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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?

Most judgments of the High Court, Court of Appeal and Supreme Court on Brussels Ia are published on www.courts.ie and www.bailii.org (but not all).

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

Mostly yes – see below re areas of difficulty.

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?

There is relatively limited literature on Brussels Ia in Ireland. The last dedicated textbook on private international law (Binchy, Irish Conflicts of Law) was published in 1988, and written before the Brussels Convention came into force in Ireland. Nevertheless, there is some detailed coverage of the Regulation and its application in Ireland in Biehler, McGrath and McGrath, Delany and McGrath on Civil Procedure, 4th ed, 2018 (hereafter "Delany and McGrath on Civil Procedure 4e") and there is a section on conflict of laws (private international law) in the Annual Review of Irish Law, which is published annually and provides discussion of developments in Irish law during the preceding year.

The reforms introduced in Article 31(2) and in Articles 33 and 34 are likely to be welcomed (see answers to Qs 55 and 56 below) although it is arguable that Articles 33 and 34 should not be confined to cases where the third-country proceedings were first in time.

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?

In Anglo Irish Bank Corp v Quinn [2011] IEHC 356 [8.1] the Irish High Court noted the lack of "clear guidance either from the direct wording of the Brussels Regulation or from the jurisprudence of the ECJ as to what is to happen in the context of a third set of proceedings being brought in a jurisdiction first seised of at least connected proceedings". The High Court subsequently sought the guidance of the CJEU on this issue of interpretation of what is now Article 30 (then 28), but the request for a preliminary ruling was subsequently withdrawn when the proceedings in the court second seised (in Cyprus) were struck out and thus only the Irish courts were seised: see Irish Bank Resolution Corp v Quinn [2013] IEHC 596.

Another point potentially requiring clarification is as to the entitlement of national courts, whose jurisdiction is contested, to grant provisional orders in aid of the resolution of the jurisdictional dispute. This issue was raised in Ryanair v Unister [2013] IESC 14.

Another issue which has arisen in a number of Irish cases is whether the Brussels Ia Regulation (previously Regulation 44/2001) can confer jurisdiction in circumstances where the claimant has not initially pleaded jurisdiction under the Regulation: see Spielberg v Rowley [2004] IEHC 384; Microsoft v EMI [2010] IEHC 228.

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

The Irish courts are generally very respectful of the principle of autonomous interpretation. This principle – and the need to disregard domestic legal conceptions - is emphasised repeatedly in the case-law. See eg Burke v UVEX [2005] IEHC 68; Popely v Popely [2006] IEHC 134; Haier v Mares [2017] IEHC 159 [17], [54].

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?

No, I am not aware of any such difficulties.

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?

I am not aware of any Irish case-law or literature discussing such "negative conflicts".

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)?

These rules are laid down in Statutory Instrument No 6 of 2015, the European Union (Civil and Commercial Judgments) Regulations 2015.

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 Irish courts have given some consideration to the delineation between court proceedings and arbitration (eg in Walsh v Newlyn Homes [2012] IEHC 597 where the question was whether a jurisdictional challenge based on Regulation 44/2001 precluded a further challenge based on an agreement to arbitrate). However, there has been no substantial engagement with the issues sought to be resolved by Recital 12.

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?

This delineation has been briefly considered on a number of occasions (see eg George v AVA Trade [2019] IEHC 187 [48] ff) but it does not seem to have led to particular problems.

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.

This case has not yet been considered by the Irish courts.

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

No, there is no case-law on this.

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

No, there is no case-law on this.

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?

No, there has been no controversy concerning these definitions (and the Irish courts do not appear to have encountered any difficulties with these definitions).

The definition of "authentic instrument" is welcomed by the Irish literature: as is noted in Delany and McGrath on Civil Procedure 4e p 1096, this concept is unfamiliar to common law legal systems and caused some confusion.

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'?

This extended definition is likely to be welcomed in Ireland. In Fairfield v Citco [2012] IEHC 81 the Irish High Court, applying Regulation 44/2001, experienced some difficulty in determining whether it was entitled to recognise Dutch orders of conservatory garnishment where they had been made ex parte and had immediate legal effect - but where the defendant, once notified, could apply to have the order lifted in an inter partes hearing. The High Court judge considered requesting a preliminary ruling but given the pressures of time in the proceedings ultimately decided to resolve the matter herself (holding that the orders were entitled to recognition even in circumstances where they had immediate legal effect). The doubt as to whether the orders qualified as "judgments" under Article 32 arose from dicta in Case C-39/02 Maersk [51].

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?

In Fairfield v Citco [2012] IEHC 81 the Irish High Court, applying Regulation 44/2001, held that the Dutch courts, issuing the orders of conservatory garnishment,

had jurisdiction "as to the substance of the matter" because they had jurisdiction under Articles 2 and 4 of Regulation 44/2001 (and did not need to rely on Article 31).

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?

In Fairfield v Citco [2012] IEHC 81 (discussed above) it seemed that the Dutch courts, issuing the orders of conservatory garnishment, were not yet seised of proceedings on the merits of the case. Nonetheless the orders were recognized in Ireland as "judgments" under Article 32 of Regulation 44/2001.

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?

There appears to be no Irish authority on this point.

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?

In Fairfield v Citco [2012] IEHC 81 the Irish High Court, applying Regulation 44/2001, appeared to make its own determination as to the jurisdiction of the Dutch courts as to the substance of the matter.

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*)?

No, other than in the Fairfield case, as discussed above.

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?

I am not aware of any such statistics.

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?

This does not appear to have been discussed in the Irish case-law or literature.

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)?

This issue does not appear to have been addressed in the Irish case-law or literature.

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 Brussels Ia Regulation does not appear to have caused any particular difficulty.

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?

Article 7(1) and (2) are often invoked – the rest of these provisions are not.

In the early days of the Brussels Convention becoming applicable in Ireland (prior to the introduction of autonomous rules for contracts for goods/services), what was then Article 5(1) of the Brussels Convention dominated the Irish courts' discussion of the Convention – particularly as respects the interpretation of "the place of performance of the obligation in question" (see the 1991 Annual Review of Irish Law 86-89;1992 Annual Review of Irish Law 126-127; 1993 Annual Review of Irish Law 118-123).

Article 6(1) of the Brussels Convention (now Article 8(1) of Brussels Ia) was considered by the Irish Supreme Court in Gannon v B&I [1993] 2 IR 359. The court ruled that Article 6(1) was inapplicable where the first defendant (domiciled in Ireland) appeared to have been sued solely in order to oust the jurisdiction of the English courts.

See below re elements of Article 7 provoking discussion/perceived as problematic.

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 boundary-line between matters relating to a contract/tort (Article 7(1) vs Article 7(2)) was considered by the Irish courts on a number of occasions prior to the Case C-548/12 Brogsitter judgment, and there was some uncertainty as to where the boundary should lie. For instance, in Burke v Unex [2005] IEHC 68 an action concerned with the sale of an allegedly defective motorcycle helmet was held to fall for consideration under Article 5(1) Regulation 44/2001 and not Article 5(3) (even though it was accepted that the claim could be made in tort under Irish law). In Leo Laboratories v Crompton [2005] IESC 31(decided a couple of months later), the Irish Supreme Court accepted, in the context of a claim concerning the supply of allegedly contaminated paraffin for use in manufacturing pharmaceuticals, that "in reality, the dispute arises from a contract". However, the Court went on to explore the possibility of jurisdiction under Article 5(3) (without making any final determination as to its relevance). In Coleman v Offley [2012] IEHC 303 an action against an insurance broker for an alleged failure to notify the insurer of a possible claim was found to be "a free-standing claim in tort" and not a "claim in contract or in respect of a tort relating to a contract".

In Castlelyons v Eukor [2018] IECA 98 the Irish Court of Appeal reflected at length on the place of provision of services under Article 7(1)(b) – finding ultimately that a UK freight-forwarding company had provided the service (arranging for the transmission of machinery from Ireland to Dubai) from its base in the UK.

The Irish courts have also had to deliberate on the nature of the contract at issue – most notably in cases concerned with exclusive distribution agreements. In one Irish case (General Motors v SES [2005] IEHC 223), the High Court applied Article 5(1)(b) having determined that in fact the alleged breaches were of individual contracts of sale of goods which had been concluded in performance of the overarching distribution contract – while in another case Article 5(1)(b) was considered inapplicable where the claim was concerned with an alleged early termination of the distribution contract itself (Nestorway v Ambaflex [2006] IEHC 235).

The Irish courts have also struggled with the characterisation of the contract concluded between a commercial user of an airline website (alleged to be engaged in "screen

scraping" or unauthorized data extraction) and the airline. In one case, (Ryanair v On the Beach [2013] IEHC 124) it was thought that this might constitute a contract for the provision of services under Article 5(1)(b) Regulation 44/2001, while in another case (Ryanair v SC Vola [2019] IEHC 239) it appeared to be dealt with under Article 7(1)(a) Regulation 1215/2012). Both cases also raised the possibility that "screen scraping" might be a tort for the purposes of Article 7(2) (formerly Article 5(3) Regulation 44/2001). Similar concerns/doubts were aired in Ryanair v Unister [2011] IEHC 167.

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?

There is no case-law or literature (to my knowledge) on the "unless otherwise agreed" formula under Article 7(1)(b).

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?

As indicated above, the meaning of "matters relating to tort" has caused the Irish courts difficulty (in demarcating the boundary between Article 7(1) and 7(2) – or Article 5(1) and 5(3) Regulation 44/2001).

The action for breach of constitutional rights was held to fall within "matters relating to tort" in Schmidt v Home Secretary of the Government of the United Kingdom [1995] 1 ILRM 301. As was observed in the 1994 Annual Review of Irish Law, this characterization could be problematic – insofar as the entitlement to exercise constitutional rights is inevitably compromised in Ireland, and insofar as it will be difficult to pinpoint the moment of damage in the context of this action.

Irish courts have had to deliberate on the place where the harmful event/damage occurred on a number of occasions: eg

Casey v Ingersoll [1996] 2 ILRM 456: where a UAE based business with an office in Ireland sued an English-domiciled company for alleged negligent misstatement (insufficient evidence of damage sustained in Ireland);

Ewins v Carlton [1997] 2 ILRM 223: where UK-based defendants facilitated the broadcast of an allegedly defamatory television documentary across the UK and Ireland, the plaintiff was entitled to sue in Ireland with respect to the damage allegedly sustained in Ireland;

Leo Laboratories v Crompton [2005] IESC 31: where a Dutch company was alleged to have supplied contaminated paraffin to an Irish pharmaceutical company for use in the manufacturing process (damage probably occurred in Ireland);

Gaffney v Germanischer Lloyd [2015] IEHC 721: where an allegedly unstable vessel was supplied by a Dutch company with certification of stability provided by two German entities and the Irish plaintiff sued for negligent misrepresentation (damage occurred in either Germany or the Netherlands, not in Ireland where the vessel was used and its alleged lack of sea-worthiness discovered);

Castlelyons v Eukor [2018] IECA 98: where a UK freight-forwarding company was alleged to have engaged in the tort of conversion in sanctioning the release of a cargo to an unauthorized person in Dubai (held only indirect damage incurred in Ireland on these facts so no Article 7(2) jurisdiction in Ireland);

Smyth v SAS Sogimalp [2019] IEHC 568: where an alleged malicious prosecution took place in France (damage occurred in France, not in Ireland where the plaintiff – the alleged victim - resided).

An allegation of online defamation was considered in CSI Manufacturing v Dun and Bradstreet [2013] IEHC 547 and it was determined that the plaintiff's entitlement to sue in Ireland, as the Member State in which it had the centre of its interests, was dependent on the plaintiff showing that the material in question "was published and read in Ireland".

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?

No – this does not appear to have been used/discussed yet.

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?

No – there has been no significant controversy regarding these rules.

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?

This does not appear to have been discussed in the Irish case-law or literature.

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?

Yes, it appeared to be assumed that they did in Abama v Gama [2015] IECA 179 (see answer to Q 35 below).

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

The literature does not appear to have expressed any view as to the effectiveness of these provisions.

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?

Article 16 (then Article 12a of the Brussels Convention) has caused some difficulty. In Minister for Agriculture, Food and Forestry v Alte Leipzinger [2001] IESC 24, the Supreme Court had to determine whether a jurisdiction clause contained in an insurance contract covering transport and storage risks for goods was precluded by Article 12 (now 15) – or whether it was valid and binding pursuant to Article 12a (now 16). The court ultimately determined that the jurisdiction clause was not binding. The court noted the difficulties that would ensue if the jurisdiction clause were valid for certain risks and not others (parallel litigation in two countries). The court also noted that the storage element here was dominant and the transport element was subservient.

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 Irish courts have deliberated at some length on the scope of application of Section 4 of Chapter II of Regulation 44/2001 – in Harkin v Towpik [2013] IEHC 351 and McDonald v AZ Sint Elisabeth Hospital [2014] IEHC 88. Two particular points of difficulty emerged from these cases: first, the meaning of "matters relating to a contract" (under what is now Article 17(1), then 15(1)) insofar as Irish law often characterizes consumer claims as tort rather than contract claims, and second, the meaning of "pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State".

In resolving the first issue (already discussed in the context of Article 7 in answering Q 24 above), it was accepted that "matters relating to a contract" has an autonomous EU meaning under Article 17 (then 15) and "cannot be diluted or qualified by reference to purely national practices or understandings" (McDonald [28]).

Both cases concerned Irish-resident plaintiffs who had undergone medical procedures in other Member States – and in Harkin it was decided that there had been no "directing of activities" to Ireland (and therefore that the Irish courts lacked jurisdiction), while in McDonald it was held that there had been such a directing of activities to Ireland (and that the Irish courts consequently had jurisdiction under Section 4). It was material in Harkin that the procedure (which took place in Poland) had been organized through a UK based agent, and that the defendants' website had a UK domain name and provided an English telephone number (not preceded by an international dialing code). Payment was effected in Sterling (not Euro). Moreover, all of the following occurred in Poland: the first meeting between the plaintiff and the surgeon (the first defendant), the initial examination, the pre-operative tests, the signing of the consent form, the main payment for the surgery – and ultimately the actual surgical procedure. In McDonald, by contrast, while the surgical procedure took place in Belgium (along with the initial consultation and the making of payment), the defendant hospital's website provided an Irish telephone number for Irish patients, the testimonials included one from an Irish patient, and reference was made to the possibility of pre-travel consultations in Dublin and Cork. On these facts, the judge concluded that "the Hospital clearly envisaged doing business with patients domiciled in Ireland" (at [40]).

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?

This does not appear to have been discussed in the Irish case-law or literature.

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 Abama v Gama [2015] IECA 179 the Irish Court of Appeal found that the Irish courts had jurisdiction to determine a claim for payment of outstanding wages brought by Turkish nationals who had been employed by a Turkish company (the second defendant) and then seconded to the employer's Irish subsidiary (the first defendant). The original contract of employment provided for the exclusive jurisdiction of the Ankara courts; however, the second defendant was deemed to be domiciled in Ireland pursuant to Article 18(2) of Regulation 44/2001 (now 20(2)) and it was thus determined that the Irish courts had jurisdiction as the courts of the employer's domicile.

In A Retail Company v A Worker (2002) 13 ELR 366, the Irish Labour Court was faced with a dispute as to "where the employee habitually carries out his work" (under Article 5 Brussels Convention). The employee in question was hired by a company in Northern Ireland. He commenced and finished his working week at an office in Northern Ireland where all office work and company meetings were carried out, and where his supervisor was based. He was paid in pounds Sterling (not Irish pounds) and paid tax in Northern Ireland. However, most of his working week was spent in Dublin in the Republic of Ireland (where he stayed in temporary accommodation provided by the employer and was paid expenses and mileage allowances). It was determined that the employee habitually carried out his work in Northern Ireland in these circumstances.

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?

There is, to my knowledge, no Irish case-law on Article 24(1) or on Article 31(1), in that context.

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?

The question of whether a company has its seat in Ireland for the purposes of Article 24(2) has arisen in two cases (Montani v First Directors [2006] IEHC 92 and Day v Adler [2014] IEHC 693) but neither case shed any light on the "rules of private international law" that ought to be applied. In both cases it appeared to be assumed that a limited liability company, incorporated in Ireland pursuant to the provisions of the Irish Companies legislation, must have its seat in Ireland for the purposes of Article 24(2) (then Article 22(2) Regulation 44/2001).

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?

There is, to my knowledge, no Irish case-law on Article 24(4).

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.

There is, to my knowledge, no Irish case-law on Article 24(5).

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?

There is, to my knowledge, no Irish case-law on this.

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?

No, there has been no discussion of this in the Irish case-law/literature (that I am aware of).

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?

I am not aware of any evidence of such an increase.

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?

These requirements do not appear to have caused any particular difficulty - although it must be noted that the Irish courts do not always specify which of the three requirements under Article 25(1) (formerly Article 23(1) Regulation 44/2001, Article 17(1) Brussels Convention) is being relied upon. The second requirement (Article 25(1)(b)) does not appear to be in frequent use – the first and third requirements ((a) and (c)) are the two which are most often invoked in the case-law (where the precise formal requirement is specified).

The Irish case-law does suggest some degree of confusion/ambiguity in the context of online contracting: it is suggested that requirement (a) is satisfied where a website-user clicks 'I agree' ('click-wrapping') but not where the user is merely aware of the

existence of 'terms and conditions' which include a jurisdiction clause (via a conspicuous hyperlink) and does not specifically affirm consent ('browse-wrapping'). In the latter case, however, requirement (c) may be satisfied. See Ryanair v On the Beach [2013] IEHC 124 [42]-[49]; Ryanair v Billigfluege [2015] IESC 11; Ryanair v SC Vola [2019] IEHC 239 [81]-[91].

It is noteworthy that Article 25(1) (formerly Article 23(1)/17(1)) has generated a lot of Irish case-law (more than any other provision of the Convention/Regulation) – including a number of references to the Supreme Court (see Unidare v James Scott [1991] 2 IR 88; Biomedical Research v Delatex [2000] 4 IR 307; O'Connor v Masterwood [2009] IESC 49; Ryanair v Billigfluege [2015] IESC 11). This level of litigation is, however, more likely to be a reflection of the wide diversity of fact situations in which Article 25(1) must be applied – and not an indictment of the provision itself or of the EU Court of Justice guidance. Indeed the Irish Supreme Court in Ryanair v Billigfluege [2015] IESC 11 [21], [33] has expressed the view that "clear principles have emerged from the Court of Justice of the European Union" whilst acknowledging that their "application presents practical difficulties which the Court of Justice of the European Union has been careful not to ignore".

> 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?

<u>Re requirement (a):</u>

"The mere fact that a clause conferring jurisdiction is printed among general conditions of one of the parties to a contract on the reverse of terms expressly agreed establishes no guarantee that the other party has really consented to a clause which waives the normal rules of jurisdiction. It would be otherwise where the text of a contract which contains an express reference to such general conditions including a clause conferring jurisdiction is signed by both parties. Indirect references, or references by implication, in pre-contract correspondence are not sufficient to establish a consensus as thereby no certainty is established that the clause conferring jurisdiction became part of the subject-matter of the contract." – Grosso v Lamsouguer [2012] IEHC 230.

"Article 23 [now Art.25] can be satisfied where the jurisdiction clause is either in writing or evidenced in writing, but… the signature of a party on any such writing is not required in order that the party be bound by same …. [T]he fact that a party may have paid little attention to the jurisdiction clause, or perhaps did not even read a document containing same and therefore was not actually aware of its existence, does

not prevent that party being deemed to be aware of it and therefore bound by it….”.- Colclough v The Association of Chartered Certified Accountants [2018] IEHC 85 [50].

It has been emphasised that requirement (a) envisages that the agreement to be bound must be in writing – not merely that the jurisdiction clause is in writing: see Ryanair v On the Beach [2013] IEHC 124 [49] citing Delany and McGrath, Civil Procedure in the Superior Courts 3e, p. 391.

<u>Re requirement (c):</u>

Citing Delany and McGrath, Civil Procedure in the Superior Courts 3e, p. 395, the High Court in Ryanair v SC Vola [2019] IEHC 239 [72] summarises the test as follows:

“… it is for the national court to determine whether: (i) the contract in question comes under the head of international trade or commerce; (ii) there was a practice in the branch of international trade or commerce in which the parties are operating; and (iii) the parties were aware or are presumed to have been aware of that practice.”

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 Irish case-law to date does not tend to separate out formal validity and substantive validity. Even after the coming into force of Regulation 1215/2012, the Irish courts tend to take the view that Article 25 simply requires evidence of ‘consensus’ (as an autonomous EU standard) and of satisfaction of one of the three formal requirements laid down in Article 25(1)(a), (b) and (c). There is no sense that national law can have any role to play in determining the validity of a choice-of-court agreement. See eg Colclough v The Association of Chartered Certified Accountants [2018] IEHC 85 [50]; Ryanair v SC Vola [2019] IEHC 239 [77].

There have been many cases where a party has argued that a jurisdiction clause ought not to be enforced because of an alleged lack of consensus. However, such arguments tend to fail – and the Irish courts are careful to distinguish a lack of awareness of the clause from a lack of consensus: Societe Lacoste v Keely [1999] 1 ILRM 510, 515; O’Connor v Masterwood [2009] IESC 49 [19]; Clubgear v Mitre [2015] IEHC 708 [31].

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?

No – there is as yet no engagement with these new words which now appear in Article 25(1) (and which did not appear in Article 23(1) of Regulation 44/2001).

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?

No – see answers to Qs 44 and 45 above.

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?

No – see answers to Qs 44 and 45 above.

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, the doctrine of severability was already part of Irish law – and it has long been accepted that the validity of the choice-of-court agreement is independent of the validity of the contract itself: see eg Ryanair v Bravofly [2009] IEHC 41, [7.4]; Ryanair v Billigfluege [2010] IEHC 47; Ryanair v On the Beach [2013] IEHC 124 [40].

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?

Yes, the Irish courts have experienced some difficulty (under Article 18 of the Brussels Convention and under Article 24 of Regulation 44/2001) in determining when a defendant has entered an unconditional appearance. There is considerable uncertainty as to when a defendant should be considered to have waived any jurisdictional objection (and as to the steps which create such implication). This provision causes particular difficulty where the plaintiff makes a claim which is wider than that suggested in the original summons: see Campbell v Peter Van Aart [1992] 2 IR 305; Murray v Times [1997] 3 IR 97; O'Flynn v Carbon Finance [2015] IECA 93.

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).

No, there have not been any particular problems – although Article 29 has not been widely discussed in the Irish case-law (in contrast to Article 30 which has received much more attention).

Where Article 29 (or Article 27 Regulation 44/2001) has been discussed, it has tended to be in circumstances where it is found to be inapplicable because the proceedings did <u>not</u> involve the same cause of action: eg in Popely v Popely [2006] IEHC 134 where the Irish action sought to determine one party's entitlement to ownership of shares in an Irish company and the earlier English action sought to determine the other party's entitlement to a one-third interest in a property owned by the same company; also in Vodafone GmbH v IV International Leasing [2017] IEHC 160 it was accepted that there were "overlapping issues" as between the Irish action and the earlier German action but it was held that the proceedings did not involve the "same cause of action", where the Irish action alleged that an offer constituted an abuse of dominant position contrary to Article 102 TFEU, and the German proceedings only raised Article 102 TFEU with respect to the provision of information.

One issue on which the Irish courts diverged from English authority is as to whether Article 29 (then 27) can still apply where the earlier foreign action is no longer pending in the other Member State: see Celtic Atlantic Salmon v Aller Acqua [2014] IEHC 421.

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?

The available Irish case-law on Articles 29 and 30 (formerly 27 and 28) suggests that contact between the Irish judge and his or her counterpart in the other Member State is not the norm (see eg Bank of Ireland v O'Donnell [2012] IEHC 424 [5.10]). Where Irish judgments cite details as to progress in the other jurisdiction, this information appears to be provided by the parties or their lawyers (see Irish Bank Resolution Corp v Quinn [2013] IEHC 596 [6.4]; Websense v ITWAY [2014] IESC 5 [24]; Irish Bank Resolution Corp v Higgins [2013] IEHC 178 [8]). This may be a reflection of the adversarial (as opposed to inquisitorial) tradition of justice in Ireland – ie the idea that the judge adjudicates on the case presented in court– and has no independent fact-finding role. The existing Irish case-law also emphasises the importance of non-interference in the proceedings before the court first-seised (see eg Anglo Irish Bank Corp v Quinn Investments [2011] IEHC 356 [7.5]-[7.7]) and it may be that this concern also inhibits direct contact.

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)?

It is (a) above (time of lodgement).

The available Irish case-law on Articles 29 and 30 does not focus on the precise moment of seisin (this was not contentious in any of the existing cases).

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?

To my knowledge, there is no Irish authority on the impact of subsequent amendments.

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))?

The Irish courts tend to exercise their discretion in favour of using Article 30 (formerly 28) where it is applicable – but in most existing cases in point, stays were granted under Article 30(1) (formerly 28(1)) and the Irish judges did not decline jurisdiction under Article 30(2) (formerly 28(2)). In some cases it was clear that the judge in the Member State first-seised did not have jurisdiction over the action in question (see eg Gonzalez v Mayer [2004] 3 IR 326) – while in other cases the jurisdiction of the court first-seised was unclear (see eg Websense v ITWAY [2014] IESC 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 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?

There is, as yet, no Irish case-law on Article 31(2); however, the Irish Supreme Court suggested strong support for the kind of reform embodied in Article 31(2) in Websense v ITWAY [2014] IESC 5 [52]. Delany and McGrath on Civil Procedure 4e 118-120 also welcomes this reform.

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 as yet no Irish case-law on these provisions – but as a common law jurisdiction, Ireland must welcome provisions which allow for a version of forum non conveniens. However, it is arguable that Articles 33 and 34 are deficient insofar as they can only come into play where the foreign court is first seised – and there is no scope for deferring to a third-country forum in circumstances where it was second-seised but is manifestly more appropriate than the Member State seised pursuant to Brussels Ia. See Briggs, The Conflict of Laws (3rd ed, 2013) 103-104; Briggs, Private International Law in the English Courts (2014) 321.

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?

As indicated above, there is no Irish authority on this yet.

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?

See the answer to Q 56 above.

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?

This definition has not caused particular difficulty. It arose for consideration in Ryanair v Unister [2013] IESC 14 [10.2] – [10.3] where the Supreme Court was deliberating on the entitlement of the Irish courts to issue a disclosure order in circumstances where the jurisdiction of the Irish courts was contested. The Court referred to the ECJ’s guidance in Case C-104/03 St Paul’s Dairy and determined “[b]y a parity of reasoning” that the disclosure order was not the type of measure which came within Article 31 Regulation 44/2001.

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 Irish authority on this.

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.

No – this Hague Convention does not appear to have been applied by the courts in Ireland yet.

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?

I am not aware of any statistics/data on the frequency of use.

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?

I am not aware of any such training programme.

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?

I am not aware of any such measure.

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?

I am not aware of any such measure.

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 such statistics.

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?

I am not aware of any particular problems.

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

No.

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?

I am not aware of any such statistics.

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?

I am not aware of any statistics/data on the frequency of use/changes in rates of success.

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?

I am not aware of any statistics/data on the frequency of enforcement/changes in approach.

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

The Irish courts have not always complied with this strict prohibition. For example, in Sporting Index v O'Shea [2015] IEHC 407 the Irish High Court determined that an English judgment on a gambling debt was contrary to public policy. Insofar as the judgment relied on the prohibition on enforcement of gambling contracts under Irish domestic law, it is arguable that the High Court did not observe the ECJ's guidance in C-7/98 Krombach v Bamberski and Case C-38/98 Renault v Maxicar (emphasizing that differences in domestic law cannot of themselves justify the invocation of public policy). Similar criticisms might perhaps be made with respect to Celtic Atlantic Salmon v Aller Acqua [2014] IEHC 421 where the Irish High Court determined that a Danish

judgment violated public policy. Danish law (unlike Irish law) made admission of expert evidence conditional on a prior court order – and this prevented the Irish party relying on an expert report which it had commissioned at a time when it was not anticipating that its claim would be determined in Denmark. The Irish High Court thought that the Irish party's procedural rights were violated in these circumstances.

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?

I am not aware of any statistics/data on the frequency of adaptation.

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?

I am not aware of any statistics/data on the frequency of such requests.

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?

It appears to have had no impact on the Brussels Convention/Regulation practice.

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

No.

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?

No.

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

The Brussels Convention Relating to the Arrest of Seagoing Ships 1952 (see MV Connoisseur [2018] IEHC 699; also MV Turquoise Bleu [1996] 1 ILRM 406).

The Brussels Convention Concerning Jurisdiction in Matters of Collision 1952 (see Doran v Power [1996] 1 ILRM 55).

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?

No – this Hague Convention does not appear to have been applied by the courts in Ireland yet.

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