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

QUESTIONNAIRE

for National Reports

31 March 2019

This project is funded by the Justice Programme
of the European Union (2014-2020)

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 applying the Brussels Ia Regulation are published and available online, particularly on the website www.rechtspraak.nl and in the publicly available legal databases of the T.M.C. Asser Institute. The selection criteria published on www.rechtspraak.nl explicitly state that all judgments regarding the Lugano Convention 2007, the Brussels I Regulation and its recasts, and the Brussels Convention have to be published, unless they are evidently irrelevant for the application or interpretation of these instruments. On the T.M.C. Asser Institute's website, two databases can be found to search for Dutch judgments on PIL in general,[1] or on Dutch (as well as other Member States') decisions concerning the Brussels Ia Regulation.[2] Both databases provide for the possibility to search on keywords as well as on specific provisions.

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

CJEU case law generally provides sufficient guidance, shown by the fact that courts in all instances regularly refer to CJEU decisions when applying the Regulation. The CJEU case law has also put an end to some controversies. A telling example regards the question if it the court seised must examine its international jurisdiction in the light of all information available to it, including the allegations made by the defendant. For long, this question was the subject of debate, with the prevailing opinion that the court must base its decision on the allegations made by the plaintiff. However, since the CJEU has clarified that within the context of the Brussels regime the court should also take into account the allegations made by the defendant,[3] the Dutch Supreme Court has changed its

[1] http://www.nipr-online.eu/zoekrechtspraak.aspx?Site_Id=35
[2] https://www.asser.nl/brusselsibis/ (updated until 2018)
[3] CJEU cases Kolassa and Universal Music.

approach, not only in relation to the Brussels Ia Regulation,[4] but also in relation to the Dutch rules on international jurisdiction.[5]

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?

In general, changes that have been perceived in practice as well as in the literature as positive are the abolition of the exequatur and the reverse lis pendens rule for choice of forum agreements.[6] In relation to the workability of the new rule of Article 25 regarding the substantive validity of a choice of forum clause, the general view appears to be rather positive. However, concerns have been raised as to the potential uncertainty it can cause (especially in view of applying the national law, including COL rules of the chosen court), and some argue that a uniform rule would have been better.[7]

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?

Articles 7(1), 7(2) and 25 are among the most applied provisions of the Regulation. A major point of critique concerns the fact that these provisions were originally designed for establishing jurisdiction in the more 'traditional' cases, such as the sale of movable property or personal injury/damage to property. However, both the wording of these provisions as well as the interpretation by the CJEU cause difficulties in 'modern-day' cases involving e.g. the transfer of intangible property (such as bonds) and prospectus liability.[8] For example, the CJEU's approach in Kolassa has been criticized as being at odds with the rationale of Article 7(2), since

[4] Hoge Raad 14 April 2017, ECLI:NL:HR:2017:694.
[5] Hoge Raad 29 March 2019, ECLI:NL:HR:2019:443; Hoge Raad 12 April 2019, ECLI:NL:HR:2019:566.
[6] E.g. M.I. Hazelhorst & X.E. Kramer, Afschaffing van het exequatur in Brussel I: daadwerkelijke verbetering of politiek gebaar?, *Tijdschrift voor Civiele Rechtspleging* 2013-2, p. 37-46; J.G. Knot, Herschikking Brussel I, *Nederlands tijdschrift voor Europees recht* 2013-5, p. 149-152; M. Zilinsky, De herschikte EEX-Verordening: een overzicht en de gevolgen voor de Nederlandse rechtspraktijk, *Nederlands Internationaal Privaatrecht* 2014, p. 3-11; X.E. Kramer et al, Synthesis Report on the application of Brussels I (recast) in the legal practice of EU Member States, (available at https://www.asser.nl/media/5018/m-5797-ec-justice-the-application-of-brussels-1-09-outputs-synthesis-report.pdf). The report builds on interviews and round table meetings with practitioners and academics from almost all EU Member States, with the Dutch experts being best represented (22%).
[7] See Synthesis Report, p. 20.
[8] See M. Haentjens and D. Verheij, 'Finding Nemo: Locating Financial Losses after Kolassa/Barclays Bank and Profit', *JIBLR* 2016-6, p. 346-358.

it neither necessarily results in the jurisdiction for a closely connected court, nor meets the foreseeability test.[9] *A solution to this problem could lie in the introduction of new provisions, specially tailored to today's economy.*

Another point of criticism regards the fact that the Regulation does not specifically regulate the issue of collective action/mass damage claims, thereby causing legal uncertainty.[10]

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

Some Dutch legal concepts have a hybrid character, making them difficult to qualify. A recent example is the so-called Peeters/Gatzen claim, having both insolvency and tort characteristics. This raises the question whether the claim falls within the substantive scope of the Brussels Ia Regulation, or within the scope of the Insolvency Regulation. The CJEU has ruled in C-535/17, NK v BNP Paribas Fortis NV that the claim should be regarded a civil and commercial matter, and thus the court should determine its jurisdiction on the basis of the Brussels Ia Regulation. This interpretation will make it more difficult for a liquidator to file a Peeters/Gatzen claim in the Dutch court.

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?

In general, the relationship between the European provisions distributing jurisdiction among Member States' courts on the one hand, and the national rules on territorial competence on the other hand, does not seem to cause difficulties in practice. Conversely, in relation to the provisions in the Regulation referring to a particular competent court within a Member State, the issue has been addressed to what extent the Regulation allows for a court not having territorial jurisdiction under the Regulation, to transfer the case to another court in the same Member State, that, according to the Regulation, has territorial jurisdiction (e.g. on the basis of Article 7(1)(b)). Some courts have held that the Regulation does not allow such

[9] Idem.

[10] See M.I. Hazelhorst & X.E. Kramer, Afschaffing van het exequatur in Brussel I: daadwerkelijke verbetering of politiek gebaar?, *Tijdschrift voor Civiele Rechtspleging* 2013-2, p. 37-46.

transfer.[11] *However, it has been argued in the literature that the Regulation does not prohibit a court to transfer the case to another court.*[12]

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?

Information N/A.

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 relative and subject-matter competence of the courts are regulated in the Dutch Code of Civil Procedure as well as in statute, such as Implementation Acts. The Dutch Code of Civil Procedure makes a division between the the subject-matter competence of district courts and subdistrict courts (e.g. Article 93: subdistrict courts have jurisdiction in cases concerning claims up to 25,000 euros and employment disputes), but also regulates the relative competence of courts (e.g. Article 99 Dutch Code of Civil Procedure: forum rei). Other rules on subject-matter jurisdiction are to be found in several specific acts, such as provisions awarding exclusive jurisdiction to the Court of The Hague in intellectual property cases.[13] *The Court of The Hague also has exclusive jurisdiction in relation to the European Order for Payment.*[14]

In addition, on 12 December 2018 the Dutch Code of Civil Procedure was amended, introducing in Article 30r the possibility for parties to include a choice of forum in international civil and commercial disputes concerning claims over 25,000 euros in favour of the Netherlands Commercial Court (NCC). The NCC is a specialised chamber of the court of Amsterdam, operating under Dutch procedural law, but using English as the language of proceedings.[15]

[11] Gerechtshof Den Haag 10 March 2015, ECLI:NL:GHDHA:2015:882; Rechtbank Rotterdam 1 October 2018, ECLI:NL:RBROT:2018:11043.
[12] J.F. de Heer, 'Relatieve bevoegdheid van een Nederlandse rechter en de (Herschikte) EEX-Verordening', *Tijdschrift voor de Procespraktijk* 2015, p. 137-142.
[13] E.g. Article 80 of the Patents Act 1995.
[14] Article 2 of the Implementation Act on the European Order for Payment Regulation.
[15] https://www.rechtspraak.nl/English/NCC/Pages/default.aspx.

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 clarification in Recital 12 of the Recast has received a positive response in the literature.[16] *Moreover, several courts have relied on (applied) the Recital in order to clarify the delineation between court proceedings and arbitration.*[17]

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.

See above, answer to question 5.

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

Information N/A.

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

In one case concerning the enforcement of a Dutch authentic instrument (notarial deed), the Court of Rotterdam had to determine whether it was competent in relation to the enforcement proceedings. As the Brussels Ia Regulation was temporally inapplicable, the court applied the Brussels I Regulation. The court held that it had jurisdiction either on the basis of Article 22(5) of that Regulation, or, if this provision would not apply in relation to the enforcement of a notarial deed, on the basis of Article 24 (voluntary appearance).[18] *Since the case did not concern a cross-border enforcement, the court did not rely on the Regulation's provisions on*

[16] See F.J.M. De Ly, Herschikking van de EEX-Verordening en Arbitrage, *Tijdschrift voor Arbitrage* 2015, p. 110.
[17] See, *inter alia*, Rechtbank Noord-Holland 24 August 2016, ECLI:NL:RBNHO:2016:6885; Rechtbank 22 June 2016, ECLI:NL:RBROT:2016:4694
[18] Rechtbank Rotterdam 15 December 2017, ECLI:NL:RBROT:2017:10379.

the enforcement of authentic instruments, but solely referred to the national provisions on enforcement proceedings.

The court of Amsterdam relied on Article 58 of the Brussels Ia Regulation in relation to the enforcement of a German notarial deed. According to plaintiff, the enforcement had to be refused since he had not been heard prior to the enforcement. The court ruled that, contrary to the plaintiff's allegations, authentic instruments can be enforced without the debtor having been heard. Therefore, the enforcement of the notarial deed was not manifestly contrary to public policy within the meaning of Article 58. [19]

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?

Noteworthy in this respect is the question whether the binding declaration of a so-called WCAM-settlement (Wet Collectieve Afwikkelingen Massaschade/Dutch Act on the Collective Settlement of Mass Damage Claims), should be viewed as a judgment or as court settlement. The prevailing opinion is that a WCAM-settlement declaring binding by the court should not be understood as court settlement, since it is concluded first by the parties and therefore not reached in the course of proceedings. Instead, it should be regarded as 'judgment'.[20]

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'?

There appears no major controversy surrounding this issue.

[19] Rechtbank Amsterdam 11 October 2017, ECLI:NL:RBAMS:2017:7491.
[20] See, inter alia, H. van Lith, The Dutch Collective Settlements Act and private international law, Maklu 2011, p. 114-115; K. Krzeminski, Tekst & Commentaar Burgerlijke Rechtsvordering, Gerechtelijke schikkingen bij: Verordening (EU) Nr. 1215/2012 betreffende rechterlijke bevoegdheid, erkenning en tenuitvoerlegging van beslissingen in burgerlijke en handelszaken, Artikel 59 [Gerechtelijke schikkingen], comment 1.b.

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?

Jurisdiction that can be established according to the rules of the Regulation. Whilst views may differ on this issue, the prevailing approach in the Dutch case law is that if a court of another Member State is seised first and actually exercises jurisdiction as to the substance of the matter, the Dutch court seised second for preliminary measures is not considered having jurisdiction as to the substance of the matter and can only base its jurisdiction on Article 35.[21] *In this respect, the courts apply the lis pendens rule of Article 29.*

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?

Yes. It is not considered necessary that proceedings on the merits of the case have been initiated.[22]

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?

Taking into account that the courts consider the lis pendens rule as being applicable in this context, the fact that a claim on the substance of the matter is subsequently *filed with a court in another Member State also having jurisdiction under the Regulation, should have no consequences on the request for enforcement on the request for enforcement in the Netherlands of the judgment issuing the provisional*

[21] See S.J. Schaafsma, in: Tekst & Commentaar Burgerlijke Rechtsvordering, Voorlopige en bewarende maatregelen bij: Verordening (EU) Nr. 1215/2012 betreffende rechterlijke bevoegdheid, erkenning en tenuitvoerlegging van beslissingen in burgerlijke en handelszaken, Artikel 35 [Voorlopige of bewarende maatregelen], comment 2.b, referring to Hoge Raad 21 juni 2002, ECLI:NL:HR:2002:AE1545, NJ 2002/563 and Gerechtshof Den Haag 31 mei 2016, ECLI:NL:GHDHA:2016:1539, IER 2016/57.

[22] See S.J. Schaafsma, in: Tekst & Commentaar Burgerlijke Rechtsvordering, Voorlopige en bewarende maatregelen bij: Verordening (EU) Nr. 1215/2012 betreffende rechterlijke bevoegdheid, erkenning en tenuitvoerlegging van beslissingen in burgerlijke en handelszaken, Artikel 35 [Voorlopige of bewarende maatregelen], comment 2.b; . M.I. Hazelhorst & X.E. Kramer, Afschaffing van het exequatur in Brussel I: daadwerkelijke verbetering of politiek gebaar?, *Tijdschrift voor Civiele Rechtspleging* 2013-2, p. 43.

measure, which was granted by the court previously seised (subject to the exceptions for choice of forum or exclusive jurisdiction).

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

The prevailing view appears to be that pursuant to Article 45(3), the jurisdiction of the court of origin may not be reviewed (subject to limited exceptions).

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 answer to question 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?

Information N/A.

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 issue has been addressed in the literature and the prevailing opinion appears to be that Article 26 applies regardless of the defendant's domicile.[23] *However, for the Netherlands, this issue has limited relevance since the rules on international jurisdiction in the Dutch Code of Civil Procedure contain a comparable provision.*[24] *This is also shown in a recent decision by the Dutch Supreme Court,*[25] *on the question whether the defendant, domiciled in Iraq, had in fact contested the Dutch court's jurisdiction. The Supreme Court did not clarify which instrument applied: the Brussels I Recast Regulation or the Dutch Code of Civil Procedure. Instead, it held that, pursuant to both instruments, the defendant had appeared without contesting jurisdiction and therefore the Dutch court was competent to hear the case.*

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 prevailing view in the literature is that Articles 29 and 30 apply regardless of the defendant's domicile.[26] *However, courts may sometimes refer to the parties' domicile as an element relevant to the applicability of the Brussels Ia Regulation, including the provisions on lis pendens.*[27]

[23] See, *inter alia*, Kuypers 2008, p. 227, P. Vlas, in: Groene Serie Burgerlijke Rechtsvordering, 1 Verweerder heeft woonplaats buiten het EEX-gebied bij: Verordening (EU) Nr. 1215/2012 betreffende rechterlijke bevoegdheid, erkenning en tenuitvoerlegging van beslissingen in burgerlijke en handelszaken, Artikel 6 [Verweerder geen woonplaats in lidstaat], comment 1.
[24] L.M. van Bochove, De herschikte EEX-Vo en derde landen: het formele toepassingsgebied van de Verordening nader bezien, *Tijdschrift voor Civiele Rechtspleging* 2017-1, p. 6.
[25] Hoge Raad 17 May 2019, ECLI:NL:HR:2019:732.
[26] See, *inter alia*, L.M. van Bochove, De herschikte EEX-Vo en derde landen: het formele toepassingsgebied van de Verordening nader bezien, *Tijdschrift voor Civiele Rechtspleging* 2017-1, p. 8; F. Ibili, Tekst & Commentaar Rv, Commentaar op art. 29 Brussel I-bis, nummer 2; L. Strikwerda & S.J. Schaafsma, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, Deventer: Wolters Kluwer 2019, p. 102.
[27] Rechtbank Rotterdam 29 March 2017, ECLI:NL:RBROT:2017:2455.

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 are few cases where the Regulation's application in time is in question. However, in one case, the court explicitly addressed Article 66, holding that proceedings were instituted in 2013 in Italy and the rules on enforcement of the Brussels Ia Regulation are temporally inapplicable. Instead, the enforcement is governed by the Brussels I Regulation.[28] *In another case, decided by the court of appeal, the question was whether proceedings were instituted before or after 10 January 2015, since the document instituting proceedings was sent to the receiving foreign agency on 7 January 2015, but the defendant was actually notified one week later. The court held that, with reference to the Service Regulation, the latter date was decisive.*[29]

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?

See above, answer to question 4.

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?

Courts often refer to the CJEU case law for the interpretation of Article 7(1).[30] *CJEU case law has repeatedly proven to provide helpful guidance to the Dutch*

[28] Rechtbank Overijssel 19 May 2016, ECLI:NL:RBOVE:2016:1920.
[29] Gerechtshof 's-Hertogenbosch 22 December 2015, ECLI:NL:GHSHE:2015:5348.
[30] See, *inter alia*, Gerechtshof 's-Hertogenbosch 22 December 2015, ECLI:NL:GHSHE:2015:5303 (referring to CJEU case *Corman-Collins*); Rechtbank Amsterdam 29 March 2017, ECLI:NL:RBAMS:2017:2194 (referring to CJEU case Woodfloor); ECLI:NL:RBAMS:2018:7930 (referring to CJEU case Kareda); ECLI:NL:RBDHA:2019:4540 (referring to CJEU case Electrosteel).

courts. For example, no problems are encountered in determining the place of performance in cases regarding passenger claims for compensation against airlines in the case of flight cancellation: courts usually explicitly rely on the CJEU's clear autonomous interpretation in the case Rehder/Air Baltic.[31] *However, in other instances, courts may struggle a bit more. In one case the court decided that it could not determine the place of performance of a service contract, since the contract did not regulate this issue, the parties' will was unclear and there was insufficient proof of the actual place where the services were provided. As a consequence, the court held Article 7(1) inapplicable.*[32] *Sometimes the relationship between Article 7(1)(a) and Article 7(1)(b) causes confusion. In one case, the court first determined that the contract in question was a services contract within the meaning of sub b (service to be provided in the Netherlands), but then went on applying sub a, by identifying the obligation in question as an obligation to pay, localizing its place of performance on the basis of the lex causae.*[33]

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?

In the literature it has been held that the provision 'unless otherwise agreed' means that the parties can agree on the place of performance for every single contractual obligation (including payment) and that the court for that place has jurisdiction in relation to disputes related to that specific obligation.[34] *However, Dutch case law shows a different picture. For example, in one case the court held that the place where the goods were delivered (Germany) was decisive in relation to a claim regarding payment: the court for this place had jurisdiction in relation to all obligations arising out of the contract. The fact that the parties had agreed on the place where the payment should take place was considered irrelevant within the context of (now) Article 7(1)(b).*[35]

[31] See, *inter alia*, Rechtbank Noord-Holland 29 August 2018, ECLI:NL:RBNHO:2018:7372; Rechtbank Noord-Holland 11 July 2018, ECLI:NL:RBNHO:2018:5873; Rechtbank Oost-Brabant 28 June 2018, ECLI:NL:RBOBR:2018:3169.
[32] Rechtbank Overijssel 3 October 2018, ECLI:NL:RBOVE:2018:4169.
[33] Rechtbank Dordrecht 24 September 2009, ECLI:NL:RBDOR:2008:BF0675.
[34] See L. Strikwerda & S.J. Schaafsma, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, Deventer: Wolters Kluwer 2019, p. 68.
[35] Rechtbank Midden-Nederland, 29 October 2014, ECLI:NL:RBMNE:2014:5078. See also Rechtbank Noord-Nederland 9 January 2019, ECLI:NL:RBNNE:2019:104 and Rechtbank Gelderland 24 February 2016, ECLI:NL:RBGEL:2016:1568, where the courts for the place where delivery took place and the place where the services were provided, respectively, accepted jurisdiction in disputes relating to payment, without checking whether parties had agreed on a place of performance of the obligation to pay.

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?

Article 7(2) Brussels Ia and its predecessors have given rise to several difficulties in application. As a consequence, the Dutch Supreme Court regularly refers preliminary questions on the interpretation of this provision to the CJEU, resulting in decisions such as Holterman Ferho and Universal Music. Most recently, the Supreme Court has announced to refer preliminary questions on the determination of the place of damage in collective action on behalf of shareholders with a Dutch investment account, who claim to have suffered financial losses due to the insufficient/misleading information given by BP in relation to the Deepwater Horizon oil spill in 2010.[36] The questions not only regard the determination of the Erfolgsort as such, but also in relation to Article 305a of Book 3 of the Dutch Civil Code, containing a rule on representative group action, especially if not all victims are domiciled in the Netherlands.

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?

Information N/A.

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

[36] Hoge Raad 14 June 2019, ECLI:NL:HR:2019:925.

to a right *in rem* on immovable property, limitation of liability from the use or operation of a ship?

It has been held in the literature that the criteria of Article 8(1) (multiple defendants), one of the key provisions in IP infringement proceedings, are rather complicated and the CJEU's case law is not always clear, creating legal uncertainty.[37]

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?

Since Article 45 nor any other provision attaches effects to a violation of the duty to inform the weaker party ex Article 26(2), the prevailing opinion is that such a violation does not constitute a ground of refusal at the stage of recognition/enforcement.[38]

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, this follows from C-154/11 Mahamdia/Algeria.[39]

[37] S.J. Schaafsma, Multiple defendants in intellectual property litigation, *Nederlands internationaal privaatrecht* 2016-4, p. 696-705.
[38] F. Ibili, Tekst & Commentaar Burgerlijke Rechtsvordering, Stilzwijgende aanvaarding van bevoegdheid van de aangezochte rechter van een lidstaat door de verweerder die in de procedure is verschenen bij: Verordening (EU) Nr. 1215/2012 betreffende rechterlijke bevoegdheid, erkenning en tenuitvoerlegging van beslissingen in burgerlijke en handelszaken, Artikel 26 [Stilzwijgende forumkeuze], comment 1(c)(i).
[39] See Th.M. de Boer's case note to this case in *Nederlandse Jurisprudentie* 2013/334, comment 5; L.M. van Bochove, De herschikte EEX-Vo en derde landen: het formele toepassingsgebied van de Verordening nader bezien, *Tijdschrift voor Civiele Rechtspleging* 2017-1, p. 4.

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

Too difficult to determine.

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 number of cases where the court applies the jurisdiction rules of Section 3 Brussels Ia Regulation is limited; no apparent difficulties found.

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 databases show several cases of courts examining whether the contract at hand is a consumer contract within the meaning of Article 17(1). In one case, the court found that the professional party (domiciled in Belgium) directed its activities at the Netherlands since its website on every page mentioned the phrase "Timber frame construction Belgium-the Netherlands" (in Dutch). The court held that the exclusive choice of court agreement in favour of the Belgian court was invalid, since it was concluded before the dispute.[40] *In another case, the court applied the criteria of C-585/08 and C-144/09 Pammer and Alpenhof, and considered relevant, inter alia, that the contact form on the website was in Dutch and the website mentioned a phone number with an international code as well as itineraries.*[41] *The application of these criteria does not seem to cause difficulties.*

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?

[40] Gerechtshof 's-Hertogenbosch 27 November 2018, ECLI:NL:GHSHE:2018:4903.
[41] Rechtbank Rotterdam 22 August 2018, ECLI:NL:RBROT:2018:7224.

Information N/A.

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 an employment case the court of Rotterdam accepted jurisdiction pursuant to Article 25, since the parties had agreed on the jurisdiction of this court. The court did not refer to Article 23. However, it is unclear from the facts whether the choice of forum was made before or after the dispute had arisen. Moreover, the weaker party (employee) was the party commencing the proceedings in the Netherlands.[42]

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?

The Dutch courts refuse to apply Article 24(1) in relation to a claim on the division of immovable property, since such as claim should be regarded as a personal right,[43] *following a decision by the Dutch Supreme Court.*[44]

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?

According to Dutch law, the seat of a company is determined on the basis of the incorporation theory (Article 118 of Book 10 of the Dutch Civil Code). Courts do

[42] Rechtbank Rotterdam 26 October 2018, ECLI:NL:RBROT:2018:8844.
[43] Rechtbank Overijssel 19 July 2017, ECLI:NL:RBOVE:2017:3014.
[44] Hoge Raad 18 March 2011, ECLI:NL:HR:2011:BP1765.

not appear to experience difficulties in this respect. However, in the literature it has been argued that the reference in Article 24(2) to national law, remains problematic in view of creating a real forum societatis *and that a uniform definition is called-for.*[45]

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?

Courts do not seem to experience particular difficulties in relation to the application of Article 24(4). In a number of cases, the Dutch court have relied on the ruling of the CJEU in Solvay/Honeywell. The court before which interim infringement proceedings have been brought in which the invalidity of a European patent has been raised, makes an assessment as to how the court having jurisdiction under Article 24(4) would rule in that regard.[46]

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.

Claims to cancel, suspend or limit an enforcement order fall under the scope of Article 24(5). Such claims are brought in enforcement proceedings ('executiegeschil'), regulated in Article 438 of the Dutch Code of Civil Procedure. The Court of Appeal of The Hague held that pursuant to Article 24(5) it had jurisdiction in relation to an injunction against the enforcement in other Member States during the period the enforcement in the Netherlands is stayed.[47] *Whether or not the removal by the court of a conservatory third party attachment falls within the scope of Article 24(5) is subject to debate (see answer to question 40). However,*

[45] E.g. K.A.M. van Vught, Rechtsmacht in de rechtspersoon, *Maandblad voor Ondernemingsrecht* 2018-8/9, p. 272.
[46] See, *inter alia*, Rechtbank Den Haag 4 May 2016, ECLI:NL:RBDHA:2016:4657; Rechtbank Den Haag 28 June 2017, ECLI:NL:RBDHA:2017:7101.
[47] Gerechtshof Den Haag 29 December 2015, ECLI:NL:GHDHA:2015:3735.

it is clear that a claim against the defendant to bring about such removal does not fall within the scope of Article 24(5).[48]

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?

This question has been subject to debate for a long time.[49] *To put an end to the controversy, the Dutch Supreme Court has referred preliminary questions to the CJEU on this specific issue.*[50]

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?

A uniform approach appears to be lacking. In a case decided by the court of Amsterdam, the court held Brussels Ia Regulation inapplicable since, except for the choice of forum in favour of the English court, the dispute was solely connected with the Netherlands. Therefore, the required degree of internationality was lacking.[51] *However, the court of Rotterdam held that even though both parties were domiciled in the Netherlands and the claim was based on a tort that took place in the Netherlands, the internationality requirement was met due to the fact that the choice of forum in favour of the court of Marseille derogated from the jurisdiction of the Dutch court pursuant to (now) Article 4 Brussels Ia Regulation.*[52] *The latter approach was also taken by the Court of Appeal of The Hague within the context of*

[48] Rechtbank Rotterdam 5 October 2017, ECLI:NL:RBROT:2017:7485.
[49] In favour of an extensive interpretation: J.P. Verheul, Rechtsmacht in het Nederlandse internationaal privaatrecht, 1982, p. 121-122; P.H.L.M. Kuypers, Forumkeuze in het internationaal privaatrecht, Deventer: Kluwer 2008, nr. 16.5.7, Rechtbank Limburg 13 July 2017, ECLI:NL:RBLIM:2017:6844. In favour of a narrow interpretation: Gerechtshof 's-Hertogenbosch 29 December 2010, *NIPR* 2011, 213.
[50] Hoge Raad 21 December 2018, ECLI:NL:HR:2018:2361.
[51] Rechtbank Amsterdam 11 April 2019, ECLI:NL:RBAMS:2019:2588
[52] Rechtbank Rotterdam 3 April 2015, ECLI:NL:RBROT:2015:1879.

the Lugano Convention, in relation to a case between two parties domiciled in the Netherlands, having designated the court in Olso as the competent court. However, 'for the sake of completeness' the Court added that the dispute was not solely connected with the Netherlands since the claim was based on a ICC arbitral award, the agreement was drawn up in English, and one of the parties was part of a multinational enterprise.[53]

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?

Information N/A

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 large portion of the case law relating to Article 25(1) regards choice of forum clauses contained in the General Terms and Conditions of an agreement. In this respect, the courts regularly consider the jurisdiction clause invalid, thereby relying on the CJEU case law, such as Saey Home & Garden.[54] *In one case, the plaintiff stated that the choice of forum in favour of the Dutch court, included in the terms and conditions of the agreement, sufficed. However, the court held that the defendant had never accepted the general terms and conditions and that, as a consequence, Article 25(1)(a) was not fulfilled. The plaintiff also held that the defendant tacitly accepted the choice of forum, being 'a form which accords with practices which the parties have established between themselves' (sub b). However, the court held that the plaintiff, relying on the choice of forum, should provide evidence of the other party's consent. Such evidence was missing. The court applied a similar line of reasoning in relation to Article 25(1)(c).*[55]

[53] Gerechtshof 's-Gravenhage 28 June 2011, ECLI:NL:GHSGR:2011:BR1381.
[54] See, *inter alia*, Rechtbank Overijssel 16 April 2019, ECLI:NL:RBOVE:2019:1605; Gerechtshof Arnhem-Leeuwarden 18 December 2018, ECLI:NL:GHARL:2018:11015.
[55] Rechtbank Rotterdam 21 November 2018, ECLI:NL:RBROT:2018:11043

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?

In one case the choice of forum met the criterion of Article 25(1)(a) (in writing), but one of the parties argued that it had been represented by someone not being empowered to do so (unauthorised representation). The court held that, if this would be true, it would not be able to accept jurisdiction on the basis of the choice of forum agreement. However, even in that case it could still accept jurisdiction pursuant to other provisions of the Brussels Ia Regulation and/or national law.[56]

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?

In relation to the substantive validity, several courts have held that a choice of forum clause was invalid on the basis of Article 108(2) of the Dutch Code of Civil Procedure, which states that a choice of forum shall have no legal force if the value of the claim does not exceed 25.000 Euros.[57] *However, the Amsterdam Court of Appeal recently ruled that the aforementioned provision does not apply to an international choice of forum and only regards a 'national' forum clause (on the territorial jurisdiction).*[58]

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?

According to Article 154 of Book 10 of the Dutch Civil Code, the applicable law to a choice of forum agreement is to be determined on the basis of the Rome I Regulation, that applies by analogy. The application of the Rome I conflict rules raises several questions, such as whether or not a choice of law clause in the

[56] Rechtbank Rotterdam 25 July 2018, ECLI:NL:RBROT:2018:7304.
[57] See, *inter alia*, Rechtbank Midden-Nederland 23 January 2019, ECLI:NL:RBMNE:2019:442; Rechtbank Limburg 18 October 2017, ECLI:NL:RBLIM:2017:10103.
[58] Gerechtshof Amsterdam 12 February 2019, ECLI:NL:GHAMS:2019:366.

agreement also determines the law applicable to the choice of forum, keeping in mind the doctrine of separability. It is argued this is a matter of interpretation of the agreement, the interpretation being determined by the chosen law (see Article 12(1) Rome I).[59] *In the absence of a choice of law clause, the applicable law to a choice of forum agreement will be determined on the basis of Article 4(4) Rome I, with the law of the chosen court presumably having the closest connection.*[60]

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?

Information N/A.

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?

Merely confirmed a principle: the same principle has been included in Article 108(4) of the Dutch Code of Civil Procedure.

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?

In a recent case, the Dutch Supreme Court referred to Elefanten Schuh/Jacqmain *in relation to the latest time by which the court's jurisdiction should be challenged.*[61] *Moreover, the Supreme Court held that invoking immunity of jurisdiction is not the same as contesting the court's jurisdiction within the meaning of Article 26 Brussels Ia Regulation.*[62] *In another case, the Court of Amsterdam held that the plaintiff had not explicitly contested the court's jurisdiction. The fact*

[59] L. Strikwerda & S.J. Schaafsma, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, Deventer: Wolters Kluwer 2019, p. 95.
[60] F. Ibili, Tekst & Commentaar Burgerlijke Rechtsvordering, Forumkeuzebedingen; aanwijzing door partijen van een bevoegde rechter of de bevoegde gerechten in een lidstaat ter kennisneming van geschillen die naar aanleiding van een bepaalde rechtsbetrekking zijn of zullen ontstaan; vormvoorschriften; materiële geldigheid bij: Verordening (EU) Nr. 1215/2012 betreffende rechterlijke bevoegdheid, erkenning en tenuitvoerlegging van beslissingen in burgerlijke en handelszaken, Artikel 25 [Forumkeuze], comment 15.
[61] Hoge Raad 17 May 2019, ECLI:NL:HR:2019:732.
[62] Idem.

that the defendant argued that the claim was inadmissible was considered insufficient.[63]

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).

Within the context of the lis pendens rule of the Brussels Convention, the Dutch Supreme Court held in 1995 that a damages claim and a claim for a declaration that the party was not liable for the damage, both involve the same cause of action.[64]

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?

Typically, the court will determine whether or not the requirements of Article 29 are met, solely on the basis of the allegations or the parties and the information/evidence they provide (procedural documents, e.g. the document instituting the foreign proceedings).[65]

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

[63] Rechtbank Amsterdam 29 September 2018, ECLI:NL:RBAMS:2018:7829.
[64] Hoge Raad 10 November 1995, ECLI:NL:HR:1995:ZC1877.
[65] E.g. Rechtbank Amsterdam 26 September 2018, ECLI:NL:RBAMS:2018:6840; Rechtbank Rotterdam 8 February 2017, ECLI:NL:RBROT:2017:1088.

been taken (see e.g., circumstance in C-173/16 *M.H. v. M.H.* relating to this issue under Regulation Brussels IIbis)?

Pursuant to Article 125 of the Dutch Code of Civil Procedure, the court is seised and the proceedings is pending when the document instituting the proceedings is received by the authority responsible for service.[66]

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?

Information N/A.

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))?

Information N/A

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?

Article 31(2) is generally regarded as a 'hard and fast' rule.[67] *In one case before the Court of Amsterdam, the defendant had alleged that the parties had chosen the court of Stuttgart as the competent court.*[68] *The court held that, pursuant to Article 31(2), question whether the parties had concluded a choice of forum agreement and whether the dispute fell under its scope, had to be answered by the Stuttgart court. According to the court, the fact that the application of Article 31(2) would lead to a delay in the Dutch proceedings was not sufficient to constitute an abuse*

[66] See also L. Strikwerda & S.J. Schaafsma, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, Deventer: Wolters Kluwer 2019, p. 101.
[67] E.g. Rechtbank Rotterdam 16 March 2016, ECLI:NL:RBROT:2016:1859.
[68] Rechtbank Amterdam 6 April 2016, ECLI:NL:RBAMS:2016:1870 (staying the proceedings) and Rechtbank Amsterdam 8 November 2017, ECLI:NL:RBAMS:2017:7391 (declining jurisdiction).

of right.[69] *In this context, the Amsterdam court made reference to the CJEU case CDC/Akzo in relation to an abuse of (now) Article 8(1) Brussels Ia Regulation.*

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?

Since the Netherlands is party to only a limited number of enforcement treaties with non-EU/non-Lugano States, a major obstacle for the application of Article 33/34 by the Dutch courts seems to be the requirement that the third state judgment is 'capable of recognition and, where applicable, of enforcement in that Member State'. Where the Dutch Code of Civil Procedure is silent on recognition of third state judgments, Article 431 of the Code states that no foreign judgment is capable of enforcement without an international/bilateral enforcement instrument being in force. However, in its case law the Dutch Supreme Court has developed criteria pursuant to which the recognition of a foreign judgment has been made possible. Moreover, if the judgment meets the recognition criteria and is considered 'enforceable' in the country of origin, the successful party can request the Dutch court to adopt the foreign judgment and to order the defendant, for example, to pay the same amount of damages.[70] *Within the context of Articles 33/34 Brussels Ia Regulation, it is unclear whether these unwritten rules amount to the qualification of a third state judgment being capable of recognition (probable in my opinion) and enforcement in the Netherlands (less likely).*[71] *In combination with the discretionary power of the court inherent to the wordings of Article 33(1)(b) and 34(1)(c) (court is satisfied that a stay is necessary for the proper administration of justice), it is doubtful whether the provisions will contribute to greater procedural efficiency and increase legal certainty.*

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?

[69] Rechtbank Amterdam 6 April 2016, ECLI:NL:RBAMS:2016:1870. See in similar fashion, Rechtbank Gelderland 19 October 2018, ECLI:NL:RBGEL:2018:4778.
[70] See Hoge Raad 26 September 2014, ECLI:NL:HR:2014:2838.
[71] See also M. Zilinsky, Overzicht herschikking EEX-Verordening (Brussel I), *Tijdschrift voor Civiele Rechtspleging* 2015-2, p. 15. See, however, Rechtbank Rotterdam 19 September 2018, ECLI:NL:RBROT:2018:7852, where the court does not appear to consider the absence of an enforcement convention with the US a reason to refuse a stay pursuant to Article 34. Still, the court refused to stay due to uncertainty as to whether the US proceedings would result in a judgment within a reasonable time.

Information N/A.

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

The requirements laid down in these provisions to stay proceedings in favour of proceedings in a non-Member State are strict and do not provide much flexibility. It is unclear whether Articles 33/34 are meant to exhaustively regulate the relationship between proceedings in a Member State and a non Member State, or whether there is still scope for applying national law (e.g. in case of parallel proceedings, in case of an exclusive choice of forum clause for a third state court and this court being seised second).[72]

Provisional measures, protective measures

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

The CJEU case law has provided some clarity as to whether certain measures, procedures or actions are covered by Article 35. An important ruling for the Dutch legal practice was Mietz/Intership Yachting, in which the Court of Justice considered the Dutch 'kort geding' a procedure being covered by (now) Article 35. However, not all issues have been resolved.[73] *Recent case law shows several examples of courts refusing to accept jurisdiction pursuant to Article 35, holding that the requested measure does not fall within the scope of this provision. This was the case with respect to a request for a preliminary expert opinion,*[74] *and a request to give access to bank statements.*[75]

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

[72] See also L.M. van Bochove, De herschikte EEX-Vo en derde landen: het formele toepassingsgebied van de Verordening nader bezien, *Tijdschrift voor Civiele Rechtspleging* 2017-1, p. 8.
[73] M.I. Hazelhorst & X.E. Kramer, Afschaffing van het exequatur in Brussel I: daadwerkelijke verbetering of politiek gebaar?, Tijdschrift voor Civiele Rechtspleging 2013-2, p. 43. An important issue is whether a conservatory third party attachment falls within the scope of Article 35. See further the answer to question 40.
[74] Rechtbank Zeeland-West-Brabant 14 February 2019, ECLI:NL:RBZWB:2019:601.
[75] Rechtbank Rotterdam 24 January 2019, ECLI:NL:RBROT:2019:538.

to issue them. How is the 'real connecting link' condition in *Van Uden* interpreted in the case-law and doctrine in your Member State?

Court seem to interpret the 'real connecting link' condition in a narrow manner. The Court of Rotterdam refused to accept jurisdiction in relation to a claim for a Dutch bank guarantee due to a lack of a real connecting link (defendant not domiciled in the Netherlands, plaintiff had even asserted that a German guarantee would also suffice).[76] In any case, there will be a real connecting link with the Dutch territory if the measure sought has to be executed in the Netherlands.[77]

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.

Only one case was found applying the Hague Convention on Choice of Court Agreements. In this case, concerning a party domiciled in the Netherlands and the other in Belgium, the Dutch court declined jurisdiction in favour of the court of Antwerp.[78] Not only was the court mistaken in applying the Convention instead of Brussels Ia Regulation, but it also held the HCCCA temporally applicable, even though the choice of forum agreement had been concluded before the Convention's entry into force.

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?

Information N/A.

[76] Rechtbank Rotterdam 18 September 2015, ECLI:NL:RBROT:2015:6879. See also: Rechtbank Zeeland-West-Brabant 1 November 2016, ECLI:NL:RBZWB:2016:6833.
[77] Rechtbank Gelderland 29 May 2018, ECLI:NL:RBGEL:2018:2647.
[78] Rechtbank Limburg 22 February 2016, ECLI:NL:RBLIM:2016:1465.

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?

In the Netherlands, the competent authority is the "gerechtsdeurwaarder" (court bailiff). Their official association's website[79] *does not show any information on the changes in the enforcement of a decision of another Member State that follow from the Brussels Ia Regulation. Empirical research indicates that more than one fourth of the survey respondents (Dutch practitioners) were not or only limited aware of the changes brought about by Brussels Ia Regulation and the Implementing Act.*[80]

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?

Information N/A.

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?

Information N/A.

[79] https://www.kbvg.nl/1184/gerechtsdeurwaarders/wet-en-regelgeving.html.
[80] X.E. Kramer et al, Synthesis Report on the application of Brussels I (recast) in the legal practice of EU Member States, (available at https://www.asser.nl/media/5018/m-5797-ec-justice-the-application-of-brussels-1-09-outputs-synthesis-report.pdf), p. 30.

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?

Information N/A.

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

No case law was found referring to this provision.

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?

Examples of Article 46 being applied are sparse. In one example the plaintiff argued that the fact that the enforcement of a French decision in the Netherlands had to be refused on the basis of the public policy exception, since the decision was appealed in France. However, the court held that since the appellate proceedings in France did not have suspensory effect, the decision was considered enforceable. The enforcement of the (enforceable) decision does not constitute a manifest violation of public policy.[81]

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?

The PIL-database of the T.M.C. Asser Instiute[82] *shows only two cases referring to Article 45 (in both cases not leading to a refusal of recognition/enforcement). However, the database only shows a limited number of cases applying Article 34 Brussels I Regulation (In 2013 and 2014 Article 34 was referred to in only two lower court cases, both dismissing the application of this provision).*

[81] Rechtbank Den Haag 7 June 2018, ECLI:NL:RBDHA:2018:8759.
[82] www.nipr-online.eu/zoekrechtspraak.aspx.

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?

Information N/A.

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

In the literature, the tension has been addressed between a révision au fond and the public policy exception.[83] *Within the context of the national (unwritten) rules on recognition, the Dutch Supreme Court recently held that a révision au fond not being permitted means that a foreign decision that is considered 'incorrect', is still eligible for recognition. However, the court does not carry out a révision au fond if it refuses to recognise a foreign judgment on the ground that in view of the way the decision was established or its contents, such recognition would be contrary to fundamental Dutch principles and values.*[84]

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?

Information N/A.

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?

Information N/A.

CHAPTER VII

[83] See D.G.J. Althoff, Internationale arbitrage en IPR: toepassing van erkenningsvoorwaarden uit het Nederlandse commune IPR bij erkenning en tenuitvoerlegging van vernietigde buitenlandse arbitrale vonnissen onder het Verdrag van New York 1958, *Nederlands International Privaatrecht* 2018-3, p. 506-507.
[84] Hoge Raad 18 January 2019, ECLI:NL:HR:2019:54, at 4.1.4.

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?

Information N/A.

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

Information N/A.

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?

In this regard, the following situation can be viewed as being problematic. Parties have included an exclusive choice of forum in favour of the Dutch courts in their multimodal transport agreement, but one of the parties seises the Belgian (or English) court. The latter court holds the CMR directly applicable and applies the CMR lis pendens rule (Article 31(2) CMR), meaning that the court can continue dealing with the case. However, if the Dutch court is seised second, it can also proceed, relying on Article 31(2) Brussels Ia Regulation (reverse lis pendens in case of an exclusive choice of forum). In such a case, there is a risk of parallel proceedings and ultimately conflicting judgments (if the first seised court considers the choice of forum invalid and the chosen court seised second deems it valid). It has been argued that in view of the CJEU case law, it is not unlikely that the CJEU would consider the traditional CMR lis pendens rule inapplicable in case the court, exclusively chosen by the parties, is seised second.[85]

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

In one case, a party claimed the application of the Convention on Limitation of Liability for Maritime Claims over Brussels Ia, invoking Article 71. However, the

[85] W. Verheyen, 'Afbakening van het toepassingsgebied van vervoerverdragen door de nationale wetgever: aanleiding tot parallelle procedures onder Brussel I(bis)?', *Nederlands Tijdschrift voor Handelsrecht* 2016-2, p. 49-58.

Court of Rotterdam held that this Convention does not contain rules on jurisdiction.[86]

The Court of Limburg relied on Article 71 to give precedence to the application of Article 31 CMR,[87] *whereas the Court of Appeal Arnhem-Leeuwarden used the same provision to give precedence to the application of the Benelux Convention of Intellectual Property.*[88]

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?

As mentioned above, only one case regards the application of the Hague Convention on Choice of Court agreements. However, the court did not take into account the Brussels Ia Regulation.[89]

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

Question is unclear (cannot find these provisions).

[86] Rechtbank Rotterdam 15 February 2017, ECLI:NL:RBROT:2017:10357.
[87] Rechtbank Limburg 21 June 2017, ECLI:NL:RBLIM:2017:5889.
[88] Gerechtshof Arnhem-Leeuwarden 22 May 2018, ECLI:NL:GHARL:2018:4622.
[89] Rechtbank Limburg 22 February 2016, ECLI:NL:RBLIM:2016:1465.