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?

   Generally, all judgments rendered by any court in Germany are available on request. This includes judgments applying the Brussels Ia Regulation. The Federal Administrative Court has held that the courts are under a duty to publish such decisions which presumably in the public interest ("Zu veröffentlichen sind alle Entscheidungen, an deren Veröffentlichung die Öffentlichkeit ein Interesse hat oder haben kann", Bundesverwaltungsgericht, 26 February 1997 – 6 C 3.96, in Neue Juristische Wochenschrift (NJW) 1997, 2694). However, only a small number of all judgments are published, e.g. judgments of Federal Courts or Higher Regional Courts. Those judgments are available either in fee-based databases (such as juris or beck-online) or on the websites of those courts (e.g. for the Federal Court of Justice at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288).

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

   Generally speaking that has been the case.

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?

   The abolition of exequatur has mostly been seen as an advantage (e.g. Mäsch/Peiffer, in Recht der Internationalen Wirtschaft (RIW) 2019, 245, 249). The same is true for the reform concerning choice of court agreements and the partial extension of the scope of application on third states. On the other hand, Article 31(2) has been said to give rise to "inverse torpedoes". Moreover, the recognition and enforcement of decisions coming from third states has not

been regulated. Article 26(2) has been said to be rather unclear. Lastly, the adaptation pursuant to Article 54 has been criticised as being too complex for the relevant authority (which is not a judge under the German system) (see e.g. Stürner, in Deutsche Gerichtsvollzieher-Zeitung (DGVZ) 2016, 216, 222).

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?

   The Recast Regulation seems to work quite well in Germany. Criticism concerns the relationship to arbitration as well as other areas which were not changed such as Article 7(1). Generally, the extension of the scope of application of the Brussels Regulation to third states seems advisable.

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

   Not to an extent that such tensions would have been visible in legal literature or court decisions.

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?

   As a general rule, in case of conflict, the Regulation will prevail over national rules on territorial jurisdiction. That is undisputed. For instance the exclusive jurisdiction for claims concerning wrong, misleading or omitted information on capital markets (sec. 32b of the German Code of Civil Procedure – ZPO) will not apply once Article 7(2) of the Brussels Ia Regulation comes into play (see e.g. Mormann, in Die Aktiengesellschaft (AG) 2011, 10).

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?

There may be a negative conflict of jurisdiction in cases where the court seised finds that, pursuant to its national law (Article 62) the place of habitual residence of the defendant is in another Member State while pursuant to the pertinent national law of that Member State the opposite is true (see for further references Staudinger, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 62 Brüssel Ia-VO at note 8). The dominant opinion in German literature opts for a renvoi solution in a sense that the first court should accept the solution of the law of the second Member State. This, however, contrasts with the clear wording of Article 62.

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)?

   The rules on territorial competence are to be found in the Code of Civil Procedure (örtliche Zuständigkeit, sec. 12 to 40 ZPO). The rules on subject-matter competence are regulated in the Court Organization Act (sachliche und funktionale Zuständigkeit, sec. 23 and 71 Gerichtsverfassungsgesetz, GVG).

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.

   The courts seem to follow the approach as advocated under the Brussel I Regulation. Recital 12 is mostly seen as being not very helpful, maybe even confusing. Indeed, the fact that pertinent changes, if any, may be visible in the Recitals only seems not to be satisfactory. Generally commentators are of the opinion that the old case law of the CJEU (e.g. *van Uden, West Tankers*) is still authoritative. In any case, the risk of parallel proceedings (arbitral and in the courts) still exists under the new regime.

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 CJEU (e.g., C-535/17, *NK v BNP Paribas Fortis NV*) has been helpful or has created extra confusion.

The approach of the CJEU taken in *Gourdain v Nadler* and later in *Christopher Seagon v Deko Marty Belgium* or is generally seen as providing helpful guidance. However, the subsequent case law has been criticized for being too casuistic and not paying enough attention to a principled approach (cf. e.g. Mankowski, in Neue Zeitschrift für Insolvenzrecht (NZI) 2019, 304)

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 is no reported case law on the recognition and enforcement of court settlements.

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

Reported case law on the recognition and enforcement of authentic instruments is sparse. One decision concerns an authentic instrument relating to maintenance drawn up by the competent Swedish authority (Försäkringskassan); it has been declared enforceable (OLG Düsseldorf, 6 March 2002 – 3 W 276/01, in Zeitschrift für das gesamte Familienrecht (FamRZ) 2002, 1422). However, recognition has been denied in a case where the Swedish authority has not been involved (Oberlandesgericht Karlsruhe, 30 January 2007 – 9 W 41/06, in Zeitschrift für das gesamte Familienrecht (FamRZ) 2007, 1581).

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?

There has been a considerable discussion on the effect of the CJEU decision in *Gothaer Allgemeine Versicherung v Samskip*. While it is uncontroversial that decisions rejecting a claim as inadmissible fall within the scope of Article 2 (a), most commentators argue that this judgments does not entail a European

res iudicata regime. Furthermore, there are some doubts as to whether or not undertakings or schemes of arrangements fall within the scope of Article 2 (a). It is also questionable whether a model case decision in the framework of representative proceedings according to the German Act on the Initiation of Model Case Proceedings in the Capital Markets (Kapitalanlegermusterverfahrensgesetz – KapMuG) may be regarded as a decision in the sense of Article 2 (a).

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 changes brought about by the Recast Regulation relating to provisional measures are relatively minor. In essence they mirror the case law of the CJEU. The main criticism concerns the fact that ex parte decisions will not be subject to recognition and enforcement under the Brussel Ia Regulation.

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?

    It is understood to mean the latter.

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?

    As to the first question, the answer is to the affirmative. As to the second, enforcement of the decision on a provisional measure will still be possible provided that the court could base its jurisdiction on the substance of the matter according to the Regulation's rules.

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?

    That specific point is not commonly addressed in the pertinent literature.

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 CJEU case C-551/15, *Pula Parking d.o.o. v Sven Klaus Tederahn*)?

    See question No. 13.

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?

    No. In general, claims against foreign defendants are rare. In 2017 (the latest statistical survey available), in 1.4% of all claims disposed of at the local courts (Amtsgerichte) the defendant had his/her place of habitual residence/seat in an EU country, while 0.5% came from a non-EU country (see Statistisches Jahrbuch, Fachserie 10, Reihe 2.1 – Rechtspflege Zivilgerichte, 2018, p. 30, available at https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/zivilgerichte-2100210177004.pdf?__blob=publicationFile).

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?

The predominant opinion in German literature argues in favour of an application of Article 26 regardless of the place of habitual residence of the defendant (see e.g. Staudinger, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 26 Brüssel Ia-VO at note 3). There are no reported cases dealing with this issue.

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 seised first the only relevant/decisive factor for the court second seised to stay its proceedings or does the obligation to stay persist only if the court first seised 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 predominant opinion in German literature argues in favour of an application of Articles 29 and 30 regardless of the place of habitual residence of the defendant (see e.g. Leible, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 29 Brüssel Ia-VO at note 5).

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?

    There do not seem to be difficulties relating to Article 66 itself. However, for the judgments which fall under the scope of Article 66(2), there is a gap in German law since the previous rules pertaining to the modalities of exequatur (AVAG) have been abolished. The Federal Court of Justice has decided to apply these rules by analogy (Bundesgerichtshof, 17 May 2017 – VII ZB 64/15, in Deutsche Gerichtsvollzieher-Zeitung (DGVZ) 2017, 202).

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 most important provision seems to be Article 7(1). At the same time this head of jurisdiction is widely criticized for being too complex. Article 7(3) has only little practical importance in Germany. Article 8(2) does not apply in Germany (Article 65).

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 distinction between contractual and non-contractual obligations is not always easy to handle. There is a bulk of case law on that issue. The *Brogsitter* judgment of the CJEU seemed to create some uncertainty. Likewise, the definition of the place of performance as a purely factual matter may not always lead to satisfactory results, e.g. where there has not been any performance yet. Furthermore, cases in which there are multiple places of performance pose particular difficulties.

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?

    Many commentators are of the opinion that the factual place of performance is decisive even though the parties had a different arrangement before (cf. also Bundesgerichtshof, 2 March 2006 – IX ZR 15/06, in Neue Juristische Wochenschrift (NJW) 2006, 1806). The wording 'unless otherwise agreed' in Article 7(1)(b) is to be understood as allowing the parties to conclude agreements pertaining to the place of performance within the limits set up in the *MSG* judgment of the CJEU.

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?

There is a bulk of case law pertaining to the wording 'matters relating to tort, delict or quasi-delict' (see the references provided e.g. by Leible, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 7 Brüssel Ia-VO at note 110). But by far the most difficult aspect seems to be the determination of the place where the damage has been sustained, e.g. in the case of pure economic loss, the violation of personality rights, or IP rights.

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?

    There is no reported case law on Article 7(4) or indeed any broader discussion in the literature (see e.g. Siehr, in Festschrift für Dieter Martiny, 2014, p. 848).

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?

    There is some discussion on Article 8(1), in particular pertaining to the wording 'so closely connected'. Besides, some commentators argue that abusive claims should not fall under this provision, as the CJEU case law seems to suggest (cf. the *Painer* and *Solvy* judgments which seem to run counter to the *Freeport* decision, see Stadler, in Musielak/Voit (eds.), ZPO, 16th ed. 2019, Article 8 at note 4).

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 diverging opinions on that point. Most commentators to take the view that a violation of the duty to inform the weaker party will not bear any consequences as to the jurisdiction of the court (see e.g. Stadler, in Musielak/Voit (eds.), ZPO, 16th ed. 2019, Article 26 at note 7; contra Geimer, in Zöller, ZPO, 32nd ed. 2018, Article 26 at note 13). In the light of the effet utile of Article 26(2), however, there is a strong current in the German literature to argue that any violation will entail a refusal of recognition under Article 45(1)(e)(i). Such view is based on an extensive teleological interpretation of that provision (cf. Mankowski, in Recht der Internationalen Wirtschaft (RIW) 2014, 625, 628 f.).

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?

That seems to be the dominant view in German literature, see e.g. Staudinger, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 15 Brüssel Ia-VO at note 2).

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

Yes that seems to be the general view (e.g. for consumers Mankowski, in Recht der Internationalen Wirtschaft (RIW) 2014, 625).

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 wording 'the place where the harmful event occurred' is interpreted as meaning the same as in Article 7(2) (cf. Staudinger, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 12 Brüssel Ia-VO at note 3).

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?

    The jurisprudence of the CJEU (e.g. *Pammer and Hotel Alpenhof*, *Mühlleitner*, *Emrek*) has provided ample guidance. In the light of those decisions, the requirement to direct the professional activity to the Member State where the consumer has his place of habitual residence is interpreted in a rather extensive manner. There is some discussion as to under which circumstance the trader may effectively insert a disclaimer on his website.

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?

    What matters is the place of habitual residence of the consumer at the time of initiation of proceedings (Klageerhebung). The fact that the consumer moves to another State later does not change jurisdiction (Gottwald, in Münchener Kommentar zur ZPO, 5th ed. 2017, Article 18 at note 8).

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?

    In a recent decision by an intermediate labour court the relationship between Section 5 of the Regulation on the jurisdiction in matters relating to employment contracts and jurisdiction relating to torts under Article 7(2) has been addressed (Landesarbeitsgericht Niedersachsen, 29 June 2016 – 13 Sa 1152/15, in Neue Zeitschrift für Arbeitsrecht Rechtsprechungsreport (NZA-RR) 2016, 611; cf. Mankowski, in Europäische Zeitschrift für Arbeitsrecht (EuZA) 2017, 126).

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 CJEU, 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?

    As there is no autonomous concept of immoveable property ('Grundstück'; cf. von Bar, Why do we need Grundstücke (Land Units), and What are They? On the Difficulties of Divining a European Concept of 'Things" in Property Law in: Juridica International 2014, p. 3) there seem to be some difficulties as to whether or not a right in rem relates to moveable or to immoveable property.

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?

    Following the CJEU case law (*Centros*, *Überseering*, *Inspire Art*), the uncodified German private international law adheres to the so-called incorporation principle ('Gründungstheorie').

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 CJEU 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?

    Article 24(4) has been criticised for undermining the principle of perpetuation fori and for providing the defendant with a tool to torpedo the proceedings (see Mankowski, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 24 Brüssel Ia-VO at notes 107 et seq.).

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.

At the outset Article 24(5) is meant to protect the territoriality principle when it comes to the enforcement of a judgment. In the light of this the provision is usually construed not too narrowly (see Mankowski, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 24 Brüssel Ia-VO at note 125). It encompasses all the proceedings concerning the actual operation of enforcement of a title (e.g. seizure of a good, realisation through foreclosure), especially actions of the debtor against such enforcement. This is also true for any action to oppose execution on fresh grounds, e.g. payment of the debt pursuant to sec. 767 ZPO ('Vollstreckungsabwehrklage'), as has been stated in an obiter dictum in the *AS Autoteile v Malhé* decision of the CJEU, even though some commentators contest this (for references cf. Stadler, in Musielak/Voit (eds.), ZPO, 16th ed. 2019, Article 24 at note 11).

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?

    At the outset Article 24(5) is usually construed not too narrowly, see question 39. Consequently, conservatory measures fall under the scope of application of this provision (see Mankowski, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 24 Brüssel Ia-VO at note 130). Some commentators, however, claim that Article 24(5) works as an exception to the rule and, therefore, has a limited scope (e.g. Halfmeier, in Praxis der Internationalen Privat- und Verfahrensrecht (IPRax) 2007, 381, 385).

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?

As far as can be seen, there is no case law on the new Article 25. Commentators often argue that no specific link to a Member State is required (see Mankowski, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 25 Brüssel Ia-VO at note 19). However, there must be some minimum degree of internationality. It follows from this that purely domestic agreements on jurisdiction do not fall under the scope of Article 25 (cf. Gottwald, in Münchener Kommentar zur ZPO, 5th ed. 2017, Article 25 at note 4).

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?

    There is no reported case law on this issue.

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?

    A considerable part of the case law in choice-of-court agreements concerns the validity of such agreements in standard terms. In a recent decision the Bundesgerichtshof has decided that the existence of a trade usage in the sense of Article 25 (1)(c) has to be established ex officio once a party asserts it, unless such an allegation is totally frivolous (Bundesgerichtshof, 26 April 2018 – VII ZR 139/17, in Neue Juristische Wochenschrift (NJW) 2019, 76).

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?

    The formal validity of an agreement under Article 25 (1) provides an indication for its substantive validity (cf. Oberlandesgericht Hamm, 20 September 2005 – 19 U 40/05, in Praxis der Internationalen Privat- und Verfahrensrecht (IPRax) 2007, 125). Apparently there is no case law in which a court found a lack of consent while the formal requirements were fulfilled.

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 is one reported case in which a Regional Court found that only defects relating to the conclusion of the choice-of-court agreement such as lack of capacity or violations of public policy fall under the notion of 'null and void' (Landgericht Kleve, 27 October 2015 – 4 O 119/15, in Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts (IPRspr.) 2015, Nr. 216).

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?

    Following the entry into force of the Rome I Regulation the German legislator has abolished the domestic private international law rules in Articles 27 to 37 EGBGB. However, as the Rome regime does not apply to choice-of-court agreements (Article 1(2)(e) Rome I Regulation), and, consequently, domestic private international rules come into play, a gap has to be filled in German law. Predominant opinion in German literature advocates an application of Articles 3 et seq. Rome I Regulation by analogy (cf. Mankowski, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 25 Brüssel Ia-VO at note 36).

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 apparently no pertinent case law in Germany.

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?

Yes (cf. Mankowski, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 25 Brüssel Ia-VO at notes 77 et seq.).

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?

    The wording 'entering an appearance' seems to leave some scope for interpretation as to the latest possible point in time. It could refer to the pleading phase (cf. Bundesgerichtshof, 19 May 2015 – XI ZR 27/14, in Neue Juristische Wochenschrift (NJW) 2015, 2667: 'Die internationale Zuständigkeit deutscher Gerichte gemäß Art. 24 Satz 1 EuGVVO a.F. wird durch eine rügelose Einlassung in der Klageerwiderung begründet') or the oral hearing (Bundesarbeitsgericht, 2 July 2008 – 10 AZR 355/07, in Recht der Internationalen Wirtschaft (RIW) 2008, 726 for labour proceedings: 'Im arbeitsgerichtlichen Verfahren sind materielle Einwendungen gegen den Klageanspruch vor oder in der Güteverhandlung nach deutschem Prozessrecht noch nicht als erstes Verteidigungsvorbringen anzusehen, das die Zuständigkeit des angerufenen unzuständigen Arbeitsgerichts kraft rügeloser Einlassung nach Art. 24 Satz 1 EuGVVO begründet.' More recently, the Regional Court of Aachen has left the question undecided (Landgericht Aachen, 21 March 2017 – 41 O 57/15, in Praxis der Internationalen Privat- und Verfahrensrecht (IPRax) 2018, 202). Commentators argue that the rationale of Article 26 does not cover an approach according to which the jurisdiction may be always contested in the first oral hearing (cf. Köchel, in Praxis der Internationalen Privat- und Verfahrensrecht (IPRax) 2018, 165; Peiffer/Peiffer, in Geimer/Schütze (eds.), Internationaler Rechtsverkehr in Zivil- und Handelssachen, 2017, Art. 26 at note 32).

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).

    Following the extensive interpretation as advocated by the CJEU (e.g. in *Gubisch* and *Tatry*) German courts follow a functional approach (see amply Leible, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 29 Brüssel Ia-VO at notes 13 to 24).

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 seised 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?

    It seems that in a system of party autonomy it is for the parties to raise the defence of lis pendens in the second proceedings. While under German law the elements of admissibility of the claim are to be established ex officio, the court does not have to examine a merely theoretical possibility of parallel proceedings (cf. Geimer, in Zöller, ZPO, 32nd ed. 2018, Article 29 at note 35).

52. When should a court in your Member State be considered to be seised 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)?

    From a German perspective, solution (a) seems to be preferable. As to further organisational or administrative requirements, lex fori applies. Under German law the claimant has to file a certain number of copies of the statement of claim and pay an advance on the court fees. The court will not be deemed to be seised unless such requirements were met (Leible, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 4th ed., 2016, Article 32 Brüssel Ia-VO at notes 6 to 8).

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?

    Some commentators argue that the filing of the initial claim should be decisive as this furthers the goal of Article 32 to prevent parallel proceedings (cf. Gottwald, in Münchener Kommentar zur ZPO, 5th ed. 2017, Article 32 at note

4). Others claim that the filing of the extended claim, or counter claim, should be decisive (cf. Peiffer/Peiffer, in Geimer/Schütze (eds.), Internationaler Rechtsverkehr in Zivil- und Handelssachen, 2017, Art. 32 at note 16).

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

    Some commentators claim that Article 30(2) does not have any practical application in Germany as German law only allows a joinder of actions which are pending before the same court (sec. 147 ZPO, cf. Geimer, in Zöller, ZPO, 32nd ed. 2018, Article 32 at note 8; cited with approval by Landgericht Erfurt, 30 December 2005 – 2 HK O 69/04, in Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts (IPRspr.) 2005, Nr. 142, p. 362). However, others submit that Article 30(2) could be applied by a German court if the lex fori of the court(s) seised first allows for a joinder of actions (e.g. French or Belgian law, cf. Peiffer/Peiffer, in Geimer/Schütze (eds.), Internationaler Rechtsverkehr in Zivil- und Handelssachen, 2017, Art. 30 at note 37). However, there is no published case law on this provision.

55. Has the application of Article 31(2) proved to be counterproductive and resulting in delaying the proceedings by the obligation of the court seised 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?

    No pertinent case law to that extent seems to have published so far.

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?

    Yes it probably has, as there were diverging approaches in the Member States before. However, there is no pertinent case law.

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 published case law on that issue.

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?

    Yes.

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?

    Apparently this is not the case.

60. In the *Van Uden Maritime v Deco-Line and Others* case (C-391/95) the CJEU 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 is no settled case law relating to that question. Some commentators doubt whether the 'real connecting link' condition in *Van Uden* is still to be applied under the Recast Regulation (cf. Domej, in Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 78 (2014), 508, 544).

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.

    There is only one reported decision in which reference was made to the Hague Convention on Choice of Court Agreements (Landgericht Kleve, 27 October 2015 – 4 O 119/15, in Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts (IPRspr.) 2015, Nr. 216). However, the Hague Convention was not applicable ratione temporis in that case.

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?

    There is no reported case law. It seems to be quite rare to make such an application.

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?

    There are specific measures run by the Federal States. For instance, the Judicial Academy in Northrhine Westphalia offers a course on cross-border enforcement for enforcement agents (Gerichtsvollzieher). Generally, however, such courses are not mandatory; the individual person can choose from a range of topics in which to choose the training.

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?

    No.

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?

    The Federal Office of Justice (Bundesamt für Justiz) offers assistance free of charge for the enforcement of foreign titles in the field of maintenance. It is the exclusive Central Authority for the assertion of claims both in and out of court in maintenance cases. In civil and commercial matters there is no such assistance.

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?

    No statistics are available in relation to that question.

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?

    No.

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

    Not so far.

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?

    No statistics are available in relation to that question.

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?

    This is hard to tell given the absence of statistical data.

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?

    No statistics are available in relation to that question.

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

Yes they do. At least there is no reported case law to the contrary.

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?

    No statistics are available in relation to that question.

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?

    No statistics are available in relation to that question.

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?

    None. Pursuant to sec. 1031(5) ZPO, arbitration agreements in which a consumer is involved must be contained in a document signed by the parties in their own hands.

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

    The following bilateral agreements may be mentioned (cf. Gottwald, in Münchener Kommentar zur ZPO, 5th ed. 2017, Article 70 at notes 5-11):
    - Agreement between Germany and Italy dated 9 March 1936 (in the field of matrimonial property)
    - Agreement between Germany and Belgium dated 30 June 1958 (in the field of legal capacity)
    - Agreement between Germany and Great Britain dated 14 July 1960 (in the field of successions)

- Agreement between Germany and the Netherlands dated 30 August 1962 (in the field of civil status)
- Agreement between Germany and Austria dated 6 June 1959 (in the field of civil status)

77. Has the precedence of Art. 351 TFEU to Article 71 Brussels Ia, as established by the CJEU 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?

There is no reported case law on that matter.

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

The following list is provided by Gottwald, in Münchener Kommentar zur ZPO, 5th ed. 2017, Article 71 at note 2:
- Revidierte Rheinschifffahrtsakte vom 17.10.1868
- Warschauer Übereinkommen zur Vereinheitlichung von Regeln über die Beförderung im internationalen Luftverkehr vom 12.10.1929, RGBl. II 1933 S. 1039
- Brüsseler Abkommen zur Vereinheitlichung von Regeln über die Zuständigkeit bei Schiffszusammenstößen auf See vom 10.5.1952, BGBl. 1972 II S. 663
- Brüsseler Übereinkommen zur Vereinheitlichung von Regeln über den Arrest in Seeschiffe vom 10.5.1952, BGBl. 1972 II S. 653
- Römisches Abkommen über die Regelung der von ausländischen Flugzeugen verursachten Flur- und Gebäudeschäden vom 7.10.1952
- Londoner Abkommen über deutsche Auslandsschulden vom 27.2.1953, BGBl. II S. 331
- Haager Übereinkommen über den Zivilprozess vom 1.3.1954, BGBl. 1958 II S. 576
- Haager Übereinkommen über die Zustellung gerichtlicher und außergerichtlicher Schriftstücke im Ausland in Zivil- oder Handelssachen vom 15.11.1965, BGBl. 1977 II S. 1452
- Haager Übereinkommen über die Beweisaufnahme im Ausland in Zivil- oder Handelssachen vom 18.3.1970, BGBl. 1977 II S. 1472
- Genfer Übereinkommen über den Beförderungsvertrag im internationalen Straßengüterverkehr (CMR) vom 19.5.1956, BGBl. 1961 II S. 1119
- Übereinkommen über die Schiffbarmachung der Mosel vom 27.10.1956, BGBl. II S. 1837

- Europäisches Übereinkommen über den Internationalen Transport gefährlicher Güter auf dem Land (ADR) vom 30.9.1957, BGBl. 1969 II S. 1489
- Haager Übereinkommen über die Anerkennung und Vollstreckung von Entscheidungen auf dem Gebiet der Unterhaltspflicht gegenüber Kindern vom 15.4.1958, BGBl. 1963 II S. 1005
- Pariser Übereinkommen über die Haftung gegenüber Dritten auf dem Gebiet der Kernenergie vom 29.7.1960 nebst Pariser Zusatzprotokoll vom 28.1.1964 einschl. des Brüsseler Zusatzübereinkommens vom 31.1.1963, BGBl. 1975 II S. 957; II 1976 S. 310
- Übereinkommen über Zusammenarbeit zur Sicherung der Luftfahrt „Eurocontrol“ vom 13.12.1960, BGBl. 1962 II S. 2273
- Brüsseler Übereinkommen über die Haftung der Inhaber von Reaktorschiffen vom 25.5.1962 nebst Zusatzprotokoll, BGBl. 1975 II S. 977
- Brüsseler Internationales Übereinkommen zur Vereinheitlichung von Regeln über die Beförderung von Reisegepäck im Seeverkehr vom 27.5.1967
- Brüsseler Internationales Übereinkommen zur Vereinheitlichung von Regeln über Schiffsgläubigerrechte und Schiffshypotheken vom 27.5.1967
- Baseler Europäisches Übereinkommen zur Staatenimmunität vom 16.5.1972, BGBl. 1990 II S. 1400
- –Genfer Übereinkommen über den Vertrag über den Internationalen Landtransport von Reisenden und Gepäck (CVR) vom 1.3.1973
- Haager Übereinkommen über die Anerkennung und Vollstreckung von Unterhaltsentscheidungen vom 2.10.1973, BGBl. 1986 II S. 826
- Athener Übereinkommen über den Transport von Passagieren und Gepäck zur See vom 13.12.1974
- Münchener Übereinkommen über die Erteilung europäischer Patente vom 5.10.1973 nebst Zusatzprotokoll, BGBl. 1976 II S. 649, 826 und 982
- Luxemburger Übereinkommen über das europäische Patent für den gemeinsamen Markt vom 15.12.1975, BGBl. 1979 II S. 833
- Hamburger UN-Übereinkommen über die Beförderung von Gütern auf See vom 30.3.1978, I. L. M 17 (1978), 608
- Übereinkommen über den Internationalen Eisenbahnverkehr (COTIF) vom 9.5.1980, BGBl. 1985 II S. 130
- Übereinkommen der Vereinten Nationen über den internationalen multimodalen Gütertransport vom 24.5.1980
- Internationales Übereinkommen von 1992 über die zivilrechtliche Haftung für Ölverschmutzungsschäden, BGBl. 1996 II S. 671 (= Neufassung des Übereinkommens von 1969) nebst Internationalem Übereinkommen von 1971 über die Errichtung eines Internationalen Fonds zur Entschädigung von Ölverschmutzungsschäden idF des Protokolls von 1992, BGBl. 1996 II S. 686

- Montrealer Übereinkommen zur Vereinheitlichung bestimmter Vorschriften über die Beförderung im internationalen Luftverkehr vom 28.5.1999, BGBl. 2004 II S. 459
- Internationales Übereinkommen vom 23.3.2001 über die zivilrechtliche Haftung für Bunkerölverschmutzungsschäden, BGBl. 2006 II S. 578

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?

    Apart from the fact that Article 26 of the Hague Convention has been criticised as being too complex there do not seem to be problems in practise.

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

    No.