Regulation BIa: a standard for free circulation of judgments and mutual trust in the European Union (JUDGTRUST)

QUESTIONNAIRE
for National Reports

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CHAPTER I

Application of the Regulation – in general

1. Are judgments applying the Brussels Ia Regulation and its predecessor(s) rendered in all instances (first, appellate and in cassation) published? Are they available online?

   Today, French judgments applying the Brussels Ia Regulation and its predecessors are not published on paper anymore. Before 2008, the most important decisions from the Cour de cassation –the highest Court of the judiciary order- were published in a printed review called the '*Bulletin des arrêts de la Cour de cassation*' and among them were those applying Brussels I or the Brussels Convention of 1968. However the Bulletin was dematerialized in 2008, and is now only available online, through the Cour de cassation's website.

   Otherwise, all of the Cour de cassation's decisions and many of the courts of appeal's decisions applying Brussels Ia and its predecessors are available online on several websites. The main ones are *Legifrance.fr, Dalloz.fr, Lexisnexis.fr, Lextenso.fr, Lamy.fr*. However, all of them except *Legifrance.fr*, which is a public website, are accessible only through subscription.

   Contrary to the decisions rendered by the Cour de cassation and the courts of appeal, first instance judgements are usually neither published on paper nor available online, unless they give rise to commentaries by academics or lawyers.

2. Has the ECJ case law generally provided sufficient guidance/assistance for the judiciary when applying the Brussels Ia Regulation?

   The preliminary ruling procedure is, on the one hand, rather well perceived in France insofar as the answers given by the ECJ are deemed to provide sufficient guidance for the court to solve the case.

   The interpretative authority of the ECJ case law –ie its impact on cases other than the one which gave rise to the preliminary ruling procedure- raises, on the other hand, much criticisms and debates as to the exact scope and/or the complexity of the solutions adopted. For instance, French courts still have difficulties, in some cases, in determining whether the dispute resorts to 'contractual matters' within the meaning of Article 7 (1). The implementation of the requirements of the ECJ regarding several provisions of the Regulation, such as Article 7.1 a. and Article 7.2, is also considered as especially difficult

in some cases. One reason for this is the emphasis put by the ECJ on the necessary proximity between the court designated by these provisions and the matter: this proximity is indeed considered by the European Court of Justice as a requirement for a proper administration of justice, whereas many French authors and judges consider this view as a mere postulate, which can turn out to be detrimental to legal certainty. Excessive focus on proximity also leads to a partition of unique cases between the courts of different member States, which adds to complexity and uncertainty.

The coherence of the solutions adopted is also a matter of concern: for example, the case law regarding the effects of choice-of-court agreements on third parties and the difference of approach between the *Tilly Russ* (CJUE 19 June 1984, case C-71/83)/ *Coreck Maritime* (CJUE, 9 November 2000, case C-387/98) cases on the one hand and the *Refcomp* case (CJUE 7 February 2013, case C-543/10) on the other hand triggered perplexity among academics and judges in France.

3. Which changes introduced in the Brussels Ia Regulation are perceived as improvements and which are viewed as major shortcomings likely to imply difficulties in application – experience in practice and prevailing view in the literature in your jurisdiction?

Changes introduced in the Brussels Ia Regulation which are generally considered in the French literature as improvements are the following:

- the extension of the scope of application of the Regulation for consumers and employees, which enable them to benefit from the protective provisions of the Regulation even when the stronger party is domiciled in a non-EU State (Article 6 (1), referring to Articles 18 (1) and 21 (2)) ;

- the reversal of the *GlaxoSmithKline* ruling (ECJ, 22 May 2008, case C-452/06) and the right now offered to employees to claim the benefit of Article 8 (1) where their claim is filed against several co-employers (Article 20 (1), referring to Article 8 (1)) ;

- the protection introduced for weaker parties in cases of tacit prorogation of jurisdiction (Article 26 (2)) ;

- the reversal of the *Gasser* caselaw (ECJ, 9 December 2003, case C-116/02) and the priority now granted to the court designated by a choice-of-court agreement even though it was not the first one to be seized (Article 31 (2)) ;

- the adoption of rules on *lis pendens* and related actions for cases where one of the claims was filed before the court of a third State (Articles 33 and 34 of the Regulation) ;

- the inclusion, among the grounds for refusal of recognition and enforcement of other Member States' decisions, of the violation of the protective provisions

of the employee, when the latter was a defendant before the court which issued the decision (Article 45.1 (e) (i)) ;

- the introduction in Article 45.1 (e) (i) of the rule pursuant to which the jurisdiction of the court of origin is controlled only if the injured party, the consumer or the employee was the defendant in the initial proceedings: this innovation reinforces the protection of these parties since exerting a control in cases where they acted as claimants may turn out to be detrimental to them.
- the new provisions on recognition and enforcement, including the new preventive actions for refusal of recognition and refusal of enforcement, which are considered as striking a rather good balance between the interests of the parties (Chapter III Recognition and Enforcement).

As regards the shortcomings, one may cite:

- Recital 12 on the delineation between matters falling within the scope of the Regulation and arbitration matters, which do not fall under the Regulation. This recital is indeed considered as ambiguous and unclear, and does not adequately prevent the risk of conflicts between an arbitral award and a judicial decision entered by the court of another Member State;
- the repeal of the condition that at least one of the parties is domiciled in a Member State in order for Article 25 to apply to choice-of-court of agreements. The risk is, indeed, that the Regulation would now apply to cases whose sole connection with the EU is the designation of the courts of a Member State, which may appear as too thin to justify the implementation of the Regulation.

- Although Article 25 on choice-of-court agreements contains useful clarifications, among which is the principle of independence of the agreement from the main contract (Article 25 (5)), it submits the substantive validity of the clause to a very complex regime. The identification of the rules designated by the private international law rules of the court designated by the clause may indeed turn out to be difficult, even though the system is identical to the one adopted under the Hague Convention of 30 June 2005.

- Article 41 (2), which allows for the application of the grounds for refusal or of suspension of enforcement ‘under the law of the Member State addressed’, insofar as they are not incompatible with the grounds referred to in Article 45, is also considered as problematic for three reasons.
First, it creates new limits to enforcement, whereas the Regulation sought, through the suppression of *exequatur*, to make the movement of decisions easier within the European judicial area.
Second, these limits may vary between Member States since they stem from their national law.
Third, the test of compatibility between national grounds for refusal or of suspension of enforcement with the grounds set forth in Article 45 may be difficult to implement in practice.

- Article 44.1 of the Regulation, which is not clear enough as to the criteria which may govern the limitation, the adjunction of conditions, or the suspension of enforcement proceedings. This lack of precision creates the risk of diverging approaches among Member States.

4. Taking into consideration the practice/experience/difficulties in applying the Regulation in your jurisdiction and the view expressed in the literature, what are suggestions for improvement?

Suggestions for improvement of the Regulation include :

- a clearer distinction between the spatial scope of application of the Regulation and the scope of each rule of jurisdiction. The rules governing the spatial scope of application could, in this regard, be spelled and synthetized in a simpler manner, within a preliminary chapter/section of the Regulation.

- the introduction of an autonomous definition of the domicile of natural persons in order to avoid resorting to the court's national law, or to the law of another Member State on the territory of which the defendant is assumed to be domiciled. Resorting to national laws may indeed entail diverging views from the courts of different Member States and create both positive and negative conflicts of competence.

- the suppression or, at least, the simplification and the limitation of the scope of the alternative grounds of jurisdiction set forth in Article 7, especially Articles 7 (1) and 7 (2). These two provisions have indeed become a very important source of litigation in France. One possibility in this regard would consist in suppressing Article 7 (1) (a) and in extending Article 7.1 (b) to all types of contracts. When it comes to Article 7.2, its scope might be revised in order to exclude weaker parties, such as consumers and employees, who should benefit from specific protective provisions even in extra-contractual matters.

- the introduction of a *forum necessitatis* in order to prevent denials of justice where the courts of another Member State have wrongly declined jurisdiction.

- the improvement and simplification of the regime of choice-of-forum agreements. As regards the applicability of Article 25, the requirement of internationality should be inscribed in the Regulation, and a definition of the relevant criteria of internationality should also be provided. As for the conditions of validity of these agreements, the formal requirements are not clear enough, while the reference to the rules designated by the private international

law rules of the Member State whose courts were elected by the parties is too complex. It may be replaced by a set of substantive requirements directly laid down in the Regulation itself. Furthermore, at the recognition and enforcement stage, the violation of a clause which confers exclusive jurisdiction on the designated court(s) should be regarded as a ground for refusal of recognition and enforcement (see in this regard, under French private international law, Cass. 15 May 2018, n°17-17.546, to be published in the Bulletin).

- a clarification should intervene as regards the relations between the Regulation and arbitration matters. Indeed, recital 12 falls short of solving this issue.

- the relations with third States should be clarified, even though the introduction of Articles 33 et 34 on *lis pendens* and connected actions constitutes a step in the right direction. In particular, the issue of the "mirror effect" of the criteria set forth in Articles 24 and 25 should be addressed: where, according to those criteria, jurisdiction is granted to the courts of a third State, shall the courts of EU Member States decline jurisdiction, even though they could *prima facie* be competent on the ground of other provisions of the Regulation, such as Article 4 ?

- in cases of *lis pendens* and related actions, a time limit should be imposed on the first court seized in order to decide whether or not it has jurisdiction. This time limit could for example be set at six months, pursuant to a former proposal of the European commission.

5. Has there been a tension between concepts under national law and the principle of 'autonomous interpretation' when applying the provisions of the Regulation?

There have indeed been numerous tensions, and even conflicts, between concepts under national law and the principle of autonomous interpretation.
The main area of tensions is the definition of matters relating to contracts. In this regard, the European Court of Justice ruled in the *Jakob Handte* case that the action of a sub-buyer of a product against the manufacturer for a lack of conformity or a hidden defect is not contractual (ECJ 17 June 1992, case C-26/91), whereas under French law, this action is contractual (see esp. Cass. Civ. 1re 9 October 1979, n°78-12.502, Bull. 1979, I, n°241). Moreover a claim based upon the breach of an established commercial relationship, within the meaning of Article L.442-6, I, 5° of the French commerce code is usually characterized as extra-contractual by French courts (see recently Cass. com. 24 October 2018, n°17-25.672, to be published) , whereas it was considered as a contractual matter by the ECJ in the *Granarolo* case, provided the relationship between the

parties had been formalized through an express or tacit agreement (see CJUE, 14 July 2016, Case C.196-15).

Besides the definition of contractual matters, another area of tensions is provision of services agreements. The definition adopted by the ECJ in the *Falco Privatstiftung et Rabitsch* case (ECJ, 23 April 2009, case C-533/07) is, indeed, quite different from the French definition is several respects. Under French law, a contract may be qualified as a provision of service even where the party who carries an activity does not perceive any kind of remuneration in return. Furthermore, several types of contracts are regarded as provisions of services under Brussels I (a) Regulation while they do not belong to this category under French law: this is for instance the case of loan agreements (see in this regard the difference of approach between Cass. Civ. 1re 1 March 2017, n°14-25.426 and ECJ, 15 June 2017, case C-249/16, *Kareda*) and of distribution contracts (see the difference between Cass. Civ. 1re 23 January 2007, n°05-12.166, Bull. 2007, I, n°30 p.26 and ECJ, 19 December 2003, Case C-9/12 *Corman-Collins*). One may add that the criteria resorted to by the ECJ in the *Car Trim* case (ECJ 25 February 2010, case C-381/08) in order to draw a distinction between sales of goods and provisions of services are very different than those which prevail under French case law.

On another note, French courts have, in a recent series of broadly commented decisions, drawn limits on the validity of asymmetrical choice-of-court agreements –ie clauses which oblige one party to seize a designated court and gives multiple choices to the other party- (see esp. Cass. Civ. 1re 26 September 2012, n°11-26.022, Bull. 2012, I, n°176, *Banque E. de Rothschild* ; Cass. Civ. 1re 7 February 2018, n°16-24.497 ; Cass. Civ. 1re 3 October 2018, n°17-21.309, see also Paris Court of Appeal 8 February 2018, n°17/17947). Whether this approach complies with the Regulation and with the *Anterist* decision (ECJ 24 June 1986, case C-22/85) is debated in France.

6. The majority of the rules on jurisdiction in the Regulation refer to a Member State and not to a particular competent court. Has the application of national rules on territorial jurisdiction caused difficulties in the application of the Regulation?

The application of French rules on territorial jurisdiction has caused and may cause in the future several difficulties.

The main issue in this regard seems to be the articulation between Article 4 of the Regulation and French rules which apply in order to identify a particular competent court when the defendant is domiciled in France.

If the claimant is also domiciled in France, it may happen that French rules allow the claimant to seize the courts of his own domicile (see for instance

Article R. 631-3 of the Consumer code). In such cases, the Cour de cassation has annulled decision from courts of appeals which had allowed the claimant to seize the court of his own domicile (see. Cass. 1re Civ. 22 février 2017, n°15-27.809 et Cass. 1re Civ. 22 février 2017, n°16-11.509). These rulings were nevertheless criticized on the ground that when French rules enter into play according to the Regulation, they shall apply regardless of the court they designate. They can therefore designate the court of the claimant's domicile or any other court. For instance, in matters relating to contracts, Article 46 of the code of civil procedure allows the claimant to seize the court of the place of performance of the contract. Hence, it may happen that, in cases where Article 4 is applicable, the particular competent court under French law is not the court of the place where the defendant is domiciled.

Another risk pointed out in the literature, but which, to my knowledge, has not yet materialized in practice is that of a negative conflict of jurisdiction, in cases where the Regulation confers jurisdiction upon French courts in general but where French rules on territorial jurisdiction do not designate any specific French court (see infra question 7).

7. Has it occurred or may it occur that there is no competent court according to the national rules on jurisdiction in your Member State, thereby resulting in a 'negative conflict of jurisdiction'? If so, how has this issue been addressed?

Even though this difficulty has not yet, to my knowledge, appeared in practice, negative conflicts of jurisdiction, may indeed occur in cases of diverging qualifications under Brussels I (a) Regulation on the one hand and under French rules of territorial jurisdiction on the other hand. For instance, it may happen that a matter would fall under Article 4 of the Regulation, allowing the claimant to seize French courts if the defendant is domiciled in France, but would then be considered, for the purpose of applying French rules, as subject to the exclusive jurisdiction of a foreign court. This situation may, for instance, happen when a given claim relating to immovable property situated outside of the French territory is to be qualified as contractual under the Regulation, while it constitutes under French law an action *in rem*, subject to the exclusive jurisdiction of the court where the property is located.

There are diverging views among authors as to how this problem shall be handled. Some authors consider that in this case, Article 4 cannot be implemented and that the competent court should be designated either through another rule of the Regulation -Article 7 for instance- or according to national rules of private international law if no jurisdiction is designated by the Regulation. In my view these solutions are not satisfactory: the provisions of

the Regulation should, indeed, not be paralyzed by national rules on territorial jurisdiction. I therefore believe that Article 4 should remain applicable in such cases, and thata solution should be found at the European level in order to confer jurisdiction upon a specific court. The latter could either be the court where the defendant is domiciled, or a court seized by the claimant within the Member State of the defendant, which has a specific connection to the case or which, at least, meets the requirements of a proper administration of justice.

8. Are the rules on relative and territorial competence regulated in the same legislative act or are instead contained in different statutory laws (e.g., Code of Civil Procedure and statutory law on organisation of judiciary or other statute)?

Most of the rules on relative and territorial jurisdiction are contained in the code of civil procedure, but many of them are also disseminated in other codes such as the civil code (see esp. Articles 14 and 15), the code of judiciary organization, the consumer code, the labor code, the commerce code, or the insurance code.

Substantive scope

9. Has the delineation between court proceedings and arbitration led to particular problems in your Member State? If yes, please give examples. Please explain whether the clarification in the Recast (Recital 12) has proved helpful and/or has changed the practice in your Member State.

   Even though this issue has sparked much debates among authors, it has not given rise to significant problems in practice yet. The reason for this is that, in cases where the existence of an arbitration clause is alleged, French rules on arbitration are applied by French courts with no interference of the Regulation, and give a clear precedence to the arbitration proceedings over state court proceedings. Indeed, under 1448 of the French code of civil procedure, where a dispute subject to an arbitration agreement is brought before a State court, the latter must decline jurisdiction unless the case has not yet been brought before the arbitral tribunal and the arbitration agreement is manifestly null or inapplicable. This rule is strictly interpreted by French courts, which therefore tend to decline jurisdiction in almot every cases involving arbitration agreements.

   The risk, raised by the *West Tanker* ruling (ECJ 10 February 2009, case C-185/07), that the rules of the Regulation could ascribe jurisdiction to national courts in order to examine the validity of the arbitration clause, has, for this reason, not materialised in France.

   Moreover, it is clear, from a French viewpoint, that the provisions of the Regulation on recognition and enforcement do not apply neither to arbitral awards (see Cass. Civ. 1re 4 July 2007, n°05-14.918, Bull. 2007, I, n°253), nor to state court decisions on the annulment or enforcement thereof (see Cass. Civ. 1re 9 December 2003, n°01-13.341, Bull. 2003, I, n°250).

   That said, recital 12 has not clarified the issue at all. A contradiction has, in this respect, been pointed out between §1 and §3, the former being interpreted as ruling out the implementation of the Regulation in arbitration matters, while the latter suggests that a national court may exercise jurisdiction pursuant to the Regulation in order to examine the validity of an arbitration clause. Moreover §4 is also deemed ambiguous and does not provide adequate guidance for handling conflicts between arbitral awards and decisions issued in other Member States on the same matter.

10. Has the delineation between "civil and commercial proceedings" on the one hand and "insolvency proceedings" on the other hand led to particular problems in your Member State? If yes, please give examples. Please, explain whether

the latest case law of the ECJ (e.g., C-535/17, *NK v BNP Paribas Fortis NV*) has been helpful or has created extra confusion.

The delineation between 'civil and commercial proceedings' on the one hand and 'insolvency proceedings' on the other hand raises problems in France. It has proven especially difficult to identify actions which 'derive directly from the bankruptcy or winding-up and [are] closely connected with the [insolvency proceedings]' within the meaning of the Gourdain decision (ECJ 22 February 1979 case 133/78, point 4). When it comes to defining those actions, it is unclear whethr the relevant criterion is to be found in the legal basis of the action –ie is it based upon specific rules of insolvency proceedings ?- (see ECJ, 4 September 2014, case C-157/13 *Nickel & Goeldner Spedition*) or in the link between the action and the insolvency proceedings (see ECJ 4 december 2014, case C-295/13, *H. v. H.K*).

Given those two criteria may lead to different results, French Courts have sometimes struggled to reach the right solution. One example of these difficulties relates to claims brought by former employees against the legal person subject to an insolvency proceeding and/or the trustee thereof, for the breach of their employment contracts following the opening of the insolvency proceedings. In one case, the Cour de cassation ruled that such an action shall fall within the realm Regulation 1346/2000 relating to insolvency proceedings (see Cass. Soc. 10 January 2017, n°15-12.284, to be published), whereas in another case, it decided that the action was subject to the provisions of Brussels I regulation on employment contracts (Cass. Soc. 28 October 2015, n°14-21.319, Bull. 2016, V, n°398).

In this context, the decision of the ECJ in the *NK v BNP Paribas Fortis NV* case might contribute to clarify the solutions: indeed, it seems to give clear precedence to the criterion of the legal basis of the action over the procedural context of the action (see esp. pt 28).

11. Is there case law in your Member State on the recognition and enforcement of court settlements? If yes, please provide information about these.

There are only a few decisions in France on the recognition and enforcement of court settlements.

One of them was entered by the Cour de cassation on 11 February 1997 (n°95-11.402, Bull. 1997, I, n°51 p.33) under the auspices of the Brussels Convention of 27 September 1968. It stated that, insofar as a court settlement could not be assimilated to a decision within the meaning of Article 25 of the Convention, it could not be invoked by a party, on the ground of Article 27.3 of the Convention,

in order to oppose the enforcement of a court decision rendered between the same parties in another Member State.

Apart from this decision, one may cite a judicial order by the President of the Paris first instance Tribunal ('*Tribunal de grande instance de Paris*') of 26 February 1980 which considered that, when requested to enforce a court settlement concluded before the court of another Member State, a court of the forum is precluded from adding to the settlement. It can, therefore, not order the payment by the defendant of a penalty which was not mentioned in the settlement.

Finally, one may mention a decision from the Paris Court of Appeal of 11 April 2002 (n°2001/0329) in which the Court, which was seized on the ground of the Brussels Convention of 1968, award only partial enforcement to a court settlement relating to two series of matters, some of them, relating to maintenance obligations, being included in the scope of the Convention, while others, purporting to the establishment of a paternity link, being excluded from the realm of the Convention.

12. Is there case law in your Member State on the recognition and enforcement of authentic instruments? If yes, please provide information about these.

A decision entered by the Aix-en-Provence Court of Appeal on 2 March 2000, admitted that an instrument signed and sealed by Spanish commercial broker, member of the Official Order of the Brokers of Madrid, constituted an authentic instrument within the meaning of Article 50 of the Brussels Convention of 1968.

Two decisions admitted partial enforcement of authentic instruments addressing several issues, some of them being included in the scope of the Brussels Convention, others falling out of its realm (see Cass. civ. 1re 14 April 1982, n°81-10.386, Bull. 1982, I, n°126 ; Paris Court of Appeal, 22 February 1990).

Some decisions have insisted on the fact that no conditions other than those laid down in Article 58 of the Regulation (former Article 50 of the Convention and 57 of Brussels I Regulation) had to be met by an authentic instrument established in another Member State in order to be enforced in France (see Paris Court of Appeal, 22 February 1990 ; Cass. Civ. 1re 12 January 1994, n°91-14.567, Bull. 1994, I, n°16 p.12), Aix-en-Provence, 2 March 2000). The enforcement judge must, in particular, avoid any control of the validity of the instrument (see Paris Court of Appeal, 22 February 1990) and cannot require any kind of legalization or similar formalities of the instrument by French authorities (see see Cass. Civ. 1re 12 January 1994 cited above).

Finally, in its abovementioned decision of 12 January 1994, the Cour de cassation ruled that it was up to the defendant to allege that the authentic

instrument did not meet some of the conditions set for its enforcement and that if he remained silent, the court had no obligation to undertake this examination *proprio motu*.

Definitions

13. Have the courts in your jurisdiction encountered difficulties when applying the definitions provided in Article 2? If yes, how are these problems dealt with? Is there any controversy in the literature concerning (some of) these definitions?

As regards the origin of the decision, the Cour de cassation ruled that such judgments entered by Andorran courts could not benefit from the enforcement provisions of the Brussels Convention insofar as they were not issued on behalf of a sovereign Member State (see Cass. Civ. 1re 6 January 1971, n°68-10.173 and n°68-10.190 Bull. 1971, I, n°2 p.1). These two decisions were however, and remain, highly criticized.
Otherwise, it is clear that arbitral awards cannot be regarded as decisions from courts of other Member State since arbitral tribunals have no forum (see Cass. Civ. 1re 4 July 2007, n°05-14.918, Bull. 2007, I, n°253). It has nervertheless been suggested that arbitrals award shall be considered as decisions under Articles 45 (1) c) and (d) on irreconcilable judgments. Even though this view might be supported by the new recital 12.3, it is challenged by the majority of French authors.

As to the notion of judgment, there are still hesitations in cases where the court did not have an active role in solving the dipute, but rather registered an act/ claim or automatically ruled in favor of a party (see for instance the case of 'default judgments'). Some authors believe that if the court only has a passive role, the qualification of judgment shall be ruled out, while others advocate a broad definition of judgments, encompassing 'all judicial interventions which have effects on the parties or on their goods, rights and obligations' (for this formula, see. Cass. Civ. 1re 17 October 2000, n°98-19.913, Bull. 2000 I n° 245 p. 16). Following the *Gambazzi* case (ECJ 2 April 2009, case C-394/07), in which a default judgment from an English court was considered as a decision, the prevailing view is that the definition of judgement under the Regulation is rather large.

Apart from judgments, the inclusion of certain decisions on provisional measures in Article 2 is bound to entail the same kind of difficulties as under section 10 of the Regulation: the very notion of provisional measures raises several difficulties in France (see. infra question 59). Moreover, the exclusion from the benefit of the recognition and enforcement regime of unilateral decisions on provisional measures (see ECJ 21 May 1980, case C.125/79,

Denilauler v. Couchet and the new Article 2 (a)) raises much difficuties. In a well-known case, the Cour de cassation even awarded recognition and enforcement to a freezing order from the High Court of London, despite its unilateral nature (see Cass. Civ. 1re 30 June 2004, *Stolzenberg*, n°01-03.248, Bull. 2004, I, n°191 p.157).

Finally, the definition of court settlements and authentic instruments does not raise much difficulties, especially since there has been abundant litterature in France on these notions, which are now rather well understound and defined.

14. Whilst largely taking over the definition of a 'judgment' provided in Article 32 of the Regulation Brussels I, the Recast in Article 2 widens its scope so as to expressly include certain decisions on provisional measures within the definition of a 'judgment' in Article 2(a) for the purposes of the recognition and enforcement. What is the prevailing view in the literature or jurisprudence in your jurisdiction on the appropriateness of the definition of 'judgment'?

The inclusion of certain decisions on provisional measures within the definition of judgments in Article 2 (a) is generally regarded as appropriate: there are indeed cases where a court of a Member State has jurisdiction to order provisional measures, which may only be performed in another Member State.

This inclusion has however triggered three series of criticisms.

First, the definition of provisional measures remains rather unclear and the recast does not provide any element of clarification.

Second, the exclusion of unilateral decisions, even though it had already been decided in the *Denilauler v.Couchet* case is sometimes criticized as being too favorable to the debtor.

Third, the requirement that the decision on provisional measure stems from a court or tribunal which by virtue of the Regulation has jurisdiction as to the substance of the matter is sometimes considered as irrelevant insofar as decisions on provisional measures have the same nature, and shall be subject to the same regime, whether or not they originate from a court which has jurisdiction as to the substance of the matter. Some authors nonetheless defend the solution and view it as a good remedy to *forum shopping*. They also argue that provisional measures ordered by a court which has no jurisdiction on the substance may still have extraterritorial effects, since the court retains the power to sanction within its own legal order –through a contempt of court or a penalty payment for instance- the refusal of a party to perform the measure abroad.

15. Within the context of including certain decisions on provisional measures in the definition of a 'judgment', how is 'jurisdiction as to the substance of the matter'

to be understood/interpreted – jurisdiction actually exercised or jurisdiction that can be established according to the rules of the Regulation?

The prevailing view in French literature is that 'jurisdiction as to the substance of the matter' means jurisdiction that can be established according to the rules of the Regulation. It is, therefore, not necessary that this jurisdiction is actually exercised. This interpretation is based upon the wording of Article 2 (a) of the Regulation which does not require that jurisdiction as to the substance of the matter is actually exercised by the court issuing provisional measures.

16. Should a decision on provisional measure issued by a court of a Member State, that could base its jurisdiction on the substance of the matter according to the Regulation's rules, be considered as a 'judgment' for the purposes of enforcement in your jurisdiction, when no proceedings on the merits of the case have yet been initiated? If the claim on the substance of the matter is subsequently filed with a court in another Member State also having jurisdiction under the Regulation, how would that reflect on the request for enforcement in your Member State of the 'judgment' issuing the provisional measure?

    Given the fact that Article 2 (a) of the Regulation does not require that the court ordering a provisional measure actually exercises jurisdiction as to the substance of the matter, French authors generally consider that the decision on provisional measure may be considered as a 'judgment' for the purpose of enforcement in France even though no proceedings on the merits have yet been initiated. However, if the claim on the substance of the matter is subsequently filed with a court in another Member State, also having jurisdiction according to the Regulation, some authors believe that enforcement shall be stayed and eventually refused if this court considers it has jurisdiction. In support of this thesis, it is said that the *ratio legis* of Article 2 (a) implies that the court ordering provisional measures will eventually exercise jurisdiction on the substance of the matter. Otherwise, the risk of *forum shopping* will remain high and one of the objectives of the Regulation, which is to put the brakes on provisional measures with extraterritorial effects, will be out of reach. This limit to the enforcement of provisional measures does not, however, result clearly from the wording of Article 2 (a).

17. When deciding on the enforcement of a decision issuing a provisional measure, are the courts in your jurisdiction permitted to review the decision of the court of a Member State confirmed by the certificate that the court has jurisdiction as to the substance of the matter? What is the prevailing view on this point?

    The prevailing view in France is that, when deciding on the enforcement of a decision issuing a provisional measure, the court of the forum must refrain from examining whether the court which issued the measure had jurisdiction as to the substance of the matter, unless the matter falls under one of the cases where this control is allowed (see Article 45 (1) (e) of the Regulation).

18. Has the definition of the 'judgment' and the 'court or tribunal' attracted particular attention in your jurisdiction (e.g., raising issues similar to those in ECJ case C-551/15, *Pula Parking d.o.o. v Sven Klaus Tederahn*)?

Apart from the difficulties signaled above, the definition of the 'judgment' on the one hand, and of the 'court or tribunal' on the other hand, has not triggered much debate. In this regard, the notion of 'court or tribunal' requires two elements: independence of the authority, and respect of the contradictory principle. Hence, decisions from state authorities such as ministers or governmental agencies are not considered in France as judgment from a court or tribunal, given the lack of independence of these authorities. The solution could however be different for administrative authorities whose statutory independence is guaranteed. As regards decisions issued by notaries, such as the one which gave rise to the *Pula Parking* case (C-551/15), they are not considered as court decisions in France insofar as they do not result from contradictory proceedings.

CHAPTER II

Personal scope (scope *ratione personae*)

19. The Recast introduces a number of provisions aimed at further improving the procedural position of 'weaker' parties. Thus, it widens the scope of application *ratione personae* so as to enable consumers and employees to rely on the protective provisions of the Regulation against non-EU 'stronger party' defendants (Article 6(1) referring to, *inter alia*, 18(1) and 21(2)). Are there any statistics available illustrating an increased number of suit actions filed by consumers and/or employees in your jurisdiction?

    There are, to my knowledge, no statistics available on this issue. However, the Cour de cassation recently applied the new provisions of the Recast widening its scope of application to the benefit of employees, in order to admit that French courts had jurisdiction over a claim brought by an employee against an employer domiciled in a third State –Monaco-, despite a choice-of-court agreement conferring jurisdiction upon the courts of the Third state. The solution relied upon the fact that the employee had habitually carried out his work in France (see Soc. 5 December 2018, n°17-19.935, to be published in the Bulletin).
    It is however worth noting that, before the entry into force of the Regulation and of these new provisions benefiting to weaker parties, French rules of private international law were already leading to the same types of results (see esp. article R.1412-1 of the Labour Code and article 631-3 of the Consumer code). From a French viewpoint, those provisions have therefore not improved significantly the position of consumers and of employees. It is true though that

they have been instrumental in unifying solutions within the European judicial area.

20. As to the scope of application *ratione personae*, has it been dealt with in case law or discussed in the literature whether Article 26 applies regardless of the domicile of the defendant, considering that Article 6 does not specifically refer to Article 26?

    There is, to my knowledge, no case law on this issue but it has been discussed in the literature. The prevailing view is that Article 26, contrary to Article 25, does not apply regardless of the domicile of the defendant. There are two reasons for this. First, the solution is not laid down in the Regulation since Article 6 does not refer to Article 26. Second, admitting that Article 26 would be applicable regardless of the domicile of the defendant would excessively widen the scope of application of the Regulation: the connection between the case end the European Union is indeed very weak in such a case, and even weaker than under Article 25, which at least requires an agreement of the parties as to the court designated.

21. In a similar vein, what is the prevailing view in your jurisdiction on whether provisions on *lis pendens* contained in Articles 29 and 30 apply regardless of the domicile of the defendant? Is the fact that a court of a Member State has been seized first the only relevant/decisive factor for the court second seized to stay its proceedings or does the obligation to stay persist only if the court first seized has jurisdiction according to the Regulation (with respect to the claim falling within the substantive, *ratione personae* and temporal scope of Regulation's application)?

The prevailing view in France is that provisions on *lis pendens* contained in Articles 29 and 30 apply regardless of the domicile of the defendant. The only relevant factor for the court second seized to stay its proceedings is therefore that a court of another Member Stat was seized first of the same case between the same parties, whether it has jurisdiction according to the Regulation or pursuant to its own rules of private international law.

Temporal scope

22. Have your courts or other authorities had difficulties with the temporal scope of the Brussels Ia Regulation? E.g., have they found it clear when the abolition of *exequatur* applies and when not?

The temporal scope of the Regulation does not raise significant difficulties in France. The prevailing view is that it applies, pursuant to Article 66.1, to legal proceedings introduced on or after 10 January 2015.

This criterion is also relevant when it comes to determining whether or not the abolition of exequatur applies: it is considered that the Recast applies only if the proceedings were instituted on or after 10 January 2015. Thus, it does not apply to decisions rendered on or after 10 January 2015, but resulting from proceedings introduced before this date.

Two difficulties are nonetheless worth mentioning.

First, the definition of the date at which the proceedings are instituted remains a source of hesitation: shall it be determined through the national rules of civil procedure, or should the solution adopted for *lis pendens* and related action also be applied to define the temporal scope of the Regulation? The latter solution is generally considered as more appropriate, but it is not supported by the letter of the Regulation.

Second, it is not clear whether the abolition of exequatur applies in cases where the proceedings before the first instance court were introduced before 10

January 2015 while, at the appeal stage, the proceedings were instituted on or after this date. One may consider that, given the fact that the proceedings before the court of appeal are distinct from the proceedings before the first instance court, the abolition of exequatur shall apply.

Alternative Grounds of Jurisdiction

23. In general, have the provisions containing alternative jurisdictional grounds in Article 7, 8 and 9 triggered frequent discussion on the interpretation and application of these provisions in theory and practice? Which rules have been relied upon most frequently? Which have proved to be particularly problematic?

The provisions containing alternative jurisdictional grounds in Articles 7, 8 and 9 have generated many discussions and difficulties. The rules which have been relied upon most often are Articles 7 (1) and 7 (2). The implementation of those two provisions has frequently been problematic, and it is especially the case of Article 7 (1).

24. Which issue(s) proved particularly problematic in the context of Article 7(1): interpretation of the concept 'matters relating to a contract', distinction between the types of contracts, principle of 'autonomous interpretation' of the Regulation, determination of the place of performance? How were the difficulties encountered dealt with?

The implementation of Article 7 (1) turns out to be highly problematic in many respects. The notion of 'matters relating to a contract' remains quite unclear: it often proves difficult in practice to determine whether the matter is contractual or extra-contractual within the meaning of the Regulation. Among the most difficult cases in this regard are claims filed by, or against third parties and based upon the breach of a contract, and claims based upon the violation of a general duty of behavior that occurred within the context of a contract (ie the abuse of the right to terminate a contract for instance).

Even where the distinction between contractual and extra-contractual matters seems clear, it can lead to problematic results and to a partition of the case between the courts of several member states. This difficulty especially arises with claims relating to both contractual and extra-contractual matters: for instance, when a claimant alleges fraudulent misrepresentation during the negotiation process and the resulting voidness of the contract.

Apart from the definition of contractual matters, the application of Articles 7 (1) (a), and to a lesser extent 7 (1) (b) has turned out to be difficult.

As regards Article 7 (1) (a), the identification of the 'obligation in question' is sometimes difficult, especially when there are several obligations at stake. Moreover the localization of the obligation pursuant to the law designated by the court's rules of conflicts of laws is also a source of problems.

Concerning Article 7 (1) (b), the definition of provisions of services and sales of goods remains partly unclear. For instance, the Cour de cassation recently ruled, in a controversial decision, that a contract of mandate was not a provision of services within the meaning of Article 7.1 b and was therefore subject to Article 7 (1) (a) (Cass. civ. 1re , 14 March 2018, n° 17-11.722). The Cour de cassation also considered that a loan agreement was not a provision of service under article 7 (1) (b) (Cass. Civ. 1re 1 March 2017, n°14-25.426) but the ECJ took the opposite stance (ECJ, 15 June 2017, case C-249/16, *Kareda*).

The identification of the place of performance within the meaning of Article 7.1 b may also prove difficult, even though it is generally less so than under Article 7.1 a. The difficulties arise when there are several places of performances, especially as regards sales of goods, when the goods are to be delivered in several Member States: the extension of the solution adopted in *Color Drack* (ECJ, 3 May 2007, case C-386/05) to such a case remains debated. French courts have also struggled to identify the place of performance of services, such as consultancy, that are conceived in one Member State and aimed at clients domiciled in another Member State. The Cour de cassation has eventually ruled that the place of performance was the final destination of the service (see Cass. Civ. 1re civ, 27 March 2007, n° 06-14.402, Bull. 2007, I, n° 130, p. 112 ; Cass. Civ. 1re, 14 November 2007, n° 06-21.372**,** Bull. 2007, I, n° 352 ; Cass. Civ. 3e 12 September 2012, n°09-71.189, Bull. 2012, III, n° 117).

25. Is the place where the goods were delivered or services provided decisive for determining jurisdiction even when the place of payment is agreed upon and a failure to pay the price has solely given rise to the dispute? If so, what is the prevailing view in the literature and case law on how the wording 'unless otherwise agreed' in Article 7(1)(b) is to be understood?

Under Article 7 (1) (b), French authors are of the view that the place where the goods were delivered or the services provided remain decisive even when the place of payment is agreed upon and the dispute is solely based upon the failure to pay the price. There are much debate in France as to the meaning of the wording 'unless otherwise agreed'. It is generally considered to give the parties the right to set aside Article 7 (1) (b) in favor of Article 7 (1) (a). It has also been suggested that the parties could distinguish, within their contracts, between different types of claims and submit some of them to Article 7 (1) (b), others to Article 7 (1) (a). Finally, some authors consider that the parties could determine

a place of performance of the obligation in question different from the one defined in Article 7 (1) (b), provided this clause does not amount to a hidden choice-of-court agreement.

26. Has Article 7(2) given rise to difficulties in application, if so which particular aspect(s): the wording 'matters relating to tort, delict or quasi-delict', the wording 'place where the harmful event occurred or may occur'/locating the place of damage, cases where the place of wrongful act is distinct from the place where the damage has been sustained, types of claims and actions falling within the scope of this provision, identification of the 'centre of interests' in cases of the infringement of personality rights/privacy, application of the requirement of 'immediate and direct damage' in the context of financial loss, interplay between the rules on jurisdiction contained in other EU legal instruments and in the Regulation especially in the context of infringement of intellectual property rights?

    The main difficulties encountered for the application of Article 7.2 pertain to the definition of 'matters relating to tort, delict or quasi-delict', to the identification of the place where the damage occurred or may occur and to the scope of competence of each tribunal in cases the damage occurred in several Member States.
    First, the definition of 'matters relating to tort, delict or quasi-delict' remains unclear insofar as it depends on the definition of 'matters relating to contracts', which is also uncertain, making it difficult to draw a clear distinction between these two types of matters.
    Second, the identification of the place where the damage occurred or may occur is especially difficult in cases of financial damages. Some authors have expressed criticisms on the lack of unity of the solutions adopted for damages caused *via* internet: is the fact that the website is accessible in a Member State sufficient in order to confer jurisdiction upon its courts or are there additional requirements? Is it relevant, from this viewpoint, to draw distinctions according to the nature of the claim (protection of data, infringement of personality rights, infringement of intellectual property rights etc…)?
    Finally, it proves difficult for courts to determine clearly the scope of their competence in cases where the damage occurred in several Member States and where, as a consequence, their competence is limited to the fraction of the damage that occurred on their territory.

27. The Recast introduced a new provision on jurisdiction regarding claims for the recovery of cultural objects as defined in Directive 93/7/EEC. Has this triggered discussion in the literature or resulted in court cases?

    This provision has not triggered much discussion in France, and has not yet resulted in court cases. It is however deemed rather useful by some authors insofar as it gives the victim an alternative to Article 4 in cases where no alternative ground of jurisdiction –especially Article 7 (2)- is available (see in

this regard, Paris Court of Appeal, 16 December 1974, *Halphen*, in which French courts had ruled out the application of former Article 5.3 to an action brought by the owner of a painting he was despoiled of under German occupation during the second World War).

For some authors, the scope of this new provision is nevertheless too limited: it only concerns cultural objects within the meaning of Directive 93/7 CE and does not apply neither to claim for damages against the author of a despoliation nor to a legal action brought by the possessor of a cultural object in order to obtain a declaratory judgment that he is the legal owner of this object.

28. Have there been any significant controversies in connection with other rules on jurisdiction under Article 7, 8 and 9, if so which particular rule: regarding claims based on acts giving rise to criminal proceedings, interpretation of 'operations of a branch, agency or other establishment, claims relating to trusts, claims relating to salvage of a cargo or freight, proceedings involving multiple defendants, third-party proceedings, counterclaims, contractual claims related to a right *in rem* on immovable property, limitation of liability from the use or operation of a ship?

Article 7 (3) of the Regulation, which states that 'as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings' raises difficulties, especially since the introduction of a new rule of jurisdiction in Article 113-2-1 of the French criminal code by a law of 3 June 2016 (n°2016-731). According to this rule, French criminal courts have jurisdiction over crimes and offenses committed or attempted through any communication network to the detriment of a person, whether natural of artificial, who is domiciled in France. Combined with Article 7 (3), this provision may extend in a very significant way the scope of competence of French courts as to civil claims of damages. It also creates a privilege of jurisdiction to the benefit of persons domiciled in France, which may be considered as a discrimination against citizens domiciled in other Member States.

With respect to Article 7 (5), the main controversy lies within the definition of a 'branch, agency, or other establishment'. This definition is indeed considered as unclear and too flexible: it may indeed lead to extend the scope of this alternative ground of jurisdiction and to favor *forum actoris*. The approach adopted by the CJEC in the Schotte case (CJEC, 9 December 1987, case C-218/86) has, in this regard, been very criticized for relying too heavily on factual considerations. By contrast, French authors tend to consider that the key criterion shall be the legal relationship between the defendant and its branch, agency of establishment and that factual criteria shall be used with cautiousness in order to avoid the type of solution affirmed in the Schotte case, where a the

parent company was considered as an establishment of its subsidiary. Another issue requires clarification: can an entity with legal personality such as a corporation be regarded as an agency, branch or establishment, or is this status reserved to entities with no legal personality ?

Article 7 (6), relating to disputes arising out of a trust has generated discussions as to its applicability to the French '*fiducie*', which was introduced in the civil code by a law of 19 February 2007. However, French authors now tend to consider that, while the *fiducie* shares some common characteristics with the trust, it remains different from the latter and shall therefore be considered as a contractual matter within the meaning of Article 7 (1).

As regards Article 8 (1), the definition of the 'close connection' between the claims brought against co-defendants remains problematic. French authors warn against an overly strict approach and have generally criticized the requirement adopted in the *Roche Nederlands* case that the legal basis of the claims are identical (ECJ, 13 July 2006, case C-539/03). It is true though that this requirement is on the wane (see. ECJ, 11 October 2007, case C-98/06, *Freeport* ; ECJ 27 September 2017, cases C-24/16 and C-25/16, *Nintendo*). In several decisions, the Cour de cassation retained a large definition of the 'close connection' and considered that this condition was met in cases where the claims were based upon different national laws (Cass. Civ. 1re 26 September 2012, n°11-26.022, Bull. 2012, I, n°76; Cass. Civ. 1re 26 February 2013, n°11-27.139, Bull. 2013, IV, n°34). In its most recent case law, the Cour de cassation underlines the importance of two criteria: the risk of irreconcilable decisions on the one hand, and the identity of the factual and legal situation – but not of the legal bases of each claim (v. Cass. Soc. 12 April 2018, n°16-24.866 ; Cass. Civ. 1re 4 July 2018, n°17-19.384).

Another problem regarding Article 8.1 relates to damages that occurred abroad and with regard to which French courts would not have had jurisdiction under Article 7(2). In some decisions, the Cour de cassation considered that jurisdiction could not be exercised on these damages under Article 8 (1) (see Cass.civ. 1re 22 March 2012, n°11-12.964). This analysis has however drawn criticisms and seems to have been abandoned: jurisdiction under Article 8 (1) may be exercised regardless of the place where the damage occurred (see Cass. Com. 20 September 2016, n°14-25.131, to be published in the Bulletin).

As regards Article 8 (2), there have been debates in France as to the criteria which shall be used to determine whether there has been a circumvention of Article 8 (2). The Cour de cassation held that there could be no circumvention of the forum in cases where there is a sufficient connection between the original claim and the claim against a third-party (Cass. Civ. 1re 19 June 2007, n°04-14862 and 04-16.154, Bull. 2007, I, n°240). This approach seems slightly different from the one adopted in the *SOVAG* case (ECJ 21 January 2016, case C-521/14), according to which the sufficient connection criterion is only one of

the elements that shall be taken into account in order to determine whether there has been a circumvention of the *forum*.
Finally, there have been discussions and contradictory rulings on the issue whether choice-of-court agreements shall prevail over the provisions of Article 8 but it seems clear now that these agreement prevail and paralyse Article 8 (see esp. Cass. Civ. 1re 9 February 2011, n°10-12000 ; Cass. Civ. 1re 14 March 2018, n°16-28.302, to be published in the Bulletin).

Rules on jurisdiction in disputes involving 'weaker parties'

29. In the newly introduced paragraph 2 in Article 26, the Recast imposes the obligation upon the courts in Member States to inform 'weaker parties' of the right to oppose jurisdiction according to the protective provisions of the Regulation, but does not expressly regulates consequences of a court's failure to do so. What is the prevailing view in your jurisdiction on the point whether the omission of the court qualifies as a ground to oppose the recognition and enforcement of a decision rendered in violation of this obligation under Article 45?

    There are debates in France as to how the new requirement introduced in §2 of Article 26 shall be sanctioned. However, it seems highly doubtful that the omission of the court to inform weaker parties would qualify as a ground to oppose the recognition and enforcement of a decision. Apart from the fact that this ground is not provided for in the Regulation, this solution would amount to introduce a new case of *révision* of the decision, and to allow the court of the forum to review the jurisdiction of the court of origin.

30. According to the prevailing view in your jurisdiction, do the provisions limiting effectiveness of prorogation clauses in cases involving 'weaker parties' apply to choice-of-court agreements providing for jurisdiction of a court in a country outside the EU?

    The prevailing view in France is that the provisions limiting effectiveness of prorogation clauses in cases involving 'weaker parties' indeed apply to choice-of-court agreements providing for jurisdiction of a court of a Third State.
    This view was confirmed by a recent decision of the Cour de cassation, whereby it admitted jurisdiction of French courts on the basis of the protective provisions of Brussels I a Regulation despite the inclusion in an employment contract of a

choice-of-court agreement in favour of the court of a third State (see Soc. 5 December 2018, n°17-19.935, to be published in the Bulletin).

31. According to the prevailing literature in your Member State, do provisions in Sections 3, 4 and 5 provide effective protection to 'weaker parties'?

These provisions are generally considered as providing sufficient protection to weaker parties.

However, some improvements may be introduced, such as the extension of the protection provided to consumers and employees to extra-contractual matters and the clarification of the respective scope of 17.1 and Article 24.1 regarding claims which may theoretically fall under those two provisions. Moreover, the option granted to the employee who does not or did not habitually carry out his work in any one country, to seize the courts for the place where the business which engaged the employee is or was situated may be considered as insufficiently protective of the employee.

32. In general, have there been difficulties in applying Section 3 of the Regulation on the jurisdiction in matters relating to insurance, if so which aspect(s): definition of 'branch, agency or other establishment' in the identification of the competent court, the identification of 'the place where the harmful event occurred', the definition of 'injured party', the application of the provisions of Articles 15 and 16 relating to choice-of-court agreements?

The most significant difficulties that have arisen in applying Section 3 of the Regulation concern the actions brought directly by the injured party against the insurer of the person responsible for the damage. One issue is to determine the law governing the admissibility of such direct action. Even though the problem is solved by Article 18 of Rome II Regulation for extra-contractual matters, it remains unsolved for contractual matters insofar as Rome I Regulation does not address the issue. After having selected the law where the damage had occurred (see Cass. Civ. 1re 20 December 2000, n°98-15.546, Bull. 2000, I, n° 342 p. 221 ; Cass. Com. 5 April 2011, n°09-16.484), the Cour de cassation eventually decided that two laws were to be consulted alternatively: the law of the contractual obligation in dispute and the law of the insurance contract (Cass. Civ. 1re 9 September 2015, n°14-22.794, Bull. 2016, I, n°114). It would however be appropriate to unify the solutions on this issue at the European level.

Apart from the law applicable to the action brought directly by the injured party against the insurer of the person responsible for the damage, another issue is whether the injured party may seize the courts of its own domicile pursuant to Article 11.2, or may only seize the same court as the insure insofar as he exercises the rights of the latter. The first solution, which was adopted by the

ECJ in the *Odenbreit* case (ECJ, 13 December 2007, case C-463/06) is highly criticized in France: it is indeed considered as a source of great legal uncertainty for insurers. Moreover the subsequent decisions of the ECJ, limiting the benefit of the *Odenbreit* solution to weaker parties (see ECJ 17 September 2009, case C-347/08) while including in the latter category the employer of the victim (see ECJ 20 July 2017, case C-340/16) is generally considered as incoherent and confusing.

33. Have there been difficulties in applying Section 4 of the Regulation on the jurisdiction in matters relating to consumer disputes, if so which aspect(s): requirements for a transaction to be considered as a 'consumer contract' as defined in Article 17, the application of the norms on the choice-of-court agreements?

There are several difficulties resulting from Section 4 of the Regulation.
One of them relates to the definition of consumer: some authors criticize the fact that only natural persons may be included in this category. From their viewpoint, these provisions shall also benefit non-professional artificial persons such as non-profit associations.
Besides, the exclusion of transportation contracts from the scope of Section 4 has also been criticized.
As for moving contracts, the Cour de cassation recently ruled that they were to be included in section 4 insofar as they do not constitute transportation contracts but rather provisions of services (Cass. Civ. 1re 4 November 2015, n°14-19.981, Bull. 2016, I, n°479).
All in all the scope of the section, as regards the consumers and the contracts concerned, is considered as too narrow.
As mentioned aboved, the articulation between Article 17.1 and Article 24.1 is also debated: French authors wonder which of these two rules shall prevail regarding matters included in the scope of both of them.
The implementation of the rules on jurisdiction laid down in Article 18 has not resulted in significant difficulties in France.
As for choice-of-court agreements, one may mention a recent *Facebook* decision (Paris Court of Appeal, 12 February 2016, n°15/08624) in which an agreement designating a Californian judge was considered as an unfair term given it obliged the consumer to seize a court with no significant connection to the dispute thereby incurring financial costs that were out of proportion with the stake of the dispute. It is true, however, that the Regulation was wrongly applied in this case.

34. Have the courts in your jurisdiction encountered difficulties in the application of Article 18(2), in the case of *perpetuatio fori*, occurring if the consumer moves to another State? If yes, how are these problems dealt with?

There is, to my knowledge, no significant case on this issue. It is nevertheless clear among French authors that the domicile of the consumer shall, for the purpose of Article 18(2), be determined at the time of the introduction of the proceedings and not at the time of the contract. Therefore, if a consumer moves to another Member State between the conclusion of the contract and the introduction of the proceedings, jurisdiction lies solely with the courts of the Member State where the consumer is domiciled at the time of the establishment of the proceedings.

35. Have there been difficulties in applying Section 5 of the Regulation on the jurisdiction in matters relating to employment contracts, if so which aspect(s): the interpretation of the concept of 'matters relating to individual contracts of employment', the interpretation of the concept of 'branch, agency or establishment', 'place where or from where the employee habitually carries out his work', the application of the provision on the choice-of-court agreements?

One of the difficulties that have arisen under Section 5 stems from the *GlaxoSmithKline* ruling (ECJ 22 May 2008, case C-462/06) whereby the ECJ decided that the rule on jurisdiction over multiple defendants laid down in Article 6 (1) of Brussels I Regulation (Article 8 (1) of Brussels I a Regulation) was not applicable to employment contracts. In order to limit the adverse effects of this decision, the Cour de cassation has admitted that employees could bring their actions against both a parent company and its subsidiary provided that the employee was under the supervision of both companies or that there was a confusion of interests, activities and management between the two companies (see for instance Cass. Soc. 19 June 2007, n°05-42.570 and 05-42.551, Bull. 2007, V, n°109; Cass. Soc. 30 November 2011, n°10-22.964, Bull. 2011, V, n°284). The extension of the scope of Article 8 (1) of Brussels I a Regulation to employment contracts may however limit the interest of this solution in the future.

Another issue, which has resulted in an extremely significant number of cases, is the definition of the place where or from where the employee habitually carries out his work, and of the last place where he did so within the meaning of Article 21 of the Brussels I a Regulation (former Article 19 of the Brussels I Regulation). As regards the place where or from where the employee habitually carries out his work, French courts follow in the ECJ's footsteps: they tend to adopt an extensive and flexible approach of this notion, in order to make the employee benefit from this criterion. In cases where the employee had carried out his work in several States, the Cour de cassation emphasizes the importance

of the place from where the work of the employee is organized (see for instance Cass. Soc. 20 September 2006, n°05-40.493; Cass. Soc. 19 December 2012, n°11-22.838; Cass. Soc. 21 March 2018, n°16-27.653). In the case of airline pilots, it has resorted to this approach in order to consider that the habitual place of work was the pilots' home base (see Cass. Soc. 4 December 2012, n°11-27.302, Bull. 2012, V, n°312; Cass. Soc. 28 February 2018, n°16-12.754 and 16-17.505, to be published). Besides, in cases where the employee had concluded several contracts with an employer, that had to be performed in several Member States, the Cour de cassation held that the tribunal had to verify whether these contracts formed a chain of contracts which was mainly performed in one Member State (Cass. Soc. 28 September 2016, n°15-17.288, to be published in the Bulletin; Cass. Soc. 5 July 2018, n°17-10.390).

On another note, the Cour de cassation decided that the place where or from where the employee habitually carries out his work may not be determined solely on the basis of a certificate of affiliation of the employee to the social organizations of a given Member State (Cass. Soc. 29 September 2014, n°13-15.802, Bull. 2014, V, n°216).

As for the last place where the employee habitually carried out his work, the Cour de cassation ruled that it designated the last place where, according to a clear agreement between the employer and the employee, the employee would carry out his work in a stable and durable manner (see. Cass. Soc. 27 November 2013, n°12-24.880, Bull. 2013, V, n°294). This requirement proves rather demanding in practice.

Finally, one may bear in mind that in a recent case, the Cour de cassation decided to set aside a choice-of-court agreement in favor of the courts of a third State, which did not abide by Article 23, since the employee habitually carried out his work in France (Soc. 5 December 2018, n°17-19.935, to be published in the Bulletin).

Exclusive jurisdiction

36. Article 24(1) uses the expression rights '*in rem'*, but provides no definition. The same holds true for case-law of the ECJ, even though it has to some extent clarified the concept by holding that it is not sufficient that the action merely concerns a right *in rem* or is connected with such right. Do the courts in your Member State experience difficulties in distinguishing between disputes which have 'as their object' 'rights *in rem'* from those that merely relate to such rights and accordingly do not fall within the exclusive jurisdiction? If so, how are these problems solved? Have there been any problems with applying Article 31(1) in this respect?

French courts have had hesitations regarding mixed or hybrid actions, that is actions which have as their objects both rights in rem and personal rights. At first, the Cour de cassation excluded these actions from the scope of Article 24

(1) (see. Cass. Civ. 1re 23 September 2015, n°14-50.031). However, in the wake of the *Virpi Komu* case (ECJ, 17 December 2015, case C-605/14), French courts have modified their stance and have admitted that such actions were to be included in the scope of Article 24 (1). This is especially the case of an action relating to the sale and the sharing of an undivided immovable property (Cass. Civ. 1re 20 April 2017, n°16-16.983, to be published in the Bulletin ; Nîmes Court of Appeal 24 May 2018, n°17/03920).
The Cour de cassation also held that a claim for damages based on the alleged breach by the defendant of his duty to return an immovable property to the heirs of its owner was a personal action and not an action having rights in rem as its objects (Cass. Civ. 1re 14 January 2015, n°13-21.814).
To my knowledge, there is no case law in France regarding the application of Article 31 (1) in this respect.

37. For the purposes of applying Article 24(2), which rule of private international law applies for determining the seat of the company in your legal system? Do the courts in your Member State experience difficulties in this respect and, if so, how are these problems dealt with?

Even though this issue is debated, French authors tend to consider that the conflict of law rule which applies in France for determining the seat of the company is the law of the statutory seat (see Cass. Com 21 October 2014, n°13-11.805, Bull. 2014, IV, n° 153). One difficulty raised by this solution is that it may encourage frauds: parties may indeed be tempted to register a company in a Member State whose law does not require any connection between the seat of the company and its territory, such as its principal place of business or its central administration. In such cases the application of Article 24 (2), combined with the French conflict of law rules, amounts to authorize the founder of the company to choose freely the *forum societatis*. It is true though that, in some decisions, French courts have mentioned that in case of a fraudulent choice of the seat of the company, the applicable law would be that of the country where the central administration of the company is situated.

38. In cases concerning the violation of an intellectual property right, the invalidity of the patent may be raised as a defence. In *GAT v Luk* (C-4/03) the ECJ ruled that for the exclusive jurisdiction it should not matter whether the issue is raised by way of an action or as a defence. This rule is now incorporated in the text of Article 24(4). Do the courts in your Member State experience any particular difficulties when applying the provision regarding the validity of the rights covered by Article 24(4)? If so, how are these dealt with?

The decision adopted by the ECJ in *GAT v. Luk* has drawn criticisms in France insofar as in cases where a claim based upon counterfeit is brought before the court of Member State other than the one in which the right was registered, the defendant may challenge the validity or the registration of the right in order to paralyze, at least temporarily, these proceedings. In this regard, this ruling is perceived as opening the door to delaying tactics by the defendant.
Despite these criticisms, there is, to my knowledge, no decision of French courts departing from this approach under Brussels I or Brussels I a regulation.
One may nonetheless signal a decision in an arbitration matter in which the Paris Court of Appeal took the opposite stance in a case similar to *Gat v. Luk* (see. Paris Court of Appeal, 28 February 2008). The Court indeed considered that in a dispute relating to the breach of a contract, the arbitrators had jurisdiction to decide on the validity of a patent which was challenged by the defendant incidentally.

39. Given the variety of measures in national law that may be regarded as 'proceedings concerned with the enforcement of judgements', which criteria are used by the courts in your Member State to decide whether a particular procedure falls under the scope of Article 24(5)? Please elaborate and provide examples.

    Even though there is no significant case on this issue, the prevailing view in France is that the notion of 'proceedings concerned with the enforcement of judgements' shall be interpreted restrictively since the *ratio legis* of this provision is solely to protect the sovereignty of the Member state where these measures are to be performed. As a consequence, Article 24 (5) only applies to disputes relating to the implementation of enforcement measures. Conversely, it does not apply to determine which court has jurisdiction to authorize or order an enforcement measure.
    Moreover, the *Autoteile* decision (ECJ 4 July 1985, case C-220/84) remains at the heart of important debates in France: some authors have criticized it, arguing that the court which had jurisdiction under Article 24 (5) shall be authorized to rule on the existence of the right which gave rise to enforcement measures, whereas others approve this solution insofar as it prevents the creation of a *forum arresti*, which is ruled out by the Regulation.

40. Does the removal of a conservatory third party attachment (in case of seizure) fall within the scope of 'enforcement' in the sense of Article 24 chapeau and fifth paragraph Brussels Ia leading to the exclusive jurisdiction of the court where the removal has to be enforced, or can jurisdiction of the removal be based on Article 35 leading to jurisdiction of the court that has granted leave to

lay a conservatory third-party attachment (seisure)? In other words, is Article 24 interpreted extensively or narrowly in you Member State?

The prevailing view in France is that the removal of a conservatory third party attachment falls within the scope of 'enforcement' in the sense of Article 24 (5). One decision can be cited in support of this opinion (see Paris Court of Appeal, 22 May 1991 ; *contra* Douai, April 1st 1999). A distinction is indeed drawn in the French literature between decisions authorizing such measures, which do not fall within the scope of Article 24 (5) since they do not affect the sovereignty of the Member State where the measure is to be implemented, and decisions which review a measure that has already been implemented: in the latter case, the principle of sovereignty supports the application of Article 24 (5) insofar as the decision implies a control over the acts of State authorities, which have implemented the enforcement measure on their territory.

Prorogation of jurisdiction and tacit prorogation

41. Application of Article 25 requires a minimum degree of internationality. Is there any particular case-law and/or literature, in your Member State in which this minimum degree of internationality has been discussed and/or a certain threshold has been set? If yes, what are the considerations and/or arguments that have been made?

This issue has given rise to many discussions in France as well as to several decisions from the Cour de cassation.
It is widely admitted that Article 25 requires a minimum degree of internationality but there have been debates as to the moment at which internationality shall be appreciated, and as to the criteria of internationality.
As regards the moment at which internationality shall be required, the majority of authors are in favour of the conclusion of the choice-of-forum agreement, which generally coincides with the conclusion of the contract containing the clause. The Cour de cassation adopted this solution in a famous *Keller Grunbau Gmbh* case (Cass. Civ. 1re 4 October 2005, n°02-12.959, Bull. 2005, I, n°352 p.292).
As for the criteria of internationality, different thesis have been defended. For some authors, internationality may be based upon the willingness of the parties, and may therefore result from the designation of a foreign court in their choice-of-forum agreement. The abovementioned *Keller Grundbau Gmbh* decision had given support to this view since it ruled that the situation was not international given the common willingness of the parties not to create an international situation.

Despite this decision, this thesis is generally criticized: internationality shall be based upon objective criteria, not upon the willingness of the parties. Moreover, it cannot result from a choice-of-forum clause which designates a foreign judge: internationality is a prerequisite to the validity of the clause and can therefore not result from the clause itself. Among the authors who advocate an objective approach to internationality, discussions occur regarding the criteria that may be taken into account. For some authors, internationality may only be based upon strong criteria, such as the domicile of the parties or the place of performance of the contract. For others, it can be conceived in a more flexible way and criteria such as the nationality of the party or the place of conclusion of the contract may also be retained. In its latest decisions on this issue, the Cour de cassation ruled that the requirement of internationality was met when the parties were domiciled in different States at the time of conclusion of the agreement (Cass. Civ. 1re 30 January 2013, n°11-24.723, Bull. 2013, I, n°8 ; Cass. Com. 23 September 2004, n°12-26.585, Bull. 2014, IV, n°134 ; Cass. Civ. 1re 28 May 2015, n°14-12.363).

42. The requirement that at least one of the parties to the choice-of-court agreement must be domiciled in a member state, as stated in Article 23 Brussels I, has been deleted in Article 25 Brussels Ia. Has this amendment resulted in an increase of a number of litigations in which jurisdiction has been based on choice- of-court agreement falling under the Regulation?

    Whether or not this modification has resulted in an increased number of litigations submitted to courts designated by choice-of-court agreements falling under the Regulation is difficult and probably too soon to tell. However, as far as choice-of-court agreements designate French courts, I doubt that there will be any significant change resulting from the new version of Article 25: unlike English courts for instance, French courts are usually not designated by choice-of-forum agreements where no parties have their domicile in France. This lack of attractiveness, which contrasts with the role played by Paris as a place for international arbitration, may however be partly remedied to with the recent creation of an international chamber within the Paris Court of Appeal, before which the proceedings will be conducted in English and the decision issued in both English and French.

43. Are there particular examples in which the formal requirements for validity of choice-of-court agreements (Article 25(1)(a-c)) caused difficulties in application for the judiciary or debate in literature? Which requirement has appeared most problematic in practice? When applying the respective requirements of an agreement ‘in writing or evidenced in writing’, ‘practice

which the parties have established between themselves' and 'international trade usages', which facts do the courts and/or literature deem decisive?

The formal requirements that have triggered most debates and have appeared most problematic in practice are those set forth in Article 25 (1) (b) and 25 (1) (c).
They are indeed considered by both authors and courts as extremely imprecise, and to some extent, too flexible. This creates a lot of uncertainty around the formal validity of choice-of-forum agreements, and amounts to undermine the usefulness and strength of the clearer requirements laid down in Articles 25 (1) (a).
Among the difficulties resulting from Articles 25 (1) (b) and 25 (1) (c) are:
- the definition of practices which the parties have established between themselves: French courts have ruled that the succession of two contracts did not give rise to an established practice (see Paris Court of Appeal, 5 April 1994) while the issuance of many bills of the same type by one party met this requirement (Cass. Civ. 1re 17 February 2010, n°08-12.749 and 08-15.024, Bull. 2010, I, n°38);
- the definition of 'the particular trade or commerce concerned' : this notion is sometimes interpreted broadly, as designating, for instance, sea shipping in general (Cass. Com. 19 November 2013, n°12-24.668) whereas it is sometimes conceived more narrowly as including only a specific branch of sea shipping (Paris Court of Appeal, 5 October 1994).
- last, but not least, there is some uncertainty as regards the type of agreements that may be deemed valid under Articles 25 (1) (b) or (c). In most cases, French courts tend to resort to these rules in order to validate clauses which do not meet the requirements of Article 25 (1) (a), such as clauses which appear only on the bills issued by one party, or on the verso of a contract or on a separate *instrumentum* which is not referred to in the main contract (see for instance Cass. Civ. 1re 13 February 2013, n°12-27.967 ; Cass. Civ. 1re 26 June 2013, n°12-17.537 ; Cass. Com. 19 November 2013, n°12-24.668 ; Cass. Com. 23 September 2014, n°13-19.108 and 13-21.934).

44. Is there case-law in your Member State in which the formal requirement(s) of Article 25 (1) (a-c) have been fulfilled, but the choice of court agreement was held invalid from the point of view of substantive validity due to a lack of consent? If the answer is in the affirmative, what were the considerations made by the court?

Not that I know of. The reason for this is probably that, when it comes to choice-of-forum agreements, formal and substantive requirements, especially

those purporting to the consent of the parties, tend to merge: the consent of the parties is examined through the formal requirements. The fact that, under Article 23 of Brussels I Regulation, there was no specific rule as to the consent of the parties may also have contributed to the practice consisting in addressing the issue of lack of consent solely through the formal requirements of Article 23. The solution might therefore evolve under Article 25 of Brussels I a Regulation.

45. Are there cases in which the courts in your Member State experienced problems with the term 'null and void' with regard to the substantive validity of a choice-of-court agreement?

    There are, to my knowledge, no cases revealing any problem in this regard. Moreover there should not be any difficulty in the future since the wording of the French version of the Regulation is different from the one in the English version : Article 25 (1) indeed refers to the 'nullité quant au fond', which is a classic concept of contract law meaning the deletion, with retroactive effect, of a contractual provision considered as null.

46. Article 25(1) Brussels Ia has been revised so as to explicitly state that the substantial validity of a choice-of-court agreement is determined by the national law of the designated court(s). Recital 20 clarifies that the designated court is to apply its own law including its private international law rules. Has the reference to private international law in this context led to discussion in literature or difficulties in application for the judiciary in your Member State?

    This reference has indeed led to discussions and poses many difficulties in practice. It requires a very complex reasoning from the court, especially where it belongs to a Member State other than the court mentioned in the choice-of-court agreement. This complexity is increased by the fact that the determination of the rules of private international law applying to the substantial validity of the clause, which is not covered by Rome I regulation, proves extremely difficult in practice.
    In France for instance, many different solutions have been proposed in the literature: the law of the court that was seized of the matter, the law of the court that was designated by the agreement, the law of the contract which contains the clause, the law specifically designated by the parties to govern the clause itself, the law of the States whose courts would have had jurisdiction in the absence of the clause, etc…The case law of the Cour de cassation on this issue is not very clear either : some decisions have suggested that a distinction between the 'lawfulness' of the clause and its 'validity' had to be drawn, the former being subject to the law of the court seized of the matter, the latter falling

under the scope of the law of the contract containing the clause (see esp. Cass. Civ. 1re 3 December 1991, n°90-10.078, Bull. 1991, I, n°343 p.224). In other decisions, the Cour de cassation seems to have opted for the application of French law on the ground that a French court was seized of the matter, but provided no clear justification for this solution (for example Cass. Com. 21 February 2012, n°11-16.156; see also Paris Court of Appeal, 10 October 1990). Last, the solution adopted in Article 25 raises a difficulty of principle since it may lead the court seized of the matter to adopt the viewpoint of another Member State on the substantive validity of the clause, even where it results in a solution that differs from the one it would have reached pursuant to its own law.

47. Is there particular case law or literature in your Member State in which the test of substantive validity of non-exclusive choice-of-court agreements was discussed? If yes, how is dealt with the substantial law of the different designated Member States?

    There is, to my knowledge, no case law on this issue but it was discussed among authors. No clear solution has emerged from these discussions but it may be advocated that, in such a case, the court shall apply cumulatively the private international law rules of the courts designated by the clause, in order to determine the applicable law. If they designate the same law, the problem would be solved. If they don't, the substantive rules of the different laws designated shall apply cumulatively, which would in practice result in the prevalence of the most severe requirements of each law.
    Given the complexity of the above-mentioned solution, one may also consider that the court shall, in such a case, implement its own rules of private international law. Even though this solution may be supported by the wording of Article 25 (1), which refers to the law of only one 'Member State', it does not seem in accordance with the *ratio legis* of Article 25 (1), which sought to avoid positive and negative conflicts of jurisdictions stemming from the application of the *lex fori* to the clause.

48. Has the express inclusion of the doctrine of severability of choice-of-court agreements, as mentioned in Article 25(5) Brussels Ia merely confirmed a principle that had already been firmly established and accepted in theory and practice within your Member State?

    The inclusion of the doctrine of severability of choice-of-court agreements in Article 25(5) Brussels Ia indeed confirmed a principle that had already been firmly established and accepted in theory and practice in France. The most important decision adopting this principle was, more precisely, entered by

the Cour de cassation on 8 July 2010 (Cass. Civ. 1re 8 July 2010, n°07-17.788, Bull. 2010, I, n°161). But the solution was regarded as certain even before this 2010 decision.

49. Do the courts in your Member State experience difficulties in applying the rules as to defining 'entering an appearance' for the purposes of applying Article 26 Brussels Ia?

French courts do no experience great difficulties in defining 'entering an appearance' under Article 26 Brussels Ia. The notion is interpreted as implying both a contradictory proceeding and a tacit agreement of the defendant to the jurisdiction of the court seized by the claimant. Accordingly, it does not apply where the defendant is absent from the proceedings and has not been able to give any instruction to the person –lawyer or legal representative- acting on his behalf. Furthermore, the appearance must, pursuant to Article 26 Brussels Ia, not be aimed at contesting the jurisdiction. As to the moment at which this contestation may take place, French Courts apply the rule set forth in Article 74 of the code of civil procedure, according to which challenges to jurisdiction must, under the penalty of inadmissibility, be raised simultaneously and prior to any defence on the merits. The implementation of this rule does not raise any major difficulty since it abides by the requirement, first adopted by the ECJ in the *Elefanten Schuh* case (EC 24 June 1981, case 150/80), that in a case where the defendant makes submissions on both the jurisdiction of the court and the substance of the dispute, the claimant and the court seized of the matter shall be able to ascertain from the time of the defendant's first defence that it is intended to contest the jurisdiction of the court (see pt 16 of the *Elefanten Schuh* decision).

Examination jurisdiction and admissibility; *Lis pendens* related actions

50. Have courts in your Member State experienced any particular problems when interpreting the 'same cause of action' within the meaning of Article 29(1) (e.g. a claim for damages for breach of contract and a claim for a declaration that there has been no breach ('mirror image')? Please elaborate and provide examples from your own jurisdiction (if any).

The concept of 'same cause of action' –which in the French version designates an identity of both cause and object of the action- is generally considered in France as having been interpreted too extensively by the ECJ in the *Gubisch* (ECJ 8 December 1987, case 144/86) and *Ship Tatry* (ECJ 6 December 1994, case C-406/92) cases. This interpretation may indeed result in a confusion between *lis pendens* and related actions, and unduly trigger the radical consequences attached to *lis pendens*.

The most debated issue in this regard is precisely the case where a claim for damages filed before the courts of one Member State conflicts with a declaratory claim of non-liability filed by the defendant in another Member State. For most French authors, this situation shall not be analysed as a case of *lis pendens* but rather as a hypothesis of related actions: deciding otherwise would indeed encourage delaying tactics. It is however worth noting that French courts have generally adopted the broad interpretation of the concept of same cause of action advocated by the ECJ and have notably applied *lis pendens* rules to the situation described above, where one of the claims is filed by a party in order to obtain a decision of non-liability (see Cass. Civ. 1re 17 January 2006, n°04-16.845, Bull. 2006, I, n° 16 p. 16 ; Cass. Civ. 1re 13 July 2016, n°15-20.900).

There are, however, a few decisions which bear witness to the reluctance of some French Courts to embrace the large approach of the 'same cause of action' requirement. For instance, the Rouen Court of Appeal recently ruled that the 'same cause of action' requirement was not met between a claim for damages brought before a French court against a carrier for breach of his contractual obligations and a claim filed by the carrier before a Belgian tribunal for the payment of diverse costs, relating to his fuel expenses and to the costs linked to the destruction of the damages goods (see Rouen, 25 January 2008, n°07/04641).

51. Do you know whether the courts of the other Member State are typically contacted immediately once sufficient evidence has been gathered which suggests or confirms that courts in the other Member State may have been seized of the 'same cause of action'? Is there a standardised internal procedural guideline which is followed by the courts of your Member State? And are there any practical (for example, linguistic, cultural or organisational) obstacles or considerations which may hinder contact between the courts of your Member State and the other Member State?

Although it appears difficult to know precisely what is the judicial practice in this regard, I don't believe that courts of the other Member State are immediately contacted or even contacted at all by French courts once sufficient evidence has been gathered which suggests that courts of the other Member State may have been seized of the 'same cause of action'. There is, accordingly, no procedural guideline on this issue. The main reason for this seems to be the case law of the Cour de cassation pursuant to which the duty of establishing a situation of *lis pendens* lies with the parties and not the court itself (see Cass. Civ. 2e 3 April 1978, n°77-11.933, Bull. 1978, II, n°106; Cass. Civ. 1re 19 March 2002 n°00-13.493; see also, under Brussels II bis regulation, Cass. Civ. 1re 11 June 2008, n°06-20.042). When seized with a claim of *lis pendens* raised

by one of the parties, the court's task is therefore limited to the review of the parties' writings and evidence (see Com. 3 June 2014, n° 12-18.012, Bull.2014, IV, n°98; Cass. Civ. 1re 17 May 2017, n°16-13.809).

52. When should a court in your Member State be considered to be seized for the purposes of Article 32 Brussels Ia? Is this when the document instituting the proceedings or 'equivalent document' is lodged with the court (a) or when such document is received by the authority responsible for service (b)? Does the moment of filing a suit with the court determine the moment as from which a proceeding is deemed pending or the proceeding is considered to be actually pending at a later point after certain administrative/organisational steps have been taken (see e.g., circumstance in C-173/16 *M.H. v. M.H.* relating to this issue under Regulation Brussels IIbis)?

    For the purpose of Article 32 Brussel Ia, a French court or tribunal is considered to be seized when the document instituting the proceedings or an 'equivalent document' is received by the authority responsible for service (Article 32 (1) (b), see in this regard Cass. Civ. 1re 23 January 2007, n°05-21.522, Bull. 2007, I, n° 28 p. 24 ; Cass. Com. 28 October 2008, n°07-20.103, Bull. 2008, IV, n° 178).
    Under French rules of civil procedure, the document must however, after having been delivered to the authority responsible for service, be lodged with the secretary of the court in order for the proceedings to be considered as pending (see Cass. Civ. 1re 18 November 2015, Bull. 2016, I, n°536 ; Cass. Civ. 1re, 28 May 2015, n°14-13.544, Bull. 2015, I, n°122). There are debates in France as to the time limit during which this 'necessary step' shall be undertaken for the purpose of Article 32 (1) (b) of the Regulation.

53. Do subsequent amendments of claims in any way affect the determination of the date of seising in your Member State? Is any differentiation made in that respect between cases where a new claim concerns facts known at the date of the original proceedings and amendments based on facts which have only emerged after the date of the original proceedings?

    Under French procedural law, subsequent amendments of claims do not affect the determination of the date of seising of the Court. However, insofar as the object of the dispute is determined by the content of the document introducing the proceeding and the defendant's first writings in response (see Cass. Civ. 2e, 3 October 2002, n° 01-00.361), subsequent amendments of claims are considered as inadmissible, unless they are attached to the originating claims by a sufficient bond (see Article 70 of the French code of civil procedure).

54. Do courts in your Member State tend to decline jurisdiction if the court seized previously had jurisdiction over the actions in question 'and its law permits the consolidation thereof' (see Article 30(2))?

    French courts tend to be reluctant to decline jurisdiction on the ground of Article 30 (2). The first case in which a French court accepted to decline jurisdiction on this ground under the Brussels Convention of 1968 dates back to 1992 (see Cass. Civ. 1re 27 October 1992, n°90-21.661, Bull. 1992, I, n°263 p.172). Since then, in most instances, French courts have refused to decline jurisdiction, invoking the lack of a sufficient connection between the claims (see Cass. Civ. 1re 17 February 2010, n°08-13.743 ; Cass. Civ. 1re 19 December 2012, n°09-17.440 ; see also Paris Court of Appeal, 16 May 1991, 9 February 2001 ; Rouen Court of Appeal, 1rst October 2009). Furthermore, the Cour de cassation ruled that, even though the court seized had to examine the elements presented by the parties in order to determine whether the existence of the different actions raise a risk of irreconcilable decisions (see Cass. Civ. 1re 27 April 2004, n°01-13.831, Bull. 2014, I, n°11 p.91), it leaves the inferior courts free to rule on the existence of related actions: this issue falls under their "sovereign power of appreciation" (see. Com. 7 January 2014, n°11-24.157, Bull. 2014, IV, n°5).

55. Has the application of Article 31(2) proved to be counterproductive and resulting in delaying the proceedings by the obligation of the court seized to stay the proceedings until a designated court has decided on the validity of a choice- of- court agreement, even when a prorogation clause has never been entered into or is obviously invalid?

    To my knowledge, there has been only one application of Article 31 (2) by French courts until now (see Colmar Court of Appeal 8 December 2017, n°720/2017). It seems therefore too soon to assess the new mechanism introduced by this provision. That said, the abovementioned decision of the Colmar Court of Appeal tends to show that the implementation of Article 31 (2) has not significantly delayed the proceedings: in this case, the tribunal of Madrid was first seized on 1st September 2015 while the tribunal of Strasbourg was seized by the other party on 22 September 2015. In a decision of 9 March 2017, the Court of Appeal of Madrid upheld the decision of the first instance tribunal of Madrid to stay the proceedings. For its part, the tribunal of Strasbourg admitted his jurisdiction on the ground of a choice-of-court agreement on 25 November 2016 and its decision was confirmed by the Court of Appeal of Colmar on 8 December 2017. All in all, a little more than two years elapsed between the first tribunal was seized and the final decision of the French court of Appeal, which sounds like a very reasonable delay.
    It is true though that, in this case, the very existence of the choice-of-forum agreement was not disputed, nor was it considered as obviously invalid or inapplicable. Contrariwise, where the clause is obviously invalid or inapplicable, French authors point to the risk that article 31 (2) might be resorted by a party whose aim is solely to delay the proceedings before the other court. Preventing this risk, may require that, in such cases, the duty for the court to stay the proceedings would cease. This solution is already in force in France in arbitration matters: the duty for a State court to decline jurisdiction and to give precedence to the arbitration agreement ceases when the arbitral tribunal is not seized yet, provided that the arbitration clause is obviously void or inapplicable (see. Article 1448 of the French code of civil procedure; comp. Article 6 of the Hague Convention of 20 June 2005 on Choice of Court Agreements).

56. Has the combined application of Articles 33 and 34 in your view contributed to greater procedural efficiency and accordingly diminished the risk of delays in resolving disputes as well as the risk of irreconcilable judgments between a third state and your Member State?

    There is, to my knowledge, no significant decision in France yet on the application of Articles 33 and 34. Nevertheless, the introduction of these two Articles in the Recast has generally been approved by French authors: before

the adoption of these provisions, there were indeed discussions and uncertainty as to whether French courts whose jurisdiction was established under the provisions of the Regulation were allowed to stay the proceeding and/or dismiss the proceedings on the basis of French private international rules on *lis pendens* (see Cass. Civ. 1re, 26 November 1974, n° 73-13.820, Bull. 1974, I, n°312 p.267, *Miniera di Fragne*) and related actions (see Cass. Civ. 1re 22 June 1999, n°96-22.546, Bull. 1999, I, n°208 p. 135). Even though the new rules have reduced uncertainty in this respect, it is not sure they will further procedural efficiency: they are indeed based upon very flexible criteria, whose implementation may give rise to difficulties in practice. French rules of private international on *lis pendens* and related actions are, by comparison, more clear-cut and simple. As regards *lis pendens* for instance, the above-mentioned *Miniera di Fragne* decision set two criteria in order for a French court to dismiss the proceedings: that the foreign court was first seized and that the decision to be rendered is likely to be awarded recognition and enforcement in France.

57. Apart from concerns regarding procedural efficiency, are connections between the facts of the case and the parties in relation to the third state typically also taken into account by the courts in your Member State in determining their jurisdiction under Articles 33 and 34, bearing in mind the aims as expounded by Recital 24 of the Regulation?

    There is no decision yet on this issue but according to French authors, the connection between the facts of the case and the parties in relation to the third state is bound to become an important criterion under Articles 33 and 34. A parallel is sometimes drawn in this regard with the *forum non conveniens* doctrine. Some French authors have however defended the idea that this connection is not a relevant factor of proper administration of justice, and turns out to be important only for the purpose of ordering provisional measures. The development of arbitration, and of choice-of-court agreements, under which no connection whatsoever is required between the seat of the tribunal and the dispute supports the latter opinion.

58. Does the application of both provisions in your view amount to a sufficiently ‘flexible mechanism’ (see further Recital 23) to address the issue of parallel proceedings and *lis pendens* in relation to third states?

    The criteria laid down in Articles 33 and 34 are generally considered as extremely flexible, and, for some of them, imprecise. This is especially the case of the references to a ‘reasonable time’ and to ‘the proper administration of justice’, which remain vague despite the indications provided for in recital 24.

This lack of precision raises the risk of diverging appreciations between the courts of different Member States as to whether the criteria to stay the proceedings are met.

Regarding the consequences attached to *lis pendens* and related actions, French authors tend to deplore a lack of sufficient flexibility. As regards *lis pendens*, some of them consider that the court of the Member State shall be given the possibility to dismiss the proceedings even before the conclusion of the proceedings in the court of the third State. This possibility exists under French private international law (see Cass. Civ. 1re, 26 November 1974, n° 73-13.820, Bull. 1974, I, n°312 p.267, *Miniera di Fragne*). As far as related actions are concerned, the possibility for the court of a Member State to dismiss the proceedings (Article 34 (3)), is considered as insufficient and shall be completed by an option for this court to decide on the case, taking into account the decision issued abroad: such additional option would indeed diminish the risk of a denial of justice every time the court of the third State does not decide on the dispute brought before the court of the Member State.

Provisional measures, protective measures

59. Do the courts in your Member State experience difficulties defining which 'provisional, including protective, measures' are covered by Article 35?

The definition of 'provisional, including protective, measures' that are covered by Article 35 indeed raises several difficulties.

One of them relates to decisions on 'interim payments' made by the president of the tribunal in accordance with Article 809 (2) of the French Code of civil procedure. This Article, which applies in summary proceedings, provides that 'In cases where the existence of the obligation is not seriously challenged, [the President of the tribunal] may award an interim payment to the creditor or order the mandatory performance of the obligation even where it is an obligation to do a particular thing'. There have been enduring discussions as to whether such interim payments awards are provisional measures or decisions on the substance of the matter. In order to resolve the problem, French courts have decided to transpose to these interim payment awards the approach adopted by the ECJ in the *Van Uden* (ECJ 17 November 1998, case C-391/95) and *Mietz* (ECJ 27 April 1999, case C-99/96) cases regarding the '*kort geding'* of Dutch law (see Articles 289 and seq. of the Dutch Code of civil procedure). They therefore consider that interim payment awards shall not be considered as provisional measures unless first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant

located or to be located within the confines of the territorial jurisdiction of the court to which application is made (see esp. Cass. Civ. 1re 13 April 1999, n°97-17.626, Bull. 1999, I, n°133 p.86). There were also debates as to the exact scope of this case law but the Cour de cassation has made it clear that the solution was applicable in both contractual and extracontractual matters (see Cass. Com. 8 June 2010, n°09-13.38, Bull. 2010, IV, n°104).

There have also been discussions in France regarding the qualification of decisions on preparatory inquiries: shall they be considered as provisional measures within the meaning of Article 35, or shall they be categorized as requests for the performance of taking of evidence within the meaning of Regulation n°1206/2001 of 28 May 2001 on the taking of evidence in civil or commercial matters ? Although the decision adopted by the ECJ in the St Paul Dairy case (ECJ 28 April 2005, case C-104/03) seems to exclude the assimilation of these decisions to provisional measures within the meaning of Article 35, there are debates as to the correct interpretation of this decision. Does it concern all decisions on preparatory inquiries or solely decisions on preparatory inquiries 'in futurum', which aims at determing the opportunity of introducing proceedings on the substance of the matter ? The solution is not perfectly clear and one recent decision from the Cour de cassation even adds to the confusion on this issue since it seems to depart from the Saint Paul Dairy ruling by deciding that even decisions on preparatory inquiries 'in futurum' withing the meaning of Article 145 of the French Code of civil procedure shall be qualified as provisional measure insofar as their aim is 'to keep of establish evidence of the facts which may condition the solution of the dispute' ("conserver ou établir la preuve de faits dont pourrait dépendre la solution du litige") (see Cass. Civ. 1re, 14 March 2018, n°16-19.731, to be published in the Bulletin). It seems, therefore, that decisions on preparatory inquiries are provisional measures within the meaning of Article 35, at least when they order the performance of an expertise (contra Cass. Civ. 1re 4 May 2011, n°10-13.712).

Finally, there are debates in France as to the possible inclusion in the category of provisional measures of enforcement mesures which aim at freezing the assets of the defendants in order to guarantee the compliance with a prior decision. In the famous *Stolzenberg* case (Cass. Civ. 1re 20 June 2004, n°01-03.248, Bull. 2004, I, n°191 p.157), the Cour de cassation gave a positive answer to this question and considered as a provisional measure a *Mareva* injunction/ freezing order issued by the High Court of London on 24 April 1998. Even though the same solution was recently reiterated by the Cour de cassation, which refused to file a motion for preliminary ruling by the ECJ (see Cass. Civ. 1re 3 October 2008, n°17-20.296, to be published), it is however not sure whether this solution is compatible with the *Reichert II* decision (ECJ 26 March 1992, case C-261/90).

60. In the *Van Uden Maritime v Deco-Line and Others* case (C-391/95) the ECJ introduced a requirement of territorial connection between the subject matter of the measures sought and the territorial jurisdiction of the Member State's court to issue them. How is the 'real connecting link' condition in *Van Uden* interpreted in the case-law and doctrine in your Member State?

    There have been abundant discussions among authors as to the correct interpretation of the 'real connecting link' condition in Van Uden but the prevailing view is now that this condition is met when the property, or more largely the object of the provisional measure, is situated on the territory of the Member State whose courts have been requested to issue the measure. This view was also adopted by the Cour de cassation in several cases (see. Cass. Civ. 1re 11 December 2001, n°00-18.547, Bull. 2001, I, n°313 p.199; Cass. Com. 20 March 2012, n°11-11.570).

    Some authors however wonder whether the requirement of a 'real connecting link' could also be met when the court is requested to issue an injunction '*in personam*' such as a *Mareva* freezing order, towards a person who resides on its territory but whose property is situated abroad.

Relationship with other instruments

61. Has the Hague Convention on Choice of Court Agreements to your knowledge ever been relied upon in declining jurisdiction in your Member State and allocating jurisdiction to third states party to that Convention? Please provide examples from case-law with a short summary.

    To my knowledge, the Hague Convention on Choice of Court Agreements has not yet been applied and has thus not been relied upon by French courts in order to decline jurisdiction.

CHAPTER III

Recognition and Enforcement

62. How frequently is the optional procedure, established in Article 36(2), to apply for a decision that there are no grounds of refusal of recognition employed in your jurisdiction?

    It is difficult to tell whether this new optional procedure will encounter success in France. One may however underline the fact that such procedure is well known in French private international law: it was introduced by the famous *Weiller* case (Cass. Civ. 22 January 1951, Rev. crit. DIP 1951. 167, note Ph. Francescakis) and is regularly resorted to since then.
    Some authors have nonetheless underlined the fact that, unlike the principal claim for recognition under Article 33.2 of the Brussels I Regulation, the procedure under Article 36 (2) is not unilateral, but contradictory, which may in turn limit the success of this new procedure.

63. Abandoning *exequatur,* Section 2 of Chapter III grants direct access to national enforcement agents (in a wide sense, including particularly courts and *huissiers*) or enforcement agencies. Have such agents or members of such agencies in your jurisdiction received specific training or instruction on how to deal with enforcement requests based on judgments rendered in other Member States? If so, who undertook the effort and who seized the initiative?

    The main initiative I am aware of in this regard is the EJL (European Judicial officer's e-learning) project, developed by the CEHJ (*Chambre européenne des huissiers de justice* / European Bailiff's foundation) in partnership with the ENP (*Ecole nationale de la Procédure*/ National School of Procedure) and the ENM (*Ecole nationale de la magistrature*/ National School of the Judiciary). It proposes an e-learning platform for all judicial officers/ enforcement officers of the Member States, encompassing Brussels I (a) Regulation.

    The CEHJ also organized and published in 2017 a comparative study on the application of Brussels I a Regulation by bailiffs and notaries in Europe.

    One may also mention the existence of a partnership between the ENM (*Ecole nationale de la magistrature*) and the '*Chambre nationale des huissiers de justic*e' ('French Chamber of Bailiff's') under which the ENM organizes learning sessions for French bailiffs, some of which being dedicated to European private international law, including Brussels I a Regulation.

    Finally, some learning sessions are organized in France by the *Institut national de formation des huissiers de justice* (National Institute for the training of Bailiffs).

64. Has there been a concentration of local jurisdiction (venue) at the national or regional level in your jurisdiction institutionalising specialised enforcement agents for the enforcement of judgments rendered in other Member States?

    Not that I know of.

65. Have there been other specific legislative or administrative measures in your jurisdiction possibly facilitating the direct access of creditors or applicants from other Member States to the enforcement agents?

    Not that I am aware of, but it is often underlined that enforcement proceedings in France are efficient and fast.

66. Has the transgression to direct enforcement enhanced the number of attempts to enforce judgments rendered in other Member States? Are there any respective statistics available in your jurisdiction? If so, may you please relay them?

    I am not aware of any data or statistics in this regard. However, insofar as the enforcement proceedings were already fast and efficient in France under Brussels I, the transgression to direct enforcement may not enhance much the number of attempts to enforce judgments rendered in other Member States.

67. Section 2 of Chapter III has created a specific interface between the Brussels Ia Regulation and national rules on enforcement. Has this generated particular problems in your jurisdiction?

    Two series of problems have been pointed out in France regarding Section 2 of Chapter III.
    The first difficulties are linked with Article 41 (2) (see infra question 68).
    The second source of problems lies within Article 44 (1). It has indeed been underlined that this provision gives full latitude to the court in order to decide whether to :
    ‘a) limit the enforcement proceedings to protective measures;
    (b) make enforcement conditional on the provision of such security as it shall determine; or
    (c) suspend, either wholly or in part, the enforcement proceedings’.
    No criterion is given in order to decide upon such measures and to choose between the three optional measures provided for. The risk is therefore that diverging practices will be adopted by the courts and tribunals of the different Member States on this key issue

68. Has Article 41(2) in particular attracted specific attention in your jurisdiction?

Article 41.2 has indeed drawn criticisms for three main reasons.

First the opportunity to provide for the application of the grounds for refusal or of suspension of enforcement under the law of the Member State whose court is seized is debated: even though Article 41 (2) may only clarify a solution which had already been adopted under Brussels I Regulation –see in this regard ECJ, 13 October 2011, C-139/10, *Prism Investment*-, it results in a paradoxical situation. Indeed, it seems, to a certain extent, in opposition with one of the goals of the Recast, which, through the suppression of the exequatur, sought to facilitate the movement of decisions within the European judicial area.

Second, these limits may vary between Member States since they stem from their national law.

Third, the test of compatibility between the grounds for refusal or of suspension of enforcement under the law of the Member State with the grounds referred to in Article 45 may prove difficult to implement in practice. The only example cited by French authors of a ground for refusal of enforcement found in French law that would be compatible with the grounds referred to in Article 45 is the fact that the decision has already been executed, as in the abovementioned Prism Investment case.

69. Article 46 introduced the so called 'reverse procedure'. Are there any statistics available in your jurisdiction on the absolute frequency and the relative rate of such proceedings, the latter in comparison to the number of attempts to enforce judgments rendered in other Member States? If so, may you please relay the said statistics?

There is, to my knowledge, no statistics available in France on this issue. One shall however keep in mind that enforcement proceedings are generally considered to unfold quickly and easily in France.

70. Public policy and denial of a fair trial to the defaulting defendant in the state of origin (now Article 45(1) (a) and (b) respectively) have a certain tradition of being invoked rather regularly as grounds for refusal of recognition or enforcement. Has this changed in your jurisdiction following the advent of the 'reverse procedure' (Article 46)? Has the rate of success invoking either of them changed?

Even though there are no clear empirical data yet on this issue, I do not believe the situation has or will change much following the advent of the reverse procedure: public policy and denial of a fair trial to the defaulting defendant in the state of origin are quite rarely invoked before French courts as grounds for refusal of recognition or enforcement and the rate of success invoking them is bound to remain very low.

71. Has the extension of now Article 45(e)(i) to employment matters practically altered the frequency of, or the approach to, enforcing judgments in employment matters in your jurisdiction?

    The extension of now Article 45 (e) (i) to employment matters was hailed in France as a positive change since there was no reason to treat distinctively insurance and consumption matters on the one hand, and employment matters on the other: this distinction amounted to a baseless discrimination against employees.
    However the extension of the scope of Article 45 (e) (i) will have very limited impact in practice insofar as it only concerns cases where the employee was a defendant in the initial proceedings: indeed, in the majority of cases, employees act as claimants in the initial proceedings. Moreover, in cases where the employee acted as a defendant in the initial proceedings and was not domiciled in a Member State, the solution will remain that the provisions on jurisdiction provided for in the French Labour Code do not confer exclusive jurisdiction on French courts in employment matters. Hence, the fact that they are not abided by and that the court of another Member State is seized of the matter will not constitute a ground for refusal of recognition and enforcement (see esp. Soc. 7 mai 1996. 93-43.771).

72. Article 52 strictly and unequivocally inhibits *révision au fond*. Do courts or enforcement agents in your jurisdiction comply with this in practice?

    The prohibition of the *révision au fond*, which is also a key principle under French private international law since the Munzer decision (Cass. Civ. 1re 7 January 1964, Bull. 1964, I, n°15) is applied very strictly by French courts even though some old decisions had disregarded this principle (see TGI Troyes, 4 October 1978, JDI 1979, p.623, obs. A. Huet and R. Kovar). The importance of this principle is regularly reaffirmed by the Cour de cassation and the decisions of inferior courts are annulled if they do not comply with the latter (see for instance Cass. Civ. 1re 8 February 2000, n°97-20.937, Bull. 2000, I, n°42 p.28). Moreover, even though a *révision au fond* is exceptionally admitted for the purposes of deciding whether there is a ground for refusal of recognition and enforcement of the decision, the Cour de cassation remains extremely strict in this situation as well, and makes sure that refusals of recognition and enforcement by inferior courts remain exceptional (for rare examples of refusal of recognition based upon public policy, see Cass. Civ. 1re 17 May 1978, n°76-14.843, Bull. 1978, I, n°191, p.154 ; Cass. Civ. 1re 16 March 1999, Pordea, n°97-17.598, Bull. 1999, I, n°92 p.61).

Besides, there are discussions as to whether the court, when seized with a claim for recognition and enforcement of a decision originating from a court which ruled it had jurisdiction according to the Regulation, is entitled to verify the applicability of the Regulation before the court of origin.

It proves more difficult to assess the practice of enforcement agents but my guess is that they also refrain from revising foreign judgments.

73. Article 54 introduced a rule for adaptation of judgments containing a measure or an order which is not known in the law of the Member State addressed. How frequently or regularly does such adaptation occur in practice in your jurisdiction? In the event that the judgment gets adapted, how frequently is such adaptation challenged by either party?

It is not easy to determine how frequently such adaption occurs in practice and whether it is challenged by either party, especially since, under Brussels I a regulation, the task of adapting a foreign judgement lies first and foremost on enforcement agents.
That said, the issue of adaptation has especially been discussed in France following the *Stolzenberg* case (Cass. Civ. 1re 30 June 2004, n°01-03.248, Bull. 2004, I, n°191 p.157). In this case, the Cour de cassation admitted the enforcement of a *Mareva* injunction/ freezing order issued by the High Court of London. Given the fact that this type of measures is not known under French Law, there have been debates as to how it shall be adapted by French courts and enforcement agents. The prevailing view was that French provisional measures were to be undertaken, in accordance with the formal rules set in the French code of civil procedure, and with the limits provided for in French law, as regards, for instance, the properties which may be affected by these measures.
The problem of adaptation also occurs regarding periodic penalty payment. Although this issue has given rise to the *DHL Express* decision (ECJ, 12 April 2011, case C-235/09), the exact meaning and implications of the decision is discussed. In cases where the court of origin has ordered such a payment, whose characteristics differ from those known under French law, it seems clear that the order shall be adapted within French law. For instance, if the foreign judge decided that payment shall be made directly to the other party, French courts or enforcement officers may order the payment to be made to the court itself, or the enforcement officer. A more difficult question is whether a French court may resort to periodic penalty payment where the foreign court ordered a measure which is unknown or inapplicable in France to civil and commercial proceedings such as a contempt of court or other criminal penalties. Adaptation

proves necessary in these situations, and the penalty payments may be ordered, but within the limits resulting from the prohibition of the *révision au fond*.

74. Translation of the original judgment is optional, not mandatory by virtue of Article 37(2) or Article 54(3) respectively. How often require courts or enforcement agents in your jurisdiction the party invoking the judgment or seeking its enforcement to provide a translation of the judgment?

    French courts and enforcement agents tend to require translation rather frequently under the Regulation insofar as it is already the usual practice under French private international law. Although there is no provision in the French code of civil procedure making this translation mandatory, it amounts to a customary duty for the parties, which is firmly established in French judicial practice. One may also note that translation is also required for the enforcement of arbitral awards drafted in a foreign language. This requirement is laid down in Article 1515 of the French Code of civil procedure.

CHAPTER VII

Relationship with Other Instruments

75. Which impact has Annex (1)(q) of Directive 93/13/EEC (Unfair Terms in Consumer Contracts) generated in your jurisdiction?

    The impact of Annex (1) (q) of Directive 93/13/EEC is rather limited in France. True this provision, which was transposed in Article R.212-2 of the Consumer Code, may *prima facie* apply to choice-of-forum agreements that are included in consumer contracts, the cases where it is bound to apply are in fact rare. According to French authors, where the clause meets the requirement of Articles 19 (1) or 19 (2) –ie the clause was entered into after the dispute has arisen or allows the consumer to bring the dispute in courts other than those indicated in Chapter II Section 4-, it shall not be considered as unfair within the meaning of Article R.212-2 of the Consumer Code. This view might however be challenged regarding agreements entered into after the dispute has arisen, especially since under French law, terms may be considered as unfair even though they have been subject to a negotiation between the professional and the consumer (see Article L.212-1 of the Consumer code).
    It therefore appears that the only or main hypothesis under which Annex (1) (q) of Directive 93/13/EEC, as transposed in Article R.212-2 of the Consumer Code, may enter into play is the one contemplated by Article 19 (3) of the

Regulation. This provision refers to an agreement entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State. However if the consumer contract is not considered as international, but rather as fully localized in France, and provided that the Regulation would indeed apply in such a case, the clause shall be considered as avoid pursuant to Article 48 of the French Code of civil procedure, which requires that both parties act as professional traders in order to validate these clauses. On the contrary, if the contract is considered as international, Article R.212-2 of the Consumer Code might apply, and it has indeed been applied in the Facebook case (see Paris Court of Appeal, 12 February 2016, n°15/08624). In this matter, an agreement designating a Californian judge was considered as an unfair term pursuant to Article R.212-2 insofar as it obliged the consumer to seize a Californian court, which had no significant connection to the dispute, thereby obliging the consumer to incur financial costs that were out of proportion with the stake of the dispute. This decision must however be interpreted cautiously given the fact that Brussels I Regulation was wrongly applied by the Court: this case should indeed have been decided on the ground of French private international law.

76. Can you identify examples for an application of Article 70 in your jurisdiction?

To my knowledge, Article 70 has not yet been applied by French Courts.

77. Has the precedence of Art. 351 TFEU to Article 71 Brussels Ia, as established by the ECJ in *TNT v AXA* (C-533/08) and *Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV* (C-452/12) prompted any practical consequences in your jurisdiction?

Insofar as France is a signatory of the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR), the only clear practical consequence of these decisions, and especially from the *Nipponkoa Insurance Co.* ruling, is that French courts are precluded from adopting an interpretation of Article 31(2) of the CMR according to which an action for a negative declaration or a negative declaratory judgment in one Member State does not have the same cause of action as an action for indemnity between the same parties in another Member State.
Article 31(2) of the CMR provides that 'Where in respect of a claim referred to in paragraph 1 of this Article an action is pending before a court or tribunal competent under that paragraph, or where in respect of such a claim a judgement

has been entered by such a court or tribunal no new action shall be started between the same parties on the same grounds unless the judgement of the court or tribunal before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought'.

Accordingly, French courts shall decline jurisdiction under the CMR in cases where an action for a negative declaration or a negative declaratory judgment is pending before the court or tribunal of another Member State competent under Article 31 (1) of the CMR. The same holds true when a judgment has been entered by such a court or tribunal on this action.

Otherwise, the precise consequences of the precedence of Art. 351 TFEU to Article 71 Brussels Ia, as established by the ECJ in *TNT v AXA* (C-533/08) and *Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV* (C-452/12), remain debated in France and there is no clear solution in this regard.

It is also worth noting that, in a recent decision, the Rouen Court of Appeal admitted the precedence of the CMR over Brussels I Regulation without referring to the abovementioned ECJ decisions (see Rouen Court of Appeal, 25 January 2018, n°17/04641).

78. Which Treaties and international Conventions have triggered Article 71 in your jurisdiction?

Treaties and international Conventions which have triggered Article 71 –or its predecessors- before French courts are:

- the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR) : see Cass. Civ. 1re 3 June 1981, n°80-13.195, Bull. 1981, I, n°195, Rouen Court of Appeal, 25 January 2018 (n°17/04641) ;

- the Montreal Convention of 28 May 1999 for the Unification of Certain Rules for International Carriage by Air : see Cass. com. 8 November 2011, n°10-28.069, Bull. 2011, IV, n°186 ;

- the Brussels Convention of 10 May 1952 relating to the Arrest of Sea-Going Ships : see Cass. com. 16 September 2014, n°13-13.880, Bull. 2014, IV, n°119.

It is also worth noting that the Cour de cassation decided, in a controversial ruling, to give precedence to the Brussels I Regulation over the Convention of 9 May 1980 concerning International Carriage by Rail (COTIF), as amended by the Vilnius Protocole of 3 June 1999 : see Cass. com. 29 November 2016, n°14-20.172.

79. Have there been problems in your Member State with the delineation of the application of Article 25 Brussel Ia and the The Hague Convention on Choice-of-Court agreements?

The delineation of the application of Article 25 Brussel I (a) and the Hague Convention on Choice-of-Court agreements has not generated any difficulty in France so far. Only a few decision have been rendered on this issue, which are not of great significance and interest:

- in a decision of 7 January 2010 (n°09/04636), the Colmar Court of Appeal recalled that the Hague Convention on Choice-of-Court agreements was not applicable to matters relating to matrimonial regimes ;

- in a decision of 4 December 2014 (n°12/19169), the Aix-en-Provence Court of Appeal ruled that the Hague Convention was not applicable to a dispute between a bank and one of its clients. The decision was based upon Article 2 (1) (a) of the Convention, pursuant to which 'This Convention shall not apply to exclusive choice of court agreements – a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party';

- in a decision of 19 December 2017 (n°17/17797), the Paris Court of Appeal held that the Hague Convention was not applicable insofar as one of the parties was domiciled in Israel, which has not signed this Convention.

80. Have Articles 71(a) – 71(d) been already applied in your jurisdiction?

All the decisions mentioned above, in my reply to question 78, were issued in application of Article 71 (2) (a).

I don't know of any French decision which would have applied Article 71 (2) (b).

There are no Articles 71 (c) or 71 (d) in the Regulation. I therefore don't know which provisions this question refers to.