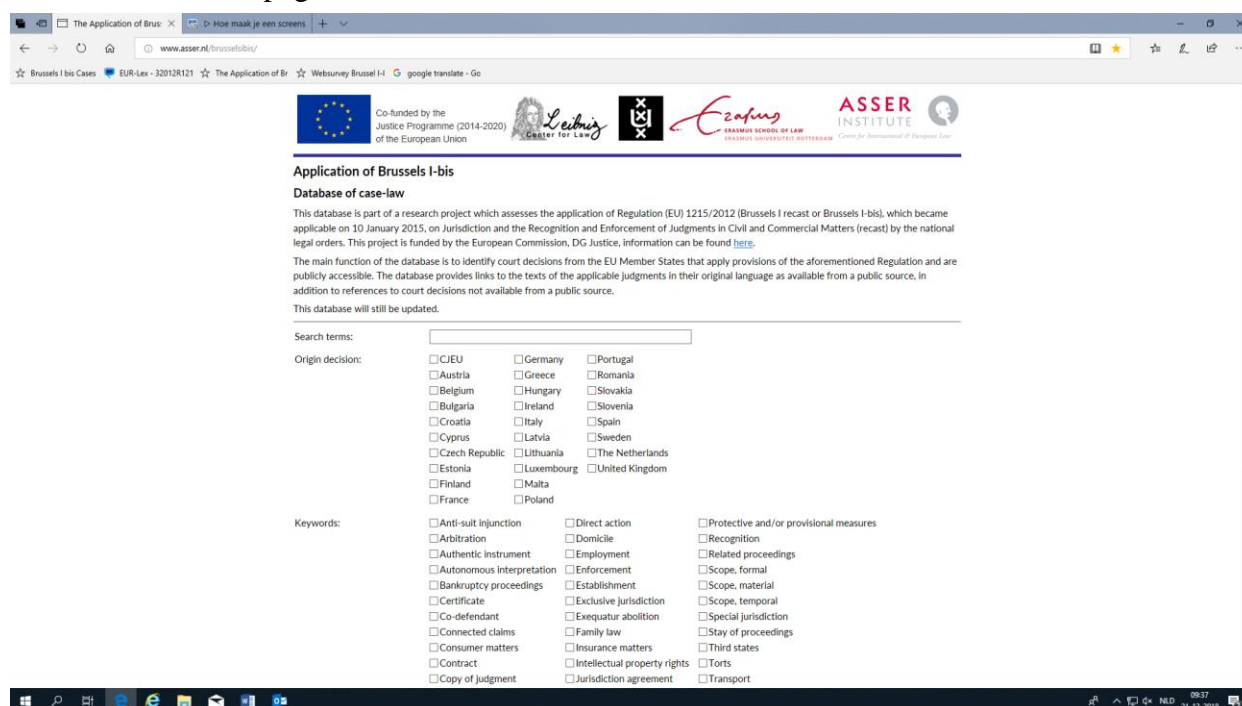
Annex I: Brussels I-bis Case Law Database

The Database of Court Decisions – Methods, Limitations and Numbers

The database can be consulted at:

<http://www.asser.nl/brusselsibis/>

Screenshot of homepage:



Methods

The original proposal envisaged that case law of the EU Member States on Brussels I-bis would be collected by using methods that are as yet not regularly used when conducting legal research. By making use of data science search techniques, case law of the EU Member States available in open databases would be sifted through for decisions dealing with Regulation 1215/2012, Brussels I-bis. However, when these techniques were applied by one of the partners in the project, Leibniz Institute, for case law from the Netherlands available through rechtspraak.nl,⁷⁹ this led to unsatisfactory results. Results were either far too numerous or far too restricted. This became obvious when the results were compared with the results achieved by traditional methods. The comparison was easy to make, as one of the other partners - T.M.C. Asser Instituut - had already used such traditional methods to search the same source, notably to publish case law on private international law. In view of the unsatisfying results, it transpired that the budget and the workforce available for the project would be insufficient to improve on the use of data science techniques in respect of Netherlands case law and then to apply these methods to case law of other

⁷⁹ The website of the Netherlands Judicial System, www.rechtspraak.nl, offers a database of Netherlands court decisions.

Member States. Therefore, it was resolved to abandon the use of data science techniques and to revert to traditional methods.

The use of data science techniques involved the use of topic modelling. Raw data, in the case of the Netherlands a complete set of all case law published on the website of the Netherlands Judicial System,⁸⁰ was searched for certain combinations of terms, topic keys. This makes it possible to identify and index cases that apply the topic or instrument that is searched for, in this case the Brussels I-bis Regulation. Traditional methods are understood as either the use of human resources (to peruse a court decision for the relevant topic) or the use of search tools offered by a database and that allow to search text for specific words or numbers. For this study, the use of traditional methods meant that the search tool available for the databases with case law of the EU Member States was used to search for the document number of the Brussels I-bis Regulation, “1215/2012”. Sometimes, when the results of this search led to too many results (e.g. because the search tool applied would also generate all cases containing ‘2012’) the word ‘regulation’ (in the national language of the database) was included in the search. This eventually led to a result of nearly 1200 cases, of which 985 were retained for the database.

Following the collection of cases, human effort was still necessary to check and index the results. The about 200 cases that were rejected would typically be cases that mention the Brussels I-bis Regulation but do not apply the Regulation, e.g. a decision given in application of Brussels I (Regulation 44/2001) stating that the recast regulation is not applicable (without making a reference to a specific provision of the recast) or that the recast contains an identical rule. Indexing of the case law would primarily take place on the basis of the provisions of the Brussels I-bis Regulation that was applied. In addition, indexing would also take into consideration: provisions of the Brussels I Regulation, case law of the Court of Justice of the European Union, other EU instruments, international conventions and a limited set of keywords. Eventually two databases were created. A publicly accessible database and another database, used to construct the public database and that is only available to the participants in the project.

Limitations

Language

The obvious complication when compiling a database of case law from a group of EU Member States is the language barrier. For the staff engaged in the work on the database, this barrier existed when the case law was not in English, French, German or Dutch. For the selecting and indexing process of case law in other languages a freely available web-based machine translation program was used. It is readily accepted that, at present, such programs are not yet suitable to offer translations that will stand thorough legal scrutiny. On the other hand, for the purpose of determining which provisions of the Brussels I-bis Regulation were applied, and to determine the subject-matter that was decided and other relevant legal sources that were applied, the quality of the machine translations were experienced as sufficient.

Open access or restrictions to access

Different attitudes exist between the Member States in respect of offering open access to national case law at a large scale. Some Member States are at the forefront of this development, as appears to be the case for at least Croatia, Estonia, Latvia, Lithuania, Slovenia, the Slovak Republic and the Netherlands. Although it is not known how the number of published case law compares to the

⁸⁰ The website of the Netherlands Judicial System offers the possibility to download of a complete set of all published case law (renewed each month). See <https://www.rechtspraak.nl/Uitspraken-en-nieuws/Uitspraken/Paginas/Open-Data.aspx>.

actual number of cases decided, these Member States offer direct access to a considerable number of judgments issued by their courts. In other Member States, some case law is openly accessible, but there are restrictions. The restrictions applicable vary greatly and may refer to the accessibility or to the number of cases. In Germany approaches vary per State (Bundesland). In France, Italy, and Luxembourg it is notably that the case law of the highest court of the jurisdiction is openly accessible. Access to case law of the lower courts is restricted. In France lower courts case law appears to be mostly available via commercial websites. In Luxembourg a request for a search in (lower) courts case law must be addressed to the ‘Service de documentation juridique’, a paid service of the Luxembourg judiciary. In Italy the database ItalGiure is a paid service for most users. In the United Kingdom the free website Bailii invites users to make a voluntary contribution.

Another restriction – and complication for the project - concerns the copyright on court decisions and the right to incorporate or distribute the text of decisions. Just a few examples can be given. In the Netherlands no copyright is claimed. In the United Kingdom linking to the judgments in the Balli database is allowed but reproduction of the text of the judgment in HTML is understood to be prohibited. In Germany the Justice Portal for the Land Nordrhein-Westfalen only allows certain uses of the text of judgments published on the portal.

Privacy considerations form another restriction. In some Member States judgments are made anonymous in whole or in part before publication. As an example, in the Netherlands there are clear guidelines with respect to anonymization, requiring the removal of, inter alia, the names of private individuals or of corporations who by their name can be easily connected with a private individual. In other Member States judgments were found in which the names of private individuals still appear. As a result, in order to avoid possible infringements with copyright, privacy law or other rights, caution was applied in respect of the publication of the text of the judgments. The users of the database will only find a direct link to the judgment as it is available on a public website. This makes the database less user-friendly, as it is necessary to open the link to access the judgment. This also means that the database cannot offer a possibility to search within the full text of judgments. Although this certainly reduces the attractiveness of the database, the current situation with respect to open access of court decisions in the EU leaves no other choice. It would be different when the situation seen in the Netherlands, where the courts deal with anonymization of judgments and there is open access to the judgments they publish, is accepted in all Member States.

Some numbers:

Total number of selected cases	957
Number of cases applying Article 4	202
Number of cases applying Article 7	256
Number of cases applying Article 7(1)	116
Number of cases applying Article 7(2)	125
Number of cases applying Article 25	155
Number of cases concerning consumers	104
Number of cases concerning employment	25
Number of cases concerning insurance	28
Number of cases concerning intellectual property	28
Number of cases concerning exequatur abolition	22
Number of cases concerning temporal scope	71

Number of cases applying Article 31(2)	8
Number of cases applying Article 29	39
Number of cases applying Article 30	24
Number of cases applying Article 66	147
Number of cases applying Article 80	30

From the numbers a few trends appear. The first is that when a top 3 is made of the provision the courts have to deal with most, first place is for Article 7, setting out the main alternatives of special jurisdiction. More than a quarter of all cases concern this provision, distributed almost evenly between Article 7 under paragraph 1 and under paragraph 2. A few cases dealt with the other alternatives of Article 7, and some cases were not precise as to the alternative that was applied. The second place is for Article 4, the basic rule of jurisdiction of the domicile of the defendant. The third place regards Article 25, the main provision on choice of court. The surprising element is perhaps that Article 4, the court of the domicile of the defendant, is not the provisions that is applied most frequently. However, this can be explained by other reasons as well, such as that a case based on jurisdiction of the court of domicile of the defendant was considered too standard for publication. There are only 37 cases that have a keyword 'domicile' which indicates there may have been an issue in determining the domicile, and most of these, 25 decisions, regard a consumer case.

With respect to the subject matter, consumer matters form some 10% of all cases. Other subject matters for which the regulation contains a separate section are divided almost evenly between employment and insurance.

Annex II: Survey Brussel I-bis (English version)⁸¹

The application of Brussels I (recast) in the legal practice of EU Member States

The research study ‘The application of Brussels I (recast) in the legal practice of EU Member States’ seeks to get a better understanding of the functioning of the recast Brussels I-bis Regulation (Reg. 1215/2012) that became applicable on 10 January 2015. It focuses on a number of changes that have been made in comparison with the previous Regulation.

This web survey is directed at EU legal practitioners and academic experts. Completing the survey will take approximately 10-15 minutes. Respondents can also choose to complete this survey in [French](#), [German](#) or [Dutch](#). Your answers will be treated carefully and participation is anonymously. Following completion of the survey, you will be asked whether you are available participate in a brief

⁸¹ Star (*): obligatory question;
Round sign: single choice; and
Square sign: multiple choice.

telephone interview. For this purpose only you will need to provide your contact details. Click on the 'Next'-button to start this web survey.

The research study is carried out by the Asser Institute (The Hague) in collaboration with Erasmus School of Law (Erasmus University Rotterdam).

For any questions or clarification you can contact Prof. Xandra Kramer (Erasmus School of Law) and Michiel de Rooij (Asser Institute) at BXL1bis@asser.nl.

Together with the distribution of this survey a discussion platform has been opened.

Click [here](#) to visit the discussion platform.

‘The application of Brussels I (recast) in the legal practice of EU Member States’ project is a cooperation between the Asser Institute and the Erasmus School of Law (Erasmus University Rotterdam)

Co-funded by the Justice Programme (2014-2020) of the European Union

1 What is your (member) state of origin?*

▼ *Dropdown list with the following options:*

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia
- Lithuania

- Luxembourg
 - Malta
 - Poland
 - Portugal
 - Romania
 - Slovakia
 - Slovenia
 - Spain
 - Sweden
 - United Kingdom
 - Swiss, Norway or Iceland
 - Other state
-

2 What is your professional background?*

- Legal practitioner (lawyer, notary)
 - Bailiff
 - Judiciary
 - Academic
 - Other legal profession
-

3 For how many years have you been active in the legal profession?*

- 1 to 3 years
 - 4 to 10 years
 - More than 10 years
-

4 How often do you deal with Regulation Brussels I (44/2001) or Brussels I-bis (1215/2012) on average?*

- Never
 - A few times per year
 - A few times per month
 - Weekly
 - (Almost) daily
-

5 Do you have practical experience with the application of the new Brussels I-bis Regulation (1215/2012) already?*

- Yes
 - No
-

6 The changes brought by Brussels I-bis (1215/2012) to the rules of its predecessor Brussels I (44/2001) are:*

Unkown to me	Hardly known to me	Neutral	Reasonably well known to me	Well known to me
<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

7 What is your opinion on the changes brought by Brussels I-bis (1215/2012)? (more than one answer possible)*

- I fully or almost fully agree with the amendments made
 - I mainly support the abolition of the exequatur
 - I mainly support the changes in respect of choice of court and lis pendens (priority to choice of court)
 - I mainly support the changes in respect of consumers and/or employees
 - In general I do not agree with the amendments
 - In particular I do not agree with the abolition of exequatur
 - In particular I do not support the changes in respect of choice of court and lis pendens
 - In particular I do not support the changes in respect of consumers and/or employees
-

7b Further explanation (if desired):

8 The enforcement of judgements coming from other member states has become easier due to the abolition of the exequatur. *

Strongly disagree	Disagree	Neutral	Agree	Strongly agree
<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

8b Further explanation (if desired):

9 The new rules for the enforcement of judgements and the possibility to appeal (Article 43-46 Brussels I-bis) offer sufficient legal protection to the party against whom enforcement is sought*

Strongly disagree	Disagree	Neutral	Agree	Strongly agree
<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

9b Further explanation (if desired):



10 The main problems when enforcing court decisions from other EU member states in my jurisdiction are (no more than 3 answers):*

- Violation of public policy
 - Incorrect or untimely notification of the document instituting proceedings
 - Irreconcilable with an existing court decision from my jurisdiction
 - The foreign court did not have jurisdiction
 - Obtaining a (duly completed) certificate in respect of the decision from the court of origin
 - Problems (in communicating) with the competent authority of execution in the requested member state
 - Incorrect application of the Brussels Regulation (1/1bis) in the Member State of origin
 - There are problems but I do not see a specific category of such problems
 - There are other problems, namely: [OPEN TEXT]
 - I do not or only exceptionally experience problems
-

10b Further explanation (if desired):

11a The validity of choice of forum clauses is regulated in Article 25(1) and (5) Brussels I-bis. Is the new rule in Article 25(1), stating that the substantive validity of a choice of forum clause is governed by the law of the chosen forum (including its conflict of law rules), a workable rule?*

	Not at all	No	Neutral	Yes	Completely
	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

11a2 Further explanation (if desired):

11b Is Article 25(5), stating that the validity shall be determined independent of the other terms of the contract, a clear rule?*

	Not clear at all	Not clear	Neutral	Clear	Completely clear
	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

11b2 Further explanation (if desired):

11c In your opinion, were these changes necessary for the use of choice of court agreements in practice, or was it unnecessary to address this issue?*

- Yes, these amendments were necessary as the rules on the validity of forum clauses were not clear
 - No, these amendments were not necessary as there were no problems in practice
-

11d Further explanation (if desired):

12 The Brussel I-bis Regulation contains a number of provisions relevant for proceedings that concern parties from outside the EU (in particular Article 25 on choice of court, Article 18 on consumer contracts and Art 21 on employment contracts). However, Brussels I-bis does not generally apply when the defendant is resident outside the EU (a third state). What is your opinion on the extension of the geographical scope of the regulation to third states?*

- The international jurisdiction rules should be fully unified by EU legislation and there should be no scope anymore for national jurisdiction rules
 - The current rules that include rules for third country defendants in specific cases only suffices; other cases involving third countries should be governed by national jurisdiction rules
 - It is irrelevant whether this is regulated by the EU or national legislation
 - It is not desirable that EU legislation extends to third country parties; this should be regulated by national jurisdiction rules
 - No opinion
-

12b Further explanation (if desired):

13 When having to enforce a judgment in another EU Member State under Brussels I-bis, how do you generally proceed:*

- I will find out which authority is competent in the other EU member state and I will contact such authority myself
- I will contact a lawyer from the other EU member state
- I would use a specialist service provider, such as a debt collection agency
- All options mentioned above, it varies from case to case
- Otherwise, namely: [OPEN TEXT]
- I do not have experience in this area

14 When having to enforce a judgment in another Member State, how do you identify the competent enforcement authority in accordance with Article 42 Brussels I-bis?*

- I search and am usually able to find the required information on the European e-justice portal
- I usually use other sources, such as (national) websites, legislation in that Member States or handbooks
- I am usually unable to find the necessary information and I seek help from experts
- I do not have experience with this

14b Further explanation (if desired):

15 Do you have any other remarks on the functioning of the new Brussels I-bis Regulation?*

- No
 - No, the Brussels I-bis Regulation functions well
 - Yes, namely: [OPEN TEXT]
-

16 Are you available for a brief discussion by telephone or skype regarding your views and experiences with the Brussels I-bis?* The interview is expected to last approximately 15 minutes and can be carried out in English, Dutch, German, French, Italian, or Romanian.

- Yes
- No

Please provide your contact details and language preferences in order for our researchers to be able to contact you.

Name: _____

E-mailaddress: _____

Phone number and/or Skype address: _____

Function: _____

Days and time preferred: _____

Language preferred: _____

Annex III: In-depth Semi-Structure Interview (Question list)

The application of Brussels I (recast) in the legal practice of EU Member States

Introduction (to be filled in prior to the interview or during the interview)

1. What is your member state of origin?

2. What is your professional background?

Legal practitioner (lawyer, notary)

Bailiff

Judge, judiciary

Academic

Other legal profession

3. For how many years have you been active in the legal profession?

... years

4. How often do you deal with Regulation Brussels I (44/2001) or Brussel I-bis (1215/2012) on average?

Never

Daily

Weekly

A few times per month

A few time per year

5. Do you have practical experience with the application of the new Brussels I-bis Regulation (1215/2012)?

Yes

No

Overall questions regarding amended provisions

6. Brussels I-bis (Regulation 1215/2012) brought several amendments to Brussel I, how do you perceive these changes in general?

Did these changes impact on your practice in applying/using the Brussels I-bis?

Did they facilitate the application of the provisions/use of the regulation?

Abolition of exequatur and enforcement

7. The exequatur has been abolished by the Brussels I-bis. Has this facilitated the enforcement of the judgements you were requested to assist with?
Could you speak about your experience in this area?
8. Are there specific problems you encounter/continue to encounter in the cross-border enforcement of judgments? Or are you aware of such problems/difficulties?
What kind of difficulties are you encountering?
How do you handle/solve them?
9. How do you proceed in practice when needing to identify/determine the competent enforcement authority in accordance with Article 42 Brussels I-bis?
10. Have you experience situations when enforcement of a foreign judgment was refused?
What were the reason for this?
How did you proceed?

Choice of forum rules

11. How do you appreciate the changes made to what is the now Article 25(1) and (5) Brussels I-bis regarding choice of court agreements?
Based on your experience, were these changes necessary?
How have these reflected in practice/your activity?
12. How do you appreciate the provisions of Article 25(1) Brussels I-bis on the substantive validity of choice of forum clauses?
Do you find the present formulation clearer/easier to use and apply?
13. How do you appreciate the introduction of the clarification in Article 25(5) Brussels I-bis that establishes that the agreement conferring jurisdiction shall be treated as an agreement independent of the other terms of the contract?
14. Have the amendments of Article 25 facilitated in practice the assessment of the agreement regarding choice of forum clauses?
Has this had implication for your activity?
Are there further clarification elements that you would like to have specifically addressed by the text of this Article?
15. Do you consider further changes/clarifications to Article 25 Brussels I-bis necessary?

Lis pendens

16. What is your opinion regarding the amendment that gives priority to the jurisdiction of the chosen court (Article 31(2) and 31(3) and the provisions clarifying on how to deal with the proceedings instituted with other courts than the chosen court (Article 33 and 34 Brussels I-bis)?

Third-country defendants

17. Brussel I-bis contains a number of provisions relevant for proceedings that concern parties from outside the EU (e.g. Article 25 on choice of court and Article 18 on consumer disputes).
How do you perceive this extension?
What are its effects in practice?

18. How would you see a further extension of the geographical scope of the jurisdiction rules of the EU member states when the defendant is resident outside the EU (a third state)?
Do you consider such an extension desirable?

Other issues

19. Are there any other aspects/issues/remarks that would like to mention regarding the functioning of the Brussels I-bis?