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

QUESTIONNAIRE
for National Reports

AUSTRIA

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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?**

   Not all judgments applying the Brussels Ia Regulation are published in Austria. While judgements of the second and third instance are published in official collections (including the SZ ["Entscheidungen des österreichischen Oberster Gerichtshofes in Zivilsachen"] and private collections (including the ArbSlg ["Sammlung arbeitsrechtlicher Entscheidungen"), EFSlg ["Ehe- und familienrechtliche Entscheidungen"], HS ["Handelsrechtliche Entscheidungen"), MietSlg ["Mietrechtliche Entscheidungen") as well as in legal journals, judgements of the first instance are rarely published. The following journals are among the most important legal journals in Austria: AnwBl (Österreichisches Anwaltsblatt), ecolex (Fachzeitschrift für Wirtschaftsrecht), NZ (Österreichische Notariats-Zeitung), ÖBA (Österreichisches Bankarchiv), ÖJZ (Österreichische Juristen-Zeitung), RZ (Österreichische Richterzeitung), Zak (Zivilrecht aktuell) and ZfRV (Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht).
   In Austria, there are various electronic legal documentation systems in database form, which are available on various storage media (e.g. some are available offline on CD-ROMs and some online). The judgements of the Austrian Supreme Court (OGH) and some of the courts of second instance can be downloaded free of charge via the RIS (Federal Legal Information System) at https://www.ris.bka.gv.at/Jus/. There are also paid databases, including the legal database founded in 1986 (available at: https://rdb.manz.at/home) and the database for taxes, law and business (available at: https://www.lexisnexis.at/produkte/lexisnexis_online/).

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

The Austrian legal writers welcome the ongoing dialogue between the CJEU and the Austrian courts. One example is the interpretation of the rules on jurisdiction in consumer matters. In the joined cases *Pammer* and *Alpenhof* (C-585/08, C-144/09) the ECJ had to decide for the first time to what extent the professional or commercial activity of a business will be considered to be directing its activity to another Member State through the use of a website. According to the ECJ (paragraph 87), the conclusion of a contract at a distance appears to be a mandatory prerequisite for the application of Article 15 of Brussels I. The OHG has again asked the ECJ for a preliminary ruling (OGH 23.3.2011, 4 Ob 32/11a, ECLI:AT:OGH0002:2011:0040OB00032.11A.0323.000); the ECJ subsequently ruled that it is not required for the contract to be concluded at a distance (C-190/11).

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

The following are viewed as improvements:

- the extension of the territorial/personal scope of application in consumer and employment matters, nevertheless, there are concerns that this does not include insurance matters.
- the new Article 7(4), aimed at improving legal protection
- reference to Article 8 in Article 20, because it improves the protection of workers,
- the possibility that even in insurance, consumer and employment matters a remedy can be obtained by entering an appearance without raising an objection; It is criticized, nevertheless, there are concerns as regards the vague nature of the obligation to inform parties of their rights and the consequences of the failure to do so (see answer to question 29).
- settling of the question to what extent parallel proceedings pending in a third country must be taken into account.

The following are viewed as shortcomings:

- the new version of Article 24(4); see the answer to question 38,

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- vague nature of the obligation to inform parties of their rights and the consequences of the failure to do so (see answer to question 29),
- the phrase "null and void" in Article 25 (see the answer relating to Articles 45 to 47),
- the provisional legal protection, see answer to question 4.

The opinions on the abolition of the exequatur procedure are split in Austria. The current provisions leave some questions unanswered (see answer to question 67). The breach of ordre public being kept as one of the grounds for refusal is welcomed. Criticism is levelled at the provision of Article 41(2), which governs the relationship between European and national law with only moderate success.

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?**

A negative point is that the general jurisdiction is only the defendant's domicile and registered office and not the defendant's habitual residence. In order to close legal loopholes, a place of jurisdiction should also be provided for at the place of habitual residence.

There are concerns that the international jurisdiction for the adoption of provisional measures is still not uniformly regulated and that recourse to the national law of the Member States is still permitted. It would have been more appropriate to provide for a uniform jurisdiction provision in Article 35. For criticism of provisional legal protection, see also answer to question 15.

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

Austrian legal writing and case law emphasise the principle of autonomous interpretation under EU law. There are no areas of tension.

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

   The reference to the Member State alone, without specifying local jurisdiction, does not pose any difficulties in Austria. Austrian law provides that, where Austria is required to exercise jurisdiction, if there is no locally competent court under Austrian law, an application must be submitted to the OGH, which determines a locally competent court (application for designation of the national court having territorial jurisdiction, Article 28 of the Austrian Court Jurisdiction Act (JN)). Within the scope of the Brussels I bis, there is no need for such application.

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?**

   In Austria, there is the obligation to administer justice. Where Austria has international jurisdiction under Brussels Ibis, a locally competent court must be made available.

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 relevant jurisdiction rules are set out in the Austrian Court Jurisdiction Act (JN). In addition, there are also special laws governing jurisdiction. The proceedings are mainly regulated in the Code of Civil Procedure (ZPO).

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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 interpretation does not cause any difficulties in practice. According to the opinion held in Austria, the exceptions include the following:

- the arbitration proceedings themselves, including the decisions of the arbitral tribunal on its jurisdiction,
- Proceedings before state courts in support of arbitration, such as proceedings for the appointment or replacement of arbitrators,
- Procedure for determining the place of arbitration,
- Procedure for extending decision, limitation or exclusion periods,
- Procedure in which an arbitral tribunal can have certain legal issues decided in advance by a state court,
- Procedure for revocation, amendment, certification, recognition or declaration of enforceability of arbitral awards,
- Actions for determination of the (in)effectiveness of arbitration agreements.

From the Austrian perspective, Recital 12 shows that in these circumstances the incidental determination of the invalidity, ineffectiveness or non-performance of the arbitration agreement alone cannot be the subject of recognition. If, for example, an Austrian court finds that an arbitration agreement in favour of an arbitral tribunal in Germany is ineffective and issues a decision requiring the defendant to render a specific service, the decision must, in principle, be recognised and enforced in Germany. However, the German arbitral tribunal would not be bound by the incidental determination of the invalidity of the arbitration agreement.

10. **Has the delineation between "civil and commercial proceedings" on the one hand and "insolvency proceedings" on the other hand led to particular problems in your Member State? If yes, please give examples. Please, explain whether the latest case law of the CJEU (e.g., C-535/17, *NK v BNP Paribas Fortis NV*) has been helpful or has created extra confusion.**

The delineation causes difficulties in Austria when it comes to insolvency-related individual proceedings that emerge directly from the insolvency proceedings or are closely related to them. According to the views held by the Austrian legal writers, all proceedings qualify as insolvency proceedings that could not have arisen with the same objective and without the opening of insolvency proceedings and which directly serve the purpose of insolvency proceedings. Disputes for which the opening of insolvency is merely the reason or only the status of the party (by the exercise of the administrative and disposal authority by the liquidator) and the details of the claim content change, but which can also be pursued outside the insolvency proceedings are covered by the scope of Brussels I bis. It is, therefore, not sufficient if the asserted claim is only affected by the opening of the insolvency proceedings and is adapted accordingly to the proceedings; rather, it must have its legal basis in the insolvency proceedings or exist under general law, but be modified by the insolvency proceedings in such a way that it is shaped by insolvency law as a whole, so that the insolvency law provisions and idiosyncrasies determine its character. Accordingly, there may not be causal or final link between insolvency-related individual proceedings and insolvency proceedings. Overall, the delineation is problematic and rather than principled, the approach has mostly been quite haphazard. The judgement in C-535/17 brings some certainty, because it creates the basis for some inductive conclusions. In the meantime, the cases presented have become so specific that it is seldom possible to draw reliable inductive conclusions for further scenarios from the concrete cases. Overall, the judgement can be described as helpful.

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

There are no relevant (published) judgements.

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

    There is one relevant (published) judgement, LG Eisenstadt 1.3.2004, 13 R 312/03k (ECLI:AT:LG00309:2004:01300R00312.03K.0301.000), under which Brussels Regulation did not contain any provisions regarding the question, whether the applicant was entitled to costs for applications for the issue of certificates under Article 59 and which court or body would have to decide on a possible award of costs. The Brussels Regulation also does not regulate the reimbursement of costs for the application for exequatur (confirmation of enforceability). This is exclusively governed by national law. These costs cannot be claimed in the original proceedings.

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?**

    In Austria, there are no difficulties in applying the definitions provided in Article 2, and there are no differences of opinion as regards their interpretation. For an interpretation of the term "provisional measures", see question 14.

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'?**

    In Austria, there is some criticism that only provisional measures ordered by the court having jurisdiction as to the substance of the matter are judgments within the meaning of the Regulation and only these provisional measures are covered by mutual recognition and enforcement. In part, this restriction to the court having jurisdiction as to the substance of the matter is advocated (for details of the opinion see *Garber*, Einstweiliger Rechtsschutz nach der neuen EuGVVO, ecolex 2013, 1071).

The criticism is justified by the fact that the restriction can lead to a considerable deterioration of the legal position of the party at risk. Although Article 35 allows provisional measures to be adopted in the State in which they will be enforced, it may, nevertheless, be necessary to enforce it in another State, despite the fact that Article 35 creates a synchronicity between the authorisation and enforcement powers, for example, in cases where the opponent of the party at risk brings the object of the measure to another Member State after the provisional measure has been adopted. If the extension of the effects of the measure adopted to another Member State were precluded, the second measure adopted after a new procedure could, as a result, prove ineffective again if the subject of the injunction is again removed from the claimant's access. The incentive to move the subject of the injunction abroad would be greater without the possibility that a measure already adopted can be recognised and enforced in other Member States, as this would prevent the measure from being enforced. In addition, in cases where the opponent of the party at risk has assets in different States, the party at risk must initiate parallel interim legal proceedings in the Member States concerned, which may lead to divergent decisions. The parties may also incur higher costs because they have to bear the costs of legal proceedings and legal advice in each Member State. This is contrary to the stated aim of Brussels I bis to facilitate legal proceedings. In order to avoid this, the party at risk only has the possibility to apply for provisional measures to the court having jurisdiction as to the substance of the matter.
It is questionable whether those measures adopted by a court having jurisdiction under Article 35 can also be recognised and enforced under the autonomous law of the Member States. Since the primacy of the Union law also supersedes the autonomous provisions of the Member States in cases where recognition and enforcement are permitted only under national law and not under Brussels I bis, in the absence of an express provision, recourse to the rules of national law or to the provisions in recognition and enforcement agreements is no longer permissible in Austria, according to the prevailing view.
The possibility of recognising and enforcing the ex parte measures ordered by the court having jurisdiction as to the substance in accordance with the provisions of Brussels I bis is generally considered to be useful. Some criticise the restriction that it must have been served beforehand and that this service must be confirmed. It is argued that the surprise effect necessary for the success of the measure is thwarted. In order to preserve the surprise effect, the provisional measure must therefore be applied for in the State in which it is to be implemented. This, in turn, is unsatisfactory in those cases where the subject of the injunction is located in several states, because the opponent

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of the party at risk is "warned" by the enforcement of the first provisional measure and is likely to expect further measures of provisional legal protection.

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?**

According to the opinion held in Austria, this refers to the procedure in which a final decision is to be taken on the claim to be secured or on the legal relationship to be regulated. The claim to be secured or the legal relationship to be regulated in proceedings for provisional and protective measures must always be the direct subject of the proceedings. On the other hand, it is not sufficient that the main proceedings affect the claim to be secured or regulated merely indirectly. Therefore, if, for example, individual items brought into the rented premises have been assigned by the tenant to the landlord to secure the rent claim, it is the court having jurisdiction as to the substance and not the court having jurisdiction over rental disputes, which will approve provisional measures to secure the claim for restitution of these items. The parties to the main proceedings must be identical to the parties to the provisional measures. On the other hand, it is irrelevant whether the roles of the parties in the main proceedings correspond to those in the provisional proceedings. A court before which an action for a negative declaratory judgment has been brought, therefore, also has jurisdiction as the court having jurisdiction as to the substance of the matter in respect of an application by the defendant for the adoption of a provisional measure.

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

    It is, in principle, possible to enforce a provisional measure in Austria without having initiated the main proceedings. The legal writers are split on the second question. According to the views held by some legal writers, this leads to the application of Article 45(1)(d). According to other legal writers, the provisional measure adopted by the court having jurisdiction as to the substance of the matter should prevail (for details of the opinion, see *Garber,* Einstweiliger Rechtsschutz nach der EuGVVO [2011] 263 ff). This is justified by the strengthening of the court having jurisdiction as to the substance, which is clearly reflected in the Regulation. The provisional measures of all other courts which do not deal with the main proceedings may only be of a supplementary nature. It is, therefore, appropriate that the provisional measures adopted by the court actually conducting the main proceedings, whether ordered by a domestic or foreign court, should take precedence over the provisional measures adopted by the court potentially having jurisdiction as to the substance of the matter.

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?**

    No relevant decisions currently exist in this regard. The view held by legal writers is as follows: If the court of the Member State of origin specifies the jurisdiction on which it has based its judgement, the court is bound by the jurisdiction provision; in accordance with Article 45(3), the jurisdiction of the court of origin may not be reviewed. Where there is doubt as to what the court of origin relied upon when adopting the provisional measure, the Member State of enforcement is not prevented from reviewing the arguments contained in the judgement of the State of origin as to the ground of jurisdiction which the court intended to invoke. Article 45(3) does not preclude this because it is

not a question of a review of jurisdiction, but merely of establishing the basis. If jurisdiction cannot be established, the court shall be deemed not to have based its jurisdiction on having jurisdiction as to the substance of the matter. The Member State of enforcement is in no way required to ask the court of the Member State of origin on what basis the measure was adopted. In this case, the court has to examine whether the requirements laid down in Article 20 are satisfied. Only in this case is recognition permitted under national law (including bilateral and multilateral conventions). If the requirements laid down in Article 20 are not met, the recognition and enforcement of the provisional measure is not possible.

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*)?**

There are no similar issues in Austria.

CHAPTER II

Personal scope (scope *ratione personae*)

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

No relevant statistics are available. It can be assumed that the number of court proceedings in consumer matters will increase because the Austrian provisions on international jurisdiction (applicable to date) did not provide for Austrian jurisdiction in these cases - apart from a few exceptions. With regard to employment matters, no increase is expected, as there was already jurisdiction under Austrian law applicable to date; with regard to the regulations, see Article 4 of the Austrian Labour and Social Courts Act (ASGG) in conjunction with Article 27a of the Austrian Court Jurisdiction Act (JN).

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 is a controversial issue in Austria. It is argued that because of the close connection between the agreed jurisdiction and the jurisdiction based on an appearance without contesting the jurisdiction, the requirements of Article 25 also apply to Article 26 (see*Rechberger/Simotta*, Grundriss des österreichischen Zivilprozessrechts, 9th edition [2017] paragraph 126). Article 26 is, therefore, applicable irrespective of the domicile of the parties; the decisive factor is that the temporal and material scope of application has been opened up and that a court of a Member State has been seised. Some legal writers are of the view that at least one of the parties (*Wallner-Friedl* in *Czernich/Kodek/Mayr,* Europäisches Gerichtsstands- und Vollstreckungsrecht[4] Art 26 [2015] Rz 12) must be domiciled in a Member State. The reason given for this is that

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Article 26 - unlike Article 25 - does not expressly state that the provision applies to parties irrespective of their domicile.

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 Austria is that Articles 29 and 30 apply irrespective of the domicile of the parties; the only decisive factor is that proceedings are conducted in different Member States. It is also irrelevant whether the courts of the Member States concerned have acted in accordance with the rules of jurisdiction laid down in the Regulation or in national law. It is undisputed that the new version should be applied whenever two proceedings involving the "same cause" within the meaning of Article 29 have been initiated in different Member States on or after 10 January 2015. On the other hand, Article 29 does not apply if both proceedings have been initiated before 10 January 2015. What is arguable is whether the applicability of Article 29 et seq. is contingent upon concurrent proceedings having been brought after the applicability of Brussels I bis (affirmative opinion, e.g. on Brussels I bis OGH 5.4.2005, 4 Ob 61/05g, ECLI:AT:OGH0002:2005:0040OB00061.05G.0405.000; dissenting opinion, OGH 9.9.2002, 7 Ob 188/02a ECLI:AT:OGH0002:2002:0070OB00188.02A.0909.000). The views held in this respect are as follows: If the first proceedings were initiated before 10 January 2015 and Brussels I thus applies, the court second seised after this date has to apply Brussels I bis (i.e. Article 29 et seq.). If Brussels I applies to the first proceedings, there is no need (initially) for any further restrictions imposed by the ECJ in the *von Horn/Cinnamond* case (C-163/95, *von Horn/Cinnamond*, ECLI:EU:C:1997:472): The judgement has to be recognised and enforced without any review of jurisdiction; a review of jurisdiction between the old and recast versions is not required under Article 66(2), and the restriction thus does not apply. Since the obligation of the second seised court to stay the proceedings or to declare that it lacks jurisdiction requires that the judgment from the State in which the court was first seised to be recognised or enforced in the second State, in the case where the Brussels I does

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not apply to the first proceedings it is necessary to consider whether the judgment should be recognised in the second State; the principles of the judgement of the ECJ in the vonHorn/Cinnamond case, therefore, apply mutatis mutandis. The court second seised shall stay its proceedings until such time as the court first seised has ruled on its jurisdiction. If the court first seised has jurisdiction and the judgment can be recognised or enforced in the second State, the court second seised must declare that it lacks jurisdiction under Brussels I bis. If the judgment cannot be recognised or enforced in the second State, i.e. if the continuation of the proceedings first instituted under the old regulation would not be capable of recognition because of the rules of jurisdiction applicable in the Member State whose court was subsequently seised, the court second seised may not decline jurisdiction under Article 29, even if the court first seised has accepted its jurisdiction.

However, there are frictions with respect to the application of Brussels I bis in the case of Article 31(2). As the provision was only added to the recast version, the situation may arise where the provision does not apply to the court first seised, while the second court is also not required to stay its proceedings under the recast version. If, contrary to a choice-of-court agreement, a non-designated court of another Member State is first seised before 10 January 2015, it must, in principle, apply Brussels I and cannot proceed in accordance with Article 31(2), but the court itself must decide on the effectiveness of the choice-of-court agreement. The court seised on or after 10 January 2015 must stay its proceedings - despite the fact Article 31(2) and (3) of Brussels I bis, which is applicable before that court, provides for the exclusive examination power of the court seised - until the court first seised has ruled on the effectiveness of the choice-of-court agreement. If the court first seised declares that it has no jurisdiction (and the choice-of-court agreement is thus ineffective), the designated court is bound by it and can no longer affirm its jurisdiction (in application of Brussels I bis) because it has to recognise the lis pendens of the proceedings initiated first. If, on the other hand, the court first seised declares itself to have no jurisdiction and the choice-of-court agreement is valid, the agreed court seised after 10 January 2015 cannot re-examine the validity of the choice-of-court agreement, because according to the judgement of the ECJ in the case "*Gothaer* " (C-456/11, ECLI:EU:C:2012:719) procedural judgments must also be recognised; this also applies if they only deal with the validity of the choice-of-court agreement on a preliminary basis. If the provisions of Brussels I do not apply to the first State - for example, if the choice-of-court agreement of the other Member State was concluded by two parties with a (domicile) registered office in a third State - the decision on the effectiveness of the choice-of-court agreement in the second

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State cannot be recognised under Brussels I; unless the national law or an applicable bilateral or multilateral recognition and enforcement agreement provides otherwise, the court of the second State is not bound by the judgement of the first State; the court seised, which has to apply the new version of Brussels I bis, must examine the effectiveness of Brussels I bis.

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 have not been any difficulties in determining the temporal scope. Controversial is the question of when the lis pendens provisions apply. See also the answer to question 21.

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?**

    In Austria, Article 7 is very important, there are only a few published judgements relating to Article 8, Article 9 has no practical significance in Austria.
    It is arguable, for example,
    - to what extent claims arising from culpa in contrahendo fall under Article 7(1) or Article 7(2),
    - whether there may be cases in which the court having jurisdiction under Article 7(1) may also rule on the tort claims,
    - whether and to what extent the parties may agree on a place of performance, which differs from that laid down in Article 7(1)(b),
    - where the place of performance is located if the goods are to be delivered in partial quantities in different Member States,

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- if, according to the contract, services are to be provided in several states, there is a separate place of performance for each service or a single place of performance should be determined.
- the extent to which parent companies can be sued where a subsidiary refers business for them.

In practice, there are also difficulties in determining the place of performance and the place where the harm arose with respect to offences committed on the internet.

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?**

See also the answers to questions 23 and 25.

Debatable are the following issues:

- In addition, can all persons jointly liable for the performance of a certain contractual obligation sue or be sued at the place of jurisdiction of the place of performance? (mostly in the affirmative)
- Do contracts with protective effect for the benefit of third parties also fall within the scope of Article 7(1)? (mostly in the negative)
- Are claims arising from unjust enrichment as a result of a void or ineffective contract within the scope of application if the breached or unfulfilled primary obligation is to be classified as a contractual obligation? (mostly in the affirmative)
- Does this include claims arising from liability for creating a legal appearance of a contract? (mostly in the affirmative)
- Does this cover legal action (under company law) for compensation and damages pursued against executive bodies (management board members, managing directors, supervisory board members, etc.) in the qualified de facto group? (mostly in the affirmative)
- Does this include the dependent company's requests to take action against the dominant company if there is a control and profit transfer agreement? (mostly in the affirmative)
- Does this cover actions arising from so-called quasi-contracts, such as management without a mandate? (mostly in the negative)
- Are claims arising from statutory obligations covered? (mostly in the negative)

- Does this include cheque holder's right of redress against the issuer? (mostly in the negative)
- How is the place of performance determined if, according to the contract, the goods are not to be delivered to the buyer, but directly to a third party? (it is generally assumed that the place of performance is the location where the goods were handed over to the third party or should have been handed over in accordance with the contract)
- Does a change of creditor lead to a change in international jurisdiction if, in accordance with the lex causae of the State of the court seised, the purchase or service agreement or the place of performance agreement, when this depends on circumstances related to the person of the creditor, such as the creditor's domicile or place of business? (mostly in the negative)

The OGH decided on the following questions related to Brussels I bis: In the judgement of 30 August 2016, 1 Ob 119/16f (ECLI:AT:OGH0002:2016:0010OB00119.16F.0830.000), the OGH had to assess the following facts: At first, a pure purchase agreement was concluded for a movable object. Only when the item was in operation, the contractual partner engaged the other party to provide additional services in connection with the object. The OGH argued that if there are two separate contracts, it does not matter that at the time the first purchase agreement was concluded it may not have been unlikely that one party would approach the other party for additional services and conclude another contract. Due to the subsequent conclusion of another contract, however, meant that the place of performance for the delivery obligation under the purchase contract, which had already been fulfilled, could no longer change retrospectively.

As to whether claims arising from culpa in contrahendo fall under Article 7(1) or Article 7(2), the view in Austria is that (1) Art. 7(1) must be applied in any case, (2) Article 7(2) must be applied in any case (3) if information and advice obligations have been violated, Article 7(1) applies, if duty of care obligations have been violated, 7(2) applies. Other commentators believe that even if there is a contract or a voluntary commitment, only claims arising from the breach of pre-contractual obligations relating to the subject matter of the agreement fall under Article 7(1). Accordingly, claims arising from the breach of pre-contractual obligations to provide information and advice are covered by Article 7(1), whereas claims arising from the breach of duty of care obligations are not. These claims are covered by Article 7(2). However, in the absence of a contract or a unilateral voluntary commitment, the obligation to pay damages for culpa in contrahendo can only arise from a breach of law. Therefore, in such a case, the jurisdiction

for claims arising from culpa in contrahendo is governed by Article 7(2), i.e. even if the fault relates to the failure of the conclusion of the contract or if tort-like elements are not at all in the foreground

As to where the place of performance is, if the goods are to be delivered in sub-quantities in different Member States, it is argued that each delivery has its own place of performance; any claims arising from the sale can be pursued at any of these delivery locations. In addition, the place of performance is considered to be

- the place where the most important part of the service or the main delivery has taken place or should have taken place,
- any place where the most important part of the service or the main delivery has taken place or should have taken place,
- any place where part of the service has been provided or should have been provided, but in each Member State it can only be sued for the part of the service to be provided there,
- a place that cannot be determined.

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 Austria, it is argued that place of performance agreements are permissible for purchase agreements relating to movable property and service contracts, even if they would not be permissible under the applicable lex causae of the State of the court seised. For other contracts, the permissibility of place of performance agreements depends on whether the relevant lex causae of the State of the court seised permits such agreements. A different place of performance is most likely to be agreed for payment obligations. In such a case, by agreeing a place of payment that deviates from Article 7(1)(b), the concentration effect of Article 7(1)(b) is eliminated. Even if such a place of performance agreement is contrary to the ratio provision, it is permissible according to Austrian legal writing, because Article 7(1)(b) explicitly permits deviating agreements on the place of performance without limitation, and the Union legislature attaches great importance to party autonomy. In addition, even when Article 7(1)(a) is applied, there are different places of performance depending on which contractual obligation is the relevant one. In addition, the parties may also achieve the same effect through a

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choice-of-court agreement pursuant to Article 25, in which they agree a jurisdiction for the payment that differs from Article 7(1)(b). Therefore, if the parties wish to agree on different places of performance for the delivery of and payment for goods or for the provision of and payment for services, this should be allowed.

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

The following issues are controversial:

- - Does Article 7(2) cover legal action for financial losses?
- Does it cover actions, which seek to establish direct liability of shareholders of a legal entity for misuse of this instrument or on the basis of external liability of the group, in so far as they are not attributable to a control and profit transfer agreement? (mostly in the affirmative)
- Does it cover action for a negative declaration to establish the absence of an infringement, e.g. a patent infringement, or tortious liability? (mostly in the affirmative)
- Are pure preparatory acts sufficient? (mostly in the negative)
- Where did the harmful event occur in the case of purely financial losses? (It is generally assumed that the place where the loss occurred is the place where the impaired assets are located.
- Where did the harmful event occur in the case of anti-competitive price agreements? (It is generally assumed that it is the location from which the customer paid the excessive price).

In practice, determining the place where the harm arose poses major practical difficulties, particularly in the case of offences committed online.

In the judgement of 7 July 2017, 6 Ob 119/17v (ECLI:AT:OGH0002:2017:0060OB00119.17V.0707.000), the claimant sought damages. The claimant bought the defendant's shares on the stock exchange and sold

them at a loss. The allegation was that the defendant was liable for damages for the difference because, as the issuer, the defendant concealed fundamental pricing information. The OGH argued: "The ad hoc disclosure obligation must be based in the country where the issuer is subject to the ad hoc disclosure obligation, which is the place where the event which gave rise to the harm occurred. The mere duplication of information in other Member States is irrelevant." As regards the place where the harm arose, the OHG argued: "The problem with investor losses is that they lack a physical manifestation. [...] In view of the fact that the defendant is a German listed company, that the defendant's shares are traded on German stock exchanges - and not on Austrian ones - and that the global certificate embodying the shares is deposited in Germany, an initial loss did not occur in Austria due to a lack of any tangible links. [...] In this case, the marketplace, the stock exchange, the global certificate and the issuing company are all based in Germany." This is again argued in the judgement of 29 August 2017, 6 Ob 92 / 17y (ECLI: AT: OGH0002: 2017: 0060OB00092.17Y.0829.000). In addition, the OHG stated: "Moreover, even if the claimant's bank account were sufficient as a starting point, nothing would be gained for the claimant because Article 7(2) of the Brussels Regulation does not only cover international but also local jurisdiction [...]. In this case, therefore, the claimant cannot infer that Article 7(2) of the Brussels Regulation bis establishes jurisdiction of the Landesgericht Korneuburg because the claimant's bank account is maintained with BAWAG PSK, which has its registered office in Vienna.

In the judgements of 30 August 2016, 4 Ob 120/16z (ECLI:AT:OGH0002:2016:0040OB00120.16Z.0830.000) and 4 Ob 131/16t (ECLI:AT:AT:OGH0002:2016:0040OB00131.16T.0830.000), the OGH determined the place where the harmful event occurred for violations of antitrust laws. The place where the harm arose is the place where the damage caused by additional costs relating to anti-competitive practices occurs, i.e. the residence of the injured party. This applies mutatis mutandis if the aggrieved bank client bases his claim for damages on a market influence by the defendant, which is contrary to Union law. If the claimant is a bank client who bases his claim for damages on market influence exercised by the defendant, which is contrary to EU law (with the consequence of an increase in the interest rate as the market price for loans), the place where the harm arose with respect to violations of antitrust laws, i.e. the place where the damage caused by additional costs relating to anti-competitive practices occurs, is the domicile of the injured party.

In the judgement of 20 December 2018, 4 Ob 181/18y (ECLI:AT:OGH0002:2018:0040OB00181.18Y.1220.000, the OGH had to rule on the

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following facts of the case: the claimant alleged that the defendant infringed first sentence of Article 1 (1) of the Act against Unfair Competition (UWG) because of engaging in unfair competition (sale of tickets for non-business events held in Austria), which had an impact on the Austrian market at the expense of the law-abiding competitors. In the event of a violation of national fair trading laws, the international jurisdiction for tort action is based on the State where the harm arose. The State where the harm arose is the state in which the infringing act has an effect (impaired market) and thus violates the national fair trading laws. In the case of online offences the only thing that matters is the availability of the infringing website in the State where the harm arose. If the objectionable website is available throughout Austria, and the alleged unfair practice can therefore have a negative effect throughout Austria, the claimant has the option of bringing the claim before one of the relevant competent courts in Austria.

In the judgement of 20 December 2006, 4 Ob 45/16w (ECLI:AT:OGH0002:2016:RS0131153), OGH had to determine the international jurisdiction for domain grabbing. The court pointed out that Austrian courts have jurisdiction under Article 7(2) for fair trading claims for an injunction against the use of a domain with the TLD ".ch", but not for claims for its transfer or deletion.

In the judgement of 21 February 2017, 4 Ob 137/16z (ECLI:AT:OGH0002:2017:RS0131327), the claimant alleged a copyright infringement, which was that the defendant, through the disputed broadcasting or cable retransmission, presented works of the authors represented by the claimant to a new audience without the claimant's consent. The claimant thus objects to the infringement of the exclusive right of the author pursuant to Article 17 (1) of the Copyright Act (UrhG) to broadcast the work by radio or in a similar manner. The OGH pointed out that the place where the harm arose as regards the infringing performance is where the performance took place and where a licence fee would have been incurred. In the case of online infringements that cannot be restricted to the territory of any particular State, the damage occurs (or may occur) anywhere from where the protected work can be accessed. In the case of terrestrial broadcasting, communication to the public takes place not only in the broadcasting country but also in the receiving countries to which the programme is (also) directed (intended broadcasting). In the case of a programme which can be received in Austria, the law of the receiving country, i.e. domestic law, must therefore be applied as a matter of principle to determine whether this was merely unintentional (i.e. whether this qualifies as an unintentional spill-over broadcast, which is irrelevant under copyright law) or deliberate. The place where the harm arose with respect to a broadcast that was (i.a.) aimed at Austria is therefore (i.a.) Austria.

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In the judgement of 7 July 2017, 6 Ob 18/17s (ECLI:AT:OGH0002:2017:0060OB00018.17S.0707.000), the OGH ruled that in the case of claims based on prospectus liability, the place where the event which gave rise to the harm occurred is the country in which the incorrect information in the prospectus occurred. Ad hoc disclosure must be based on the country in which the issuer is subject to the relevant obligation. If the claimant has acquired his shares on a German stock exchange and the market place, the stock exchange place, the global certificate and the issuing company are thus in Germany, neither the place where the harm arose nor the place where the event which gave rise to the harm occurred are located in Austria within the meaning of Article 7(2) for the purpose of claims for damages by the investor resident in Austria. Mere consequential damages are covered by Article 7(2).

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?**

    In Austria, there is neither case law nor a comprehensive opinion in the legal literature on this jurisdiction.

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?**

    The question at issue is whether Article 8(2) applies only if the main action has jurisdiction under the Regulation or whether it is sufficient for jurisdiction to arise from national law. In the *Danvaern/Otterbeck* case (C-341/93, *Danvaern/Otterbeck* ECLI:EU:C:1995:239), the ECJ stated that Article 8(3) does not apply to set-off as a defence, which does not seek a judgement of the defendant and represents a pure defence. According to the ECJ, the defences which may be raised and the conditions under which they may be raised are governed by national law. How this reference to national law should be understood is debatable; according to views held by some legal

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writers, reference is made to the entire national procedural law, so that domestic law may make the admissibility of an offsetting process conditional on the international court having jurisdiction to enforce the offsetting claim, according to another part the reference should only refer to the substantive law. Some legal writers argue that the ECJ wanted to make it clear that national law applies to all issues not covered by the Regulation itself. Since the Brussels Regulation conclusively establishes international jurisdiction, the determination of international jurisdiction for set-off is not left to national law, otherwise no harmonisation of jurisdiction could be achieved; the reference to national law, therefore, relates, for example, to questions concerning the form and time limit for the set-off as a defence and to the question of whether set-off is a defence under substantive law or whether a counterclaim is necessary for set-off purposes.
Controversial is the judgement of the ECJ in "*Land Berlin/Sapir*" (C-645/11, *Land Berlin/Sapir et al.,* ECLI:EU:C:2013:228), according to which Article 8(1) does not apply to defendants domiciled in a third country. The judgement is largely rejected, as it implies that a defendant domiciled in another Member State is more likely to be sued abroad than a defendant domiciled in a third country, even though the Brussels Regulation should privilege and not disadvantage persons domiciled in Member States.

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 is a controversial issue in Austria. Some legal commentators argue that an infringement of Article 26(2) must be taken into account in the recognition and enforcement of the judgment in another State; Article 45 may preclude the recognition and enforcement of the judgment. Others consider Article 26(2) to be a provision without sanction; an infringement can therefore no longer be taken into account in recognition and enforcement *(Wallner-Friedl* in *Czernich/Kodek/Mayr,* Europäisches Gerichtsstands- und Estreckungsrecht[4] Article 26 [2015] Paragraph 8).

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

The prevailing view is that the limits on prorogation of jurisdiction also apply where the parties have agreed on a court in a third country to have jurisdiction. This view is justified by the fact that otherwise the purpose of the limits on prorogation of jurisdiction i.e. to protect one party as the party who is regarded as economically weaker and less experienced in legal matters, would be easily counteracted by agreeing on the jurisdiction of a third country.

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

In Austrian legal literature, the protection of the party who is economically weaker and less experienced in legal matters is advocated by jurisdictional rules. Some commentators have proposed to extend the protection. For example, the wording of Article 45 precludes recognition and enforcement even if the defendant is the economically weaker and less experienced party to the proceedings but has prevailed in the proceedings. In this case, the full wording should be reduced teleologically and an infringement should not lead to a refusal of recognition and enforcement.

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?**

In the judgement of 30 October 2018, 2 Ob 189/18k () the OGH ruled that Article 13(2) in conjunction with Article 11(1)(b) only established jurisdiction of the court at the domicile of the injured party under applicable law against the liability insurer. It cannot be inferred from this provision or from Article 8(1) or Article 13(3) of the Brussels Regulation 2012 that this court would also have jurisdiction for an action of the injured party against the policyholder or insured party liable for the loss/damage. The court was able

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to keep the controversial issue as to whether the "law governing direct action" is the *lex fori* of the court seised or the *lex causae* of the pursued claim, open.

Other questions that are controversial are the following:

- Does Article 12 apply only if the harmful event occurred in a Member State other than that in which the defendant (insurer) or claimant are domiciled?
- Does Article 13(1) apply where the insured person's court of jurisdiction is determined by national jurisdiction?
- Does Article 14(2) only apply to actions brought by the insurer against the policyholder, insured person, beneficiary or any other party involved in the insurance relationship, or is the (defendant) insurer also entitled to a make a counterclaim?

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?**

What is at issue in Austria is

- - how many partial payments must be made for the transaction to qualify as purchase on instalment credit terms,
- - whether a claim brought to enforce an isolated promise of financial benefit, which does not depend on an order of goods, also falls under Article 17(1)(c),
- - whether pure loan agreements also count as service agreements,
- - whether Article 17 is also applicable where the consumer's domicile and the branch of his contractual partner who is the defendant are located in the same Member State.

The OGH is often required to provide interpretation, including the following cases:

In the judgement of 7 July 2017, 6 Ob 18 / 17s (ECLI: AT: OGH0002: 2017: 0060OB00018.17S.0707.000), the OGH ruled that a shareholder cannot be regarded as a consumer in relation to the company, because of the ongoing and organisational nature of the relationship without remuneration.

In the judgement of 7 July 2017, 6 Ob 18/17s (ECLI:AT:OGH0002:2017:0060OB00018.17S.0707.000, the OGH qualified the claim arising from culpa in contrahendo as tortious and the court thus denied the application of Article 17 et seq. The court also took a position on the term "directing" of activities within the meaning of Article 17 (1) (c) in connection with an issuance of shares and its marketing to the investment public. This alone never leads to "directing", as otherwise

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this would mean that every listed company could be sued by its investors across Europe because most listed companies are probably targeting an international investment public.
The fact that ad hoc communications have been published on the website did not qualify as directing because the company was required to disclose the information by law.
In its judgement of 26 April 2018, 6 Ob 69/18t (6 Ob 69/18t), the OGH argues that it is not necessary for the validity of the consumer jurisdiction to assume that the initiative to conclude the contract was taken by the contractor.

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?**

The legal writing points out that the principle of forum perpetuum applies even if the defendant is a consumer. If, on the other hand, the consumer changes his domicile only after the action was brought (i.e. after the court was seised), the jurisdiction once established will remain in accordance with the principle of perpetuatio fori. This issue has not yet become virulent in case law.

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?**

The legal literature and case law both find it difficult to determine the habitual place of work of mobile workers. There is an issue with determining the habitual place of work where the employee is a pilot, flight attendant, truck driver, etc.
It is also disputed whether the provisions also apply in the case of individual or total legal succession.

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 interpretation of Article 24 (1) hardly causes any difficulties in Austria. This has already been reflected in case law involving the predecessor provision (Article 22 [1] Brussels I); The OGH emphasises in settled case law (RIS-Justiz RS0112834, ECLI:AT:OGH0002:1999:RS0112834) that it is not sufficient for the applicability of the aforementioned provision of Article 16 that a right in rem in immovable property is only affected by the action. the action must be based on a right in rem and not on a claim under the law of obligations ("personal right"); the right in rem must therefore be the subject of the dispute. The action must be the result of the exercise of a right in rem in immovable property.
The judgement of the OGH of 20 December 2016, 10 Ob 74/16d, ECLI:AT:OGH0002:2016:RS0131202 concerned the interpretation of Article 24(1). The claimant sought to oblige the defendant, a GmbH established in Germany, to refrain from parking vehicles in a specifically designated area rented by the claimant in a way that rendered it impossible for the claimant to use his parking space. From a substantive perspective, the tenant can take Publician action in accordance with Article 372 ABGB (Austrian Civil Code) in his effort to seek injunctive relief against the third-party disturber. The OGH ruled that the public action is not to be classified as in rem or as a criminal offence. If according to the case law of the ECJ (18.5.2006, C-343/04, *Land Oberösterreich/ČEZ*, ECLI:EU:C:2006:330) an injunction action arising from a property right is not an action arising from a "right in rem" within the meaning of Article 16 (1) (a) of the 1968 Brussels Convention or Article 24 (1) of the Brussels Ia Regulation, this must apply even more to a mere Publician action to seek injunctive relief (Article 372 ABGB).

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The judgement of 30.1.2018, 2 Ob 3/18g also concerned the interpretation of Article 24 (1). The OGH stated that, according to settled case-law, 24(1) - apart from rent and lease - only actions relating to immovable property are based on a right in rem and not merely on a personal (mandatory) right. It is irrelevant whether a contractual right is related to the consent to registration or - as in the case to be assessed - the consent to erase a title to property; in both cases, the claimant does not assert his right in rem in the property, but relies on his contractual relationship with the defendant. While the ECJ (C-417/15, *Schmidt/Schmidt*, ECLI:EU:C:2016:881) affirmed the application of Article 24(1) to an action for removal based on the invalidity of the undertaking underlying the entry of the defendant. However, the court justified this by stating that the invalidity of the title under Austrian law also led to the invalidity of the acquisition of property, and the claimant could, therefore, actually base his claim on his ownership of the property. This is not the case with respect to the contractual claim underlying the judgement, and Article 24(1), therefore, does not apply.
There are currently no (published) decisions on Article 31(1).

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 the prevailing opinion in Austria, Article 24(2) refers to Article 10 of the Austrian Private International Law Act (IPRG), which is why the actual administrative seat is relevant. On the other hand, it is occasionally argued that only the international procedural provision laid down in Article 75 JN should be applied; in this case, the action would primarily be brought at the formal seat, and the administrative seat would only be relevant when in doubt. According to some legal commentators, there should be a right to choose between Article 10 of the Austrian Private International Law Act (IPRG) and Article 75 of the Austrian Court Jurisdiction Act (JN) Even if the interpretation of Article 24(2) is controversial in legal writing, in practice, there are no cases in which the connection according to Article 24(2) would have caused problems, nevertheless, an adaptation of this rule towards an autonomous concept of domicile appears desirable.

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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?**

In practice, there are no issues with the interpretation of the new version of Article 24(2). No published judgements are currently available. The legal literature (see, for example, *Garber/Neumayr*, Europäisches Zivilverfahrensrecht (Brüssel I/IIa ua), *Herzig*, Jahrbuch Europarecht 2013 [2013] 211[220]) strongly criticises the ECJ's judgement in the GAT/Luk case. It should be noted that, in order to contest the invalidity of the patent, only the court having jurisdiction under Article 24(4) is competent to rule on the question of invalidity, whereas "pure" patent infringement proceedings are excluded from the scope of Article 24(4). It is debatable how the invalidity objection affects the infringement proceedings. In this exceptional case, does the raising of a substantive objection directly result in the lack of jurisdiction of the court seised? It is proposed that the infringement proceedings be stayed until a decision has been reached in the invalidity proceedings (to be instituted).

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.**

Under Austrian law, Article 24(5) covers the following measures and procedures:

- the actual enforcement measures,
- impugnment action under Article 36 of the Austrian Enforcement Code (EO) (it can be filed during the enforcement proceedings by the obligor against the judgement creditor at the granting court and serves to assert obstacles, which do not concern the claim but do not permit enforcement at the time - e.g. temporary or permanent waiver of enforcement, lack of maturity),
- the application for impugnation under Article 40 EO (which allows obliged entities to request the cessation of enforcement without bringing a preliminary action for impugnment),

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- third-party opposition in accordance with Article 37 EO (if items which are the property of a third party are seized, the third party has the option to oppose the seizure through third-party action),
- Actions arising from enforcement proceedings if they concern the effectiveness of an executive coercive measure,
- the enforcement complaint under Article 68 EO (which can be used to assert that one considers oneself to be aggrieved by the enforcement measure, in particular, by an official act of the enforcement organ or by the refusal of an enforcement act),
- Requests for deferment of the enforcement,
- Requests for suspension of enforcement,
- Requests for restriction of enforcement.

As regards such remedies, which raise substantive objections to the title to be enforced, the situation is complex. In Austria, this is done by an opposition petition in accordance with Article 40 EO (which can be used to request suspension of enforcement if the satisfaction of the claim or the deferment of the claim are supported by unobjectionable documents) or an opposition action under Article 35 EO (which can be used to assert facts which, after the creation of the enforcement title, have extinguished or hindered the claim evidenced therein, e.g. satisfaction, waiver, deferment). With regard to the opposition petition, the application of Article 24(5) is affirmed. As regards the opposition action, there are two scenarios: If a final decision on the existence of the title claim is made, Article 24(5) is not applicable, in particular, because this lies outside international jurisdiction. On the other hand, if, as a result of the remedy, only the enforceability of the title (in the Member State concerned) is eliminated, or if, in fact, only the actual enforcement is suspended, then this opens a path to subsumption under Article 24(5). In the judgement of the OGH of 18 October 2016, 3 Ob 174/16h (ECLI:AT:OGH0002:2016:0030OB00174.16H.1018.000), the OGH ruled that in the case of an enforcement of maintenance obligations by a maintenance creditor domiciled abroad, the international compulsory jurisdiction of Article 24(5) Brussels Ia Regulation is not applicable to an opposition claim used by the debtor to assert changed circumstances, which is why international jurisdiction must be determined in accordance with Article 3 of the EU Maintenance Regulation (formerly Article 5(2) of the Brussels Regulation). The OGH could have made it a little easier for itself here - with the same result: Brussel I bis is not applicable to maintenance claims. In the judgement of 7 June 2017, 3 Ob 89/17k (ECLI:AT:OGH0002:2017:0030OB00089.17K.0607.000), the OGH ruled that the jurisdiction of the courts of the enforcement state under Article 24(5) for opposition actions is not to be affirmed unreservedly, but depends on the

concretely asserted grounds of opposition, whereas actions for impugnment in any case fall under this jurisdiction. The objection asserted in this case within the meaning of the first sentence of Article 36 (1) EO, the suspensive condition contained in the title, that has not (yet) occurred that is just as enforcement-related as the (opposition) objection was extinguished by payment.

By contrast, Article 22(5) of the Brussels Regulation does not cover:

- proceedings for issuing provisional measures; proceedings for enforcing the provisional measures are subsumed under Article 24(5),
- the imposition of penalties (= fines to enforce unjustifiable actions),
- claims for damages for unjustified enforcement,
- claims for unjust enrichment, such as such as repayment of benefits to prevent enforcement proceedings,
- actions pursuing a claim (justified under Austrian law) for acquiescence to enforcement,
- actions for a negative declaration concerning the extinction of an enforceable claim for which enforcement proceedings have not yet been brought but have been threatened
- actions for surrender of the enforceable copy of the title,
- proceedings designed to prepare for or facilitate enforcement proceedings,
- proceedings for submitting and signing a list of assets,
- proceedings for issuing and revoking the certificate of enforceability,
- proceedings for issuing and revoking the European enforcement order,
- the supplementary title action pursuant to Article 10 EO (for example, in the case of a legal successor - the enforcement claim is determined in separate proceedings),
- the lien action (Article 258 EO, here the better (former) lien is determined if third creditors had the matter seized in the custody of a person other than the lien holder; the action grants a claim for preferential satisfaction from the proceeds of the matter in question).
- the third-party debtor action, because here too it is not a question of the effectiveness of an enforcement measure but rather whether the third-party debtor would have to pay the obliged entity
- action for interest (Article 368 EO), because its objective is the payment of interest due to non-performance of the obligation incumbent on the obligor;

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- actions arising from enforcement proceedings, but not affecting the effectiveness of a coercive measure, such as actions arising from transactions concluded by the receiver with third parties;
- the creditor's action for annulment, because it constitutes a disposition action taken by the debtor to impair the creditor's rights to be invalid vis-à-vis the creditor.

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?**

If items which are the property of a third party are seized, the third party has the option to oppose the seizure through third-party action. The prevailing view is that the scope of Article 24(5) is open.
In Austria, Article 24(5) is interpreted narrowly. In its judgement of 7 June 2017, 3 Ob 89/17k (ECLI:AT:OGH0002:2017:0030OB00089.17K.0607.000), the OGH ruled that the main reason for the exclusive jurisdiction of the courts at the place of enforcement of the decision under Article 24(5) is that it is only for the courts of the Contracting State in whose territory enforcement is to be or will be carried out to apply in that territory the rules governing the activities of the enforcement authorities. This compulsory jurisdiction may not be interpreted more broadly than its purpose requires, because it deprives the parties of the possibility of choosing between several jurisdictions, which would otherwise be available to them. Compulsory jurisdiction applies to enforcement proceedings on the basis of an existing title obtained in previous declaratory proceedings. The narrow interpretation finds is approved of in Austrian literature.

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?**

The internationality of choice-of-court agreements was discussed within the scope of application of the previous regulation in Austria. The subject of the controversy was the question, whether a link to a third country is sufficient or whether a link to another Member State is necessary in order to establish the required internationality. The provision did not apply to purely domestic matters. In its judgement of 1 August 2003, 1 Ob 240/02d (ECLI:AT:OGH0002:2003:0010OB00240.02D.0801.000), the OGH ruled that Article 23 Brussels it does not apply to a "domestic case" without a personal or factual international link due to a lack of "international reference". Accordingly, an agreement will be deemed to be ineffective if two parties domiciled in the same (Member) State (here: Germany) agree on a court in another Member State (here: Austria) without there being any foreign element in the dispute or any other legitimate interest in the choice of a foreign court. This decision was strongly criticized in legal literature (see, for example, the note by *Klicka*, JBl 2004, 187). According to the view expressed in legal literature, there is always a foreign element when the choice-of-court agreement excludes a place of jurisdiction in another Member State. This means that if forum prorogatum and forum derogatum are located in different Member States, this qualifies as an international element and Brussels I thus applies. In the judgement of 5 June 2007, 10 Ob 40/07s (ECLI:AT:OGH0002:2007:0100OB00040.07S.0605.000), the OGH expressly departed from the view and endorsed the view represented in the literature. In the judgement of 28 March 2017, 2 Ob 40/17x (ECLI:AT:OGH0002:2017:0020OB00040.17X.0328.000), the OGH argued that the case is not domestic if the claimant is in Germany and the defendant is in Austria, even if the claimant argued that she was staying (in a hotel) in Salzburg on a "daily basis".

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

There are no statistics of how many choice-of-court agreements have been concluded. Already, under national law, two persons not resident in Austria can agree that Austria has international jurisdiction over certain legal disputes between them. There is no need for any ties to Austria. A special need for legal protection, e.g. due to impossibility or disproportionate difficulty of pursuing litigation abroad or the lack of mutual recognition and enforceability, is also not necessary. As it has been possible for persons not domiciled in Austria to pick Austria as their international place of jurisdiction, we would not expect the number of concluded choice-of-court agreements to have increased.

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?**

In general, the formal requirements laid down in Article 25 and their interpretation do not pose practical difficulties. The only controversial issue in Austria is whether choice-of-court agreements drawn up in a foreign language are effective. This is the case, in particular, where the choice-of-court arrangement has been incorporated into standard terms and conditions (STC). The following is assumed: If the language in which the contract was negotiated and concluded differs from the language used to draw up the STC, the STC are effective in any event if they are drafted in a language understandable to the recipient; Otherwise, the STC must have been referenced in the language in which the contract was negotiated and concluded - an express reference to the choice-of-court clause contained in the STC, however, is not necessary - and the contracting party must have submitted an unqualified acceptance. The prevailing opinion is that - especially in international business transactions - the communication of the STC in English should suffice, especially if knowledge of this language can be expected

by the customers concerned to the extent necessary to understand the choice-of-court agreement. It is in any case sufficient if the user offers the other party the translation of the STC in the latter's native language, even if the translation offer is not accepted by the user's contractual partner.

It should also be noted that in practice the question, whether there is a business practice in the line of international business in which the parties operate can often only be proved by an expert's report or by obtaining information from local or international chambers of commerce, which can be time-consuming and costly.

There are some issues with the scope of the choice-of-court agreement. In the judgement, OGH 21 December 2017, 6 Ob 187/17v (ECLI:AT:OGH0002:2017:0060OB00187.17V.1221.000), the OGH stated that a jurisdiction clause in the articles of association of an Aktiengesellschaft (AG, public limited company) only covers the relationship between the AG and shareholders in their membership function ("shareholders as such"), but not also in the context of third-party transactions. An extension to include beneficiaries and/or obligors of financial instruments relating to shares in the company is also prohibited. A choice-of-court clause included in the articles of association can only - as the judgement points out - cover disputes between members (within the corporate body). If, on the other hand, a shareholder acts as a third party creditor - e.g. when asserting claims under capital market laws and regulations - or if these are even claims by investors without shareholder status, in the opinion of the OGH the jurisdiction is not accessible to a provision of the articles of association.

There is also a debate, whether it is permissible to monitor misuse with respect to choice-of-court agreements. In the judgment of 28 March 2018, 6 Ob 19/18i (ECLI:AT:OGH0002:2018:0060OB00019.18I.0328.000), the OGH seems to suggest such a possibility when it speaks of a disadvantage for "specific procedural reasons" and a "specific procedural consideration".

In its judgement of 3 April 2009, 1 Ob 53/19d (ECLI:AT:OGH0002:2019:0010OB00053.19D.0403.000), the OGH had to decide whether the phrase "Gerichtst. Wels", which was printed on an invoice in English in the German-language footer area between company register numbers and bank details, constituted an effective choice-of-court agreement. The phrase was in the German language. The OGH concurred with the view of the court of second instance that the muddled phrase "Gerichtst. Wels" lodged in small print in the footnote between the Austrian and the German VAT registration numbers does not satisfy the requirements for a clear

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and explicit reference to the desired conclusion of a choice-of-court agreement because rather than using the word "Gerichtsstand", "Gerichtszuständigkeit" or another relevant term for "jurisdiction", an (unusual) abbreviation was used which was also misspelled ("s" was missing).

In Austria, the views on the criteria are as follows:

Article 25(1)(a): The agreement is in writing where each party has submitted its declaration of intent, in a common document or in separate documents such as an exchange of letters, in writing, subject to electronic transmissions, which are a permanent recording of the agreement, are equivalent to the written form. It is, therefore, not sufficient for a choice-of-court clause to be located on the reverse side of a contract printed on the stationary of one of the parties, printed on the reverse side of a bill of lading or in a smaller font than the rest of the text in the footer below the contract text, which is otherwise only used to print the details of one of the parties (address, email, bank details, etc.). Material contractual provisions should not be hidden near the footers, because no one expects to find it there and this is not a customary business practice. Where the jurisdiction clause is contained in a text which does not form an integral part of the contract document or of the contract offer, it will take effect only if there is a clear reference to it in the contract; an inconspicuous hidden clause will thus not suffice. The written declarations do not require a handwritten signature for the choice-of-court agreement to be effective; in some cases, however, it is argued that this only applies if modern communication techniques require a waiver of the signature and such a waiver is customary. Therefore, no signature is required for telegrams, telexes or faxes. The written form requirement can also be fulfilled by a reference to the standard terms and conditions. Whether the STC have become a part of the agreement must be examined autonomously and strictly under EU law, but without excessive formalism. For a jurisdiction clause in the STC to be effective, reference must be made in the main contract to the GTC, although it is not necessary for the jurisdiction clause to be expressly referred to. The reference to the STC must be made in the contract in a clearly recognisable place and in such a way that the validity of the STC is apparent. The STC must also be structured in a way that makes them easy to read without unreasonable effort, whereby they may be written in small print. The mere handing over or attachment of the STC without corresponding reference in the contract text is, therefore, just as insufficient for the fulfilment of the formal requirement as the mere printing on the back of the contract or an invoice. However, the written form will be deemed to have been complied with if the parties expressly refer in the contract to a previous offer letter,

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which in turn refers to STC containing the jurisdiction clause. The STC must be communicated to the other party prior to the conclusion of the contract. It is not sufficient that the text of the STC, to which reference is expressly made, can easily be obtained upon request. A reference to STC which are available on a website is, therefore, not sufficient to include them in the contract. An explicit reference to the STC is not necessary if the terms and conditions in question have been the basis of the business relations between the parties for many years, i.e. if their validity corresponds to a custom established between them, or if the STC originate from a set of clauses commonly used in an industry, drawn up by a recognised organisation or body, which the parties must be aware of.

If the parties have first reached an oral agreement on the choice-of-court agreement, which is subsequently confirmed in writing or by electronic means by one of the parties within a reasonable time, the following shall apply: The parties must first agree in a legally binding manner on the place of jurisdiction when concluding an oral contract, whereby they may also agree on the validity of a clause on the place of jurisdiction contained in the STC if the STC of the other party are already known or available. It is, therefore, not sufficient for one party to have referred to its STC during contract negotiations, but for these to be received by the other party at the time of confirmation or at a later date. The oral agreement must then be confirmed in writing or electronically by one of the parties, whereby the written or electronic confirmation must, of course, fully comply with the prior agreement between the parties. Which of the parties confirms the agreement is irrelevant; the role of the party cannot typically be determined ex ante. It can thus also be confirmed by the party invoking or proposing it. The same requirements apply to the content of the confirmation as to the written contract on both sides. The confirmation of the choice-of-court agreement concluded orally must take place within a reasonable time, although the Regulation does not contain any provision to that effect.

Article 25(1)(b): Practices are behaviours established in a longer business relationship between the parties themselves rather than in general which the parties routinely use, for example, to conclude a contract. The emergence of a practice presupposes an actual practice, i.e. a certain frequency of contracts concluded on the basis of the STC with the choice-of-court clause, so that the parties can rely on a form customary between them. It is not absolutely necessary for the creation of a custom that the contracts always relate to the same type of service or substantially similar goods. The practice must exist at the time when the choice-of-court agreement is concluded; it is not sufficient that it exists at the time when the action is brought.

Article 25(1)(c): A choice-of-court agreement is deemed to exist where

- the parties concluding the choice-of-court agreement participate in international trade, whereby the formal status of a business is not decisive; rather, members of the liberal professions are also covered if they are involved in international trade similar to businesses,
- the transaction serves a commercial or professional purpose,
- the form corresponds to a commercial practice, i.e. a factual usage in the line of business in which the contracting parties are active; there is no generally applicable, uniform business practice applicable to all lines of business;
- business practice is customary in cross-border trade, although it does not have to exist in all Member States,
- business practice is customary in the industry, i.e. it is known and respected by a (broad) majority of persons in the sector concerned,
- the parties know or ought to have known the business practice; the parties are presumed to have known the business practice if they have previously had business relations with each other or with other parties to the contract in the line of business in question or if, in that line of business, actors generally and routinely behave in a specific way when concluding a particular type of contract and it is, therefore, sufficiently well-known to be regarded as an established practice.

No specific form of disclosure is required. It is therefore not necessary to prove commercial practice by means of standard forms with a choice-of-court clause from professional associations or organisations.

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?**

While the Austrian theory and case law emphasise that an effective agreement assumes an actual agreement between the parties on the place of jurisdiction and that compliance with the form when examining the question, whether there is an agreement is only an indication of a consensus between the parties, however, there are no (published) decisions to the effect that the agreement of will was denied if the formal requirements were complied with.

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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?**

See answer to question 47.

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?**

See answer to question 47.

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

There are currently no (published) judgements involving the term "null and void". The interpretation is controversial in Austrian legal writing. In Austria, it is assumed that this is a universal reference to the law of the forum, including its conflict of laws rules, so that referrals back and forth are also permissible. The conflict of laws provisions thus determine to what extent the provisions of the lex fori or the contract statute are relevant. Although Article 25(1) refers to the conflict of laws provisions of the forum prorogatum only with regard to the substantive nullity of the choice-of-court agreement, the concept of "null and void" cannot be interpreted narrowly; it covers all circumstances which may lead to the invalidity or non-binding nature of the choice-of-court agreement - such as the treatment of conventional defects of will. This term also covers the lack of capacity to conclude choice-of-court agreements, and the reference thus also applies to questions of legal capacity, business capacity and capacity to act. It can be concluded from the wording of Article 25(1) that the substantive validity of the agreement is to be presumed, so that the burden of proof and presentation of the invalidity lies with the party invoking it. Substantive nullity, however, does not include the question of the existence of simple consent of the parties; in this respect, Article 25 applies.

In Austria, it is assumed that the result of the new regulation will be a tripartite division of the issues to be assessed in connection with a choice-of-court agreement:

1) Form and consensus are determined by Article 25 of the Brussels Regulation;
2) Effectiveness conditions, the absence of which will result in "null and void" must be assessed in accordance with the lex fori prorogati;
3) Effectiveness conditions, which are not included in (1) and (2) have to be assessed in accordance with the lex causae.

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?**

According to the prevailing view in case-law and legal theory, the effectiveness of the choice-of-court agreement should be examined separately from the main contract; no further criteria have been formulated by case-law and legal theory.

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 the judgement of 28 October 2016, 9 ObA 118/16t (ECLI:AT:OGH0002:2016:009OBA00118.16T.1028.000), the OGH, in accordance with the prevailing legal opinion and case law, held that the concept of recourse to the procedure must be determined autonomously under Union law. This means any defence which is directly aimed at defending a claim, so that the plea cannot be raised until the opinion which, under the national rules of procedure, is to be regarded as the first plea before the court seised has been delivered. It is, therefore, necessary to assess, in accordance with national law, which claim in a particular case is to be regarded as the first defence submitted by the defendant in which the remedy under Article 26(1) of the Brussels Regulation applies. In Austria, this is controversial in connection with dunning. In the aforementioned judgement, the OGH states that even an objection to an order for payment justified on the merits of the case does not give rise to an intervention in the proceedings under Article 26 of the Brussels Regulation if no statement of reasons was necessary under the relevant procedural rules. In the district court dun-

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ning proceedings and in the labour court proceedings, an objection under Austrian procedural laws does not require a justification. It is, therefore, not to the detriment of a defendant in these types of proceedings with respect to entering an appearance without raising an objection if the defendant, nevertheless, raises a well-justified objection without already asserting the international jurisdiction of the court. The defendant can raise the objection for lack of jurisdiction in the first preparatory pleading or, at the latest, in the first oral hearing. Some legal commentators are critical of this; they argue that a well-founded objection, even if it does not constitute an appearance by the defendant (i.e. in the district court dunning proceedings and in the labour court proceedings), is sufficient because of the factual submission it makes to the procedure such an objection. On the other hand, an unfounded objection to an order for payment issued in district court proceedings and/or in labour court proceedings cannot be interpreted as an entry of appearance in the proceedings. In the judgement of 19 December 2018, 3 Ob 177/18b (ECLI:AT:OGH0002:2018:0030OB00177.18B.1219.000), the OGH states (in accordance with legal writing and case-law) that an express denial of international jurisdiction is not necessary (even under Article 26(1) of the Brussels Regulation 2012), but that it is sufficient if it follows from the defendant's submission that he wishes to plead the defect which lies in the fact that the court seised does not have jurisdiction under the international rules of jurisdiction. A more detailed explanation of the complaint is not necessary.

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).**

National law in Austria deviates from the provisions of Brussels I bis. Under Austrian law, the action for performance generally supersedes the mere action for a declaration. Since the legal protection sought by the declaratory claimant is also satisfied when the action for performance is brought to a conclusion, the more comprehensive procedure is carried out. Despite the different view, the application of Article 29 et seq. does not pose any difficulties in Austria.

In Austria, the OGH adopted "the same cause of action" in the following cases:

- between an actio negatoria and an actio confessoria directed towards the adversarial opposite (OGH 15.12.1997, 1 Ob 60/97y ECLI:AT:OGH0002:1997:0010OB00060.97Y.1215.000);
- between an action brought by a business for a declaration that a commercial agent's contract has been validly terminated and an action brought by the commercial agent for damages or compensation (OGH 25.2.1999, 6 Ob 139/98d ECLI:AT:OGH0002:1999:0060OB00139.98D.0225.000);
- between an action for a negative declaration and an action for performance filed at a later point in time (OGH 15.07.2011 8 Ob 149/10k ECLI:AT:OGH0002:2011:0080OB00149.10K.0715.000);
- between two actions based on the same "master agreement" (OGH 13.06.2001 7 Ob 117/01h ECLI:AT:OGH0002:2001:0070OB00117.01H.0613.000);
- between two actions for injunctive relief brought in different Member States for infringement of a Community trade mark, if they are based on the same facts, even if further different claims (e.g. on publication of a judgment) are pursued alongside them. (OGH 16.12.2003 4 Ob 58/03p ECLI:AT:OGH0002:2003:0040OB00058.03P.1216.000);
- between the contractor's claim for payment of wages and the commissioning party's claim for reimbursement as a result of a change and damages for defective performance (OGH 26.04.2005 4 Ob 60/05k ECLI:AT:OGH0002:2005:0040OB00060.05K.0426.000).

In Austria, the OGH denied "the same cause of action" in the following cases:

- between trademark infringement proceedings in Austria and opposition to trademark registration in Germany (OGH 28.09.2006 4 Ob 118/06s ECLI:AT:OGH0002:2006:0040OB00118.06S.0928.000);
- between proceedings alleging that a contract for the assignment of shares was a fictitious contract without real content and thus void, and proceedings concerning a reduction by more than half, and where malicious intent and immorality in relation to the contract of assignment are asserted. (OGH 5.8.2009, 6 Ob 122/09y ECLI:AT:OGH0002:2009:0060OB00122.09Y.0805.000);
- between main proceedings and provisional measures (OGH 15.02.2007 6 Ob 266/06w ECLI:AT:OGH0002:2007:RS0121816).

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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?**

Whether an Austrian court is seised depends on the circumstances of the individual case. To bring a case before an Austrian court, for example, the (typically) short duration of the proceedings can be cited, while the high court fees are an argument against.

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)?**

Article 32(1)(a) applies to the determination of the time in the event of an action being brought in Austria. After that, lis pendens occurs at the same time the court is seised. The receipt of the document at the entry point of the court seised qualifies as filing before the court in accordance with Article 232(1) ZPO. It is, therefore, not sufficient to send the complaint by throwing the document into a letterbox, by handing it over at a post office or by handing it over to a messenger service, etc. The loss of the claim or delays in the postal or other means of transmission prior to its acceptance by the court shall therefore be borne by the sender. It is also not sufficient for the action to enter the "sphere of the court", i.e. the court's area of jurisdiction, for example, by holding it ready for collection in the court's P.O. box at the post office or by depositing it in the court's enema box. Rather, the actual arrival of the claim (after picking up the claim from the post office or the removal of the inbox, etc.) at the entry point of a court is decisive. If the claim is later lost (permanently or temporarily) in the entry office or elsewhere in

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court, this is not a problem. Documents received by the court must, in principle, be received by the official at the entry agency. Judges and other court employees (outside the entry office), on the other hand, are not authorised to accept applications (Article 99(1) Geo). The fact that a claim is received by another office or department of the court or is handed over to a court clerk, a judicial officer, a trainee lawyer, a candidate judge or a judge does not mean that the claim is handed over with legal effect. These persons must, however, hand over a (nevertheless) accepted complaint to the entry office as soon as possible. Only then will the action be deemed to have been brought effectively. The opening hours of the entry office cannot therefore be circumvented by handing it in to (any) court person.

If an action is postponed for improvement and then duly re-introduced within the set period of grace, the court is pending from the original date of receipt of the action not duly filed. It is disputed whether lis pendens within the meaning of Article 32(1)(a) occurs if the required number of equivalences are lacking (equivalence is understood to mean the copy of the action for the defendant). These copies are identical to the original [for the judicial act].

Electronic entries are deemed to have been made in court if their data have been received in full by Bundesrechenzentrum GmbH. The federal computer centre thus has the function of an upstream entry point. If it is envisaged that the submissions are to be forwarded via a transmitting agency, and if they have actually arrived in their entirety at Bundesrechenzentrum GmbH in this way, they shall be deemed to have been submitted to the court at the time at which the transmitting agency reported back to the submitter that it had taken over the data of the submission for forwarding to Bundesrechenzentrum GmbH.

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?**

If a substantive motion is filed only during the proceedings (in the form of an extension or amendment of a statement of claim or an interim motion for a declaratory judgment), the case shall become pending before the court with the assertion at the oral hearing or, in the case of a written assertion, with the receipt of the pleading at the court.

Although the parties are required to submit all the facts and evidence at the beginning of the proceedings, Article 179(1) ZPO grants them the procedural right to continue to submit new allegations of fact and to request the admission of evidence until the end of the oral proceedings. From then on, new facts or allegations can no longer be submitted. In accordance with the second sentence of Article 179 ZPO, however, new arguments of fact are no longer to be considered if, in particular, with regard to the discussion of the arguments of fact and of law, they were not brought forward earlier intentionally or negligently and if their admission would considerably delay the discharge of proceedings.

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))?**

There are no statistical data available to answer this question.

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?**

Legal writers point out that the new regulation does not completely prevent the risk of misuse. A party may - even if an action has already been brought against it - bring an action in another Member State, known for its long duration, in which it bases the jurisdiction of the court seised on an exclusive choice-of-court agreement (allegedly concluded). In order to address this problem, it is argued that a mere unsubstantiated assertion of the existence of an exclusive choice-of-court agreement does not oblige the court first seised to stay proceedings. This must apply because otherwise this would result in "reversed torpedoes". A party could, by instituting proceedings before another court and asserting the existence of an exclusive choice-of-court agreement which, in reality, does not exist, force the court first seised to stay the proceedings. It, therefore, seems reasonable that at least a certain initial probability must exist for the existence of an exclusive choice-of-court agreement.

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?**

In Austria, the provisions of Articles 33 and 34 are generally welcomed. The criticism is that the provisions are rather complex and their application will likely cause problems. It remains to be seen whether there will be any approximation of uniform standards for the exercise of the discretion which they confer on the courts of the Member States.

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?**

The last sentence of Recital 24 is of particular importance in Austria. In Austria, it is argued with respect to Brussels I that, if the defendant is domiciled in a Member State, the general provisions on jurisdiction would apply; however, for reasons of international fairness - Article 22 Brussels I also applies to parties domiciled in third countries - this Article will also apply in a mirror image if the decisive criterion of jurisdiction under Article 22 Brussels I is in a third country. Accordingly, the court having jurisdiction under Article 2 or Article 5 et seq. of the Brussels Regulation, in particular, if the third country has a corresponding compulsory jurisdiction in its law and would refuse the recognition and enforcement of the judgement from the state having jurisdiction according to Article 2 et seq. of the Brussels I Regulation, must reject the action on the grounds that, analogous to Article 22 of the Brussels Regulation, the courts of the third country have international (exclusive) jurisdiction. The OGH (25 April 2001, 3 Ob 267/00m ECLI:AT:OGH0002:2001:0030OB00267.00M.0425.000) denies such a reflex effect of Article 22 Brussels I. In the case of an action for payment of a rent for a field situated in a third country (then Hungary), the OGH justified this by stating that a denial of Austrian international jurisdiction would lead to an unjustified impairment of the rights of the foreign creditor who wishes to enforce a pecuniary claim against an Austrian in Austria and, therefore, has to execute the enforcement in Austria as a whole. In any case - according to the OGH - Austrian jurisdiction should be given, despite the fact

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that the property is situated in a third country, if, as in the present case, a judgment given in the land in which the property is situated does not apply in Austria could be.

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 answer to question 56.

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 interpretation of Article 35 is controversial in legal writing. Debatable is

- whether the term of provisional measures can only subsume those measures the adoption of which presupposes particular urgency, and
- whether orders of acquiescence and injunctions should also be subsumed under the concept of provisional measures.

Nevertheless, the interpretation in case law poses hardly any problems.

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?**

The term "real connecting link" has an enforcement law subtext. The "real connecting link" therefore exists only to the courts of the Member State in whose territory the provisional measure is to be taken. The party at risk shall indicate in the application the property which is located in the State in which the provisional measure is to be taken and which will enable the provisional measure to be implemented. However, in order to prevent the opponent of the party at risk from becoming subject to excessive court proceedings, the enforcement of the measure must be promising; a merely symbolic satisfaction of the party at risk, therefore, not sufficient to establish international jurisdiction under Article 31 of the Brussels Regulation in conjunction with autonomous law.

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In the case of provisional measures relating to a specific movable tangible or immovable object, the real link exists if the object concerned is located in the State of the court seised. The decisive factor is, therefore, the objectively determinable location.
Where the provisional measure concerns a claim, there is a real link to the State in which the third-party debtor is domiciled. In the case of current account claims of the opponent of the party at risk against its bank, there is, therefore, a real link to the country in which the bank is domiciled.
When an act is provisionally ordered, there is a real link to the Member State in which the act is to be carried out. If provisional orders of acquiescence and injunctions are considered to be covered by the concept of provisional measure within the meaning of Article 31 of the Brussels Regulation, the provisional order of acquiescence or injunctive relief has a real link with the Member State in which the act is to be acquiesced in or omitted. If, for example, a specific local act is to be prohibited, the courts of the State to whose territory the local link exists will have jurisdiction. If, on the other hand, the opponent of the party at risk is prohibited from performing general acts and no local link can be established, the provisional measures may be sought in any Member State.
In the case of payment orders, repayment of the amount awarded must be guaranteed and the order may only relate to items which are or should be located within the local jurisdiction. The question as to when repayment of the awarded amount can be considered as guaranteed is controversial in Austria. It is generally assumed that repayment of the amount paid can only be regarded as guaranteed if the amount to be paid to the party at risk is deposited in court or if the party at risk has to provide security - e.g. in the form of a bank guarantee - before the amount is paid out.
The following issues are controversial:

- Is a security also required in non-contractual legal arrangements?
- Is a time limit on the security permissible?
- If a waiver of a security permissible?

In Austria, it is argued with regard to Brussels I bis that the additional conditions "formulated" by the ECJ are no longer necessary within the scope of application of the recast version. The ECJ has challenged them with the view of restricting the recourse to national jurisdictional standards for interim measures, which Brussels it has made possible. It should be prevented that provisional measures, which have not been adopted by the potential or actual court having jurisdiction as to the substance of the matter under European procedural law, but which have been obtained under national jurisdiction, must be given cross-border effect through mandatory recognition and enforcement. Under the Brussels I bis regime, only provisional measures adopted by the

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court having jurisdiction as to the substance may be recognised and enforced in other Member States. Provisional measures adopted on the basis of national competences are not (anymore) marketable in other Member States. This eliminates the need for protection of the (other) Member States and their nationals which the ECJ sought to satisfy with its Van Uden & Co case.

Relationship with other instruments

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

There are no statistics available that would help to answer this question. There are no relevant judgements available, or they have not been published.

CHAPTER III

Recognition and Enforcement

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

    There are no statistics or published judgements available. The courts asked indicated that such proceedings are hardly ever carried out in Austria.

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 Austria, a judicial enforcement approval procedure is required; the enforcement is carried out by court employees. There are regular training courses and advanced training courses available.

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?**

    In Austria, district courts have jurisdiction over enforcement approval and enforcement proceedings. Local jurisdiction is determined in accordance with Article 18 EO. The rules on jurisdiction are as follows:

    - if the enforcement is carried out on immovable property located in Germany and registered in a public book or on rights registered thereon, the district court at which the deposit of the immovable property is located,
    - if the enforcement is carried out on property located in the inland but not registered in a public beech, immovable or legally declared immovable, on ship mills located

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there or on buildings erected on ships, the district court in whose district the property is located at the beginning of the enforcement, namely in the case of ship mills and buildings erected on ships,

- in the case of the enforcement of claims, insofar as they are not secured in the books, the district court at which the obligor has his general place of jurisdiction in disputes and, if such a court is not justified in Germany, the district court in whose district the domicile, registered office or residence of the third-party debtor is located or, if the latter were unknown or not located in Germany, the pledge granted for the claim is located;
- in all other cases, the domestic district court in the district in which the objects at which the enforcement is directed are located at the beginning of the enforcement or, in the absence of such objects, the district court in the district of which the first act of enforcement is actually to be performed.

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?**

In Austria, there are special provisions in the Enforcement Code (EO) which take account of the provisions of Brussels I bis. Article 404 EO governs the adaptation of foreign enforcement titles. Paragraph 1 provides that foreign instruments of enforcement, which contain a measure or order which is not provided for in the Austrian legal order are to be adapted ex officio, upon application or, insofar as this results from a directly applicable international legal act, at the same time as the authorisation of the enforcement is granted, to a measure or order provided for in the Austrian legal order with comparable effects and which pursues similar objectives and interests. The adaptation may not result in effects going beyond those provided for in the law of the Member State of origin. An application is not provided for under Article 54, so that the foreign decision is also to be amended ex officio. As is apparent from the reference to the enforcement order, the adaptation is made at the same time as the enforcement order. Before the decision on the adaptation is taken, the judgement creditor and the obligor may be heard in accordance with paragraph 2. This is an exception to Article 3 EO because of the joint decision with the enforcement permit, according to which a decision is to be taken on the application for the permit of enforcement without a prior oral hearing and without the consent of the opponent. The adaptation decision interferes

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with the decision of the civil-law declaratory proceedings and should therefore do justice to the right to a fair hearing and fairness. In this sense, both the obligor and the judgement creditor should be given the opportunity to comment on the adaptation and if necessary, to respond. Where adjustments have been made without consulting the debtor or the judgement creditor, it is necessary to provide them with an opportunity to appeal against such adaptations. A recourse does not work here because new facts or allegations can no longer be submitted. In accordance with the provisions on provisional injunctions, the party who was not heard before the decision was taken is therefore given the opportunity to lodge an objection. Paragraph 4 provides that an objection must be lodged within fourteen days of notification of the decision. Any objection raised as a result will be heard orally to determine the lawfulness of the adaptation and will be decided by resolution.

Article 418 EO contains regulations for the refusal procedure under Article 46. Accordingly, the grounds for refusal must be invoked in the dismissal application. In the opinion of the Austrian legislator, a time limit for the assertion of the grounds for refusal may be codified; this is eight weeks after service of the enforcement order. If grounds for refusal are based on facts, which arose only after service of the enforcement order or of which the obligated party did not become aware due to an unforeseen or unavoidable event through no fault of its own or due to a lesser degree of oversight, the period shall begin on the day on which the obligated party was able to become aware of these facts. The obliged party must cite those circumstances in its application for dismissal and indicate the means by which it can establish its prima facie case. Paragraph 4 provides that a further appeal against a decision to appeal against a decision refusing enforcement or rejecting such an application is not inadmissible because the court of second instance has upheld the contested decision in its entirety. This will ensure that this is in line with the exequatur procedure.

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?**

There is no statistical analysis available to answer this question.

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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?**

In Austria, the mingling of European and national standards does not cause any special problems. Individual questions are controversial in legal writing. For example, it is debatable when an application for refusal of enforcement is made, whether only the grounds for refusal relied on in the application are to be examined, or whether the court can or even must also take other grounds into account. It is largely argued that a distinction should be made between the individual grounds for refusal. Reasons which serve the interests of the state and which are beyond the control of the parties - such as a manifest breach of public policy - must be exercised ex officio, i.e. irrespective of whether the applicant invokes this ground for refusal. An infringement of a place of jurisdiction laid down in Article 24 must also be taken into account ex officio because exclusive places of jurisdiction are excluded from the parties' disposition. Furthermore, the grounds for refusal in Article 45(1)(c) and (d) - i.e. if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed or with an earlier judgment given in another Member State or in a third State, which fulfils the conditions for its recognition - must be exercised ex officio. In contrast, Article 45(1)(b) and Article 45(1)(e)(i) concern aspects which the parties may dispose of (e.g. by not exercising the right to be heard or by refraining from pleading lack of jurisdiction); for this reason, the application of the principle of negotiation seems appropriate here; an examination is, therefore, not carried out ex officio, but only on condition that the applicant invokes the ground of refusal.

It is also disputed whether grounds other than those referred to in Article 45 may also be invoked in the proceedings for refusal of enforcement. According to the views held by some legal writers, only the grounds for refusal laid down in Article 45 can be examined in the context of the proceedings for refusal of enforcement; others argue that other grounds leading to refusal of enforcement under national law can also be invoked in the proceedings for refusal of enforcement. According to the views of other legal writers, other grounds can only be invoked in proceedings for refusal of enforcement if they are undisputed.

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

    See the answer to question 14.

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

    There are no statistics or published judgements available.

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?**

    There are no statistics or published judgements available.

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?**

    There are no statistics or published judgements available.

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

    In Austrian law, the prohibition of révision au fond was recognised before Austria joined the EU (OGH of 23 February 1982, 3 Ob 185/92). There are no violations of this rule.

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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?**

There are no statistics or published judgements available.

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?**

There are no statistics or published judgements available.

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?**

Annex (1)(q) had an impact in Austria, in particular, with respect to arbitration agreements between consumers and businesses. In Austria, the conclusion of an arbitration agreement with the consumer must be negotiated in detail; with regard to the content of the arbitration agreement, there is no objection to the use of an arbitration agreement template signed by the consumer, as long as there is no undue departure from the dispositive norms of the ZPO. According to the views held by the Austrian legal writers, the use of arbitration agreements is also recognised by Directive 93/13/EEC, which only considers those arbitration agreements to be invalid if they contain unfair provisions. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The Annex to the Directive contains an indicative and non-exhaustive list of terms which may be considered unfair. Terms which have the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract. Unfair terms are strictly invalid for the consumer. In this context, Article 617 ZPO should be mentioned. The provision regulates arbitration agreement between a business and a consumer.

In particular, it states that such agreements can be effectively concluded only for disputes that have already arisen. Arbitration agreements involving a consumer must be included in a document signed by the consumer. Other agreements than those relating to the arbitration may not contain this. In the case of arbitration agreements between a business and a consumer, the consumer must be given written legal instructions on the essential differences between arbitration proceedings and court proceedings prior to the conclusion of the arbitration agreement. Arbitration agreements between businesses and consumers must specify the seat of the arbitral tribunal. The arbitral tribunal may only meet at a different venue for an oral hearing and taking of evidence if the

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consumer has consented to it or if the taking of evidence at the seat of the arbitral tribunal presents considerable difficulties. Where the arbitration agreement has been concluded between a business and a consumer and where the consumer is not domiciled, habitually resident or employed in the State in which the arbitral tribunal is situated, either at the time when the arbitration agreement is concluded or at the time when an action is brought, the consumer shall comply with the arbitration agreement only if the consumer invokes it. An arbitral award may also be set aside if, in arbitration proceedings in which a consumer is involved, mandatory legal provisions have been infringed, the application of which could not be waived by the parties' choice of law, even in the case of facts with foreign implications.

If the arbitration proceedings between an entrepreneur and a consumer have taken place, the arbitral award shall also be set aside if the written legal instruction has not been given.

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

There are hardly any examples in Austrian case law. There are decisions in which an agreement has to be applied because the temporal scope of the regulation is not open (see, for example, OGH of 25 March 1998, 3 Ob 76/98t, ECLI:AT:OGH0002:1998:0030OB00076.98T.0325.000). In literature, the following example is given in particular: If the material scope of the Brussels I bis is not opened because there is no civil and commercial dispute, then any existing international treaty can be used. Since the concept of civil and commercial matters is to be interpreted autonomously under Union law, it may differ from that used in international agreements. There is currently no Austrian court judgement available.

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

There are no relevant judgements available in this regard. Three problems are mentioned in legal writing:

- Although the comparison of benefits preserves the *effet utile* of Union law with Brussels I bis establishing the minimum standard, the legal certainty and predictability of the courts of jurisdiction is considerably impaired, although the ECJ in the above-mentioned case specifically emphasises the postulate of legal certainty and predictability of the courts of jurisdiction.
- Member States are forced to violate their obligations under international law. This is especially the case where a special convention contains an obligation not to recognise a foreign judgment, the provision does not seem to apply because the application of the special convention must not affect the principle of the free movement of judgments and the recognition and enforcement of the foreign judgment cannot therefore be refused.
- A comparison of benefits is difficult in the context of lis pendens.

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

From the Austrian point of view, the treaties include the following:

Revidierte Rheinschifffahrtsakte (Mannheimer Akte) idF des Revisionsübereinkommens vom 20. 11. 1963, Österreich hat seit 2004 Beobachterstatus	Revised Rhine Navigation Act of 17 October 1868 as amended by revising convention of 20 November 1963, Austria has had observer status since 2004
Abkommen zur Vereinheitlichung von Regeln über die Beförderung im internationalen Luftverkehr (Warschauer Abkommen), idF des Haager Änderungsprotokolls vom 28.9.1955, des Zusatzabkommens von Guadalajara	Convention for the Unification of Certain Rules Relating to International Carriage by Air (warsaw convention) as amended by The Hague Protocol of Amendment of 28.9.1955, the Supplementary Agreement of Guadalajara of 18.9.1961, the Protocol of

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vom 18.9.1961, des Protokolls von Guatemala-Stadt vom 8.3.1971 sowie der Zusatzprotokolle von Montreal vom 8.3.1975	Guatemala City of 8.3.1971 and the Additional Protocols of Montreal of 8.3.1975
Londoner Abkommen über deutsche Auslandsschulden	The London Agreement on German External Debts
Haager Übereinkommen über das Verfahren in bürgerlichen Rechtssachen (Haager Prozessübereinkommen	(Hague) Convention of 1 March 1954 on civil procedure
(Pariser) Europäisches Niederlassungsübereinkommen (Europäische Konvention über Niederlassung); Österreich hat das im Rahmen des Europarates vereinbarte Übereinkommen zwar unterzeichnet, aber nicht ratifiziert	(Paris) European Convention on Establishment Austria has signed the Convention agreed within the framework of the Council of Europe, but has not ratified it.
Genfer Übereinkommen über den Beförderungsvertrag im internationalen Straßengüterverkehr (CMR) idF des Protokolls vom 5.7.1978	Geneva Convention on the Contract for the International Carriage of Goods by Road as amended by the protocol of 5 July 1978
Europäisches Übereinkommen über die internationale Beförderung gefährlicher Güter auf der Straße (ADR)	The European Agreement concerning the International Carriage of Dangerous Goods by Road
Haager Unterhaltsvollstreckungsübereinkommen über die Anerkennung und Vollstreckung von Entscheidungen auf dem Gebiet der Unterhaltspflicht gegenüber Kindern (HUVÜ 1958)	Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children
(Pariser) Übereinkommen über die Haftung gegenüber Dritten auf dem Gebiet der Kernenergie (Atomhaftungskonvention) idF des Zusatzprotokolls vom 28. 1. 1964, des Protokolls vom 16.11.1982 (Pariser Übereinkommen 1982) und des Protokolls vom 12.2.2004; Brüsseler Zusatzübereinkommen vom 31.1.1963 (Österreich hat das Stamm-Übereinkommen und die Protokolle von 1964	Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 (Paris Convention) as amended by the Additional Protocol of 28. 1. 1964, the Protocol of 16.11.1982 (Paris Convention 1982) and the Protocol of 12.2.2004; Brussels Supplementary Convention of 31.1.1963

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u 1982 zwar unterzeichnet, bisher jedoch nicht ratifiziert)	(Austria has signed the original Convention and Protocols of 1964 and 1982, but has not yet ratified it)
Übereinkommen über die Zusammenarbeit zur Sicherung der Luftfahrt „EUROCONTROL“ idF des Protokolls vom 12.2.1981	International Convention relating to Cooperation for the Safety of Air Navigation of 13 December 1960 "EUROCONTROL" as amended by the protocol of 12 February 1981
Haager Übereinkommen über die Zuständigkeit der Behörden und das anzuwendende Recht auf dem Gebiet des Schutzes von Minderjährigen (Haager Minderjährigenschutzübereinkommen)	(Hague) Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants
Übereinkommen über die Eintragung von Binnenschiffen samt Protokoll Nr. 2 über die Sicherungsbeschlagnahme und die Zwangsvollstreckung betreffend Binnenschiffe	Convention on the registration of inland navigation vessels including Protocol No. 2 annexed to the Convention concerning Attachment and Forced Sale of Inland Navigation Vessels.
Brüsseler Internationales Übereinkommen zur Vereinheitlichung von Regeln über die Beförderung von Reisegepäck im Seeverkehr, Österreich hat das Übereinkommen zwar unterzeichnet, aber bisher nicht ratifiziert; das Übereinkommen ist auch noch nicht in Kraft getreten	Brussels International Convention fort he unification of certain rules relating to carriage of passenger luggage bay sea, Austria has signed the Convention but has not yet ratified it; the Convention has not yet come into force
Brüsseler Internationales Übereinkommen zur Vereinheitlichung von Regeln über Schiffsgläubigerrechte und Schiffshypotheken; Österreich hat das Übereinkommen zwar unterzeichnet, aber bisher nicht ratifiziert	International Convention for the unification of certain rules relating to maritime liens and mortgages; Austria has signed the agreement but has not yet ratified it.
(Baseler) Europäisches Übereinkommen über Staatenimmunität	European Convention on State Immunity

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(Münchener) Übereinkommen über die Erteilung europäischer Patente (Europäisches Patentübereinkommen – EPÜ) idF der Revisionsakte vom 29. 11. 2000 (EPÜ 2000) samt Protokoll vom 5. 10. 1973 über die gerichtliche Zuständigkeit und die Anerkennung von Entscheidungen über den Anspruch auf Erteilung eines europäischen Patents (Anerkennungsprotokoll)	Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 as amended by (the Act revising Article 63 EPC of 17 December 1991 and) the Act revising the EPC of 29 November 2000 including the protocol of 5 October 1973 on Jurisdiction and the recognition of decisions in respect of the right to the grant of a European patent", commonly known as the "Protocol on Recognition"
Hamburger UN-Übereinkommen über die Beförderung von Gütern auf See	United Nations Convention on the Carriage of Goods by Sea (The "Hamburg Rules")
Übereinkommen über den Internationalen Eisenbahnverkehr (COTIF) mit Anhang A: Einheitliche Rechtsvorschriften über die Internationale Eisenbahnbeförderung von Personen und Gepäck (CIV) und Anhang B: Einheitliche Rechtsvorschriften für den Vertrag über die Internationale Eisenbahnbeförderung von Gütern (CIM)	The Convention concerning International Carriage by Rail (COTIF) with annex A Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) and annex B Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM)
Europäisches Übereinkommen über die Anerkennung und Vollstreckung von Entscheidungen über das Sorgerecht für Kinder und die Wiederherstellung des Sorgerechts (Europäisches Sorgerechtsübereinkommen)	The 1980 European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children
Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung (HKÜ)	(Hague) Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
Haager Übereinkommen über die Zuständigkeit, das anzuwendende Recht, die Anerkennung, Vollstreckung und Zusammenarbeit	(Hague) Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

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auf dem Gebiet der elterlichen Verantwortung und der Maßnahmen zum Schutz von Kindern (KSÜ)	
Montrealer Übereinkommen zur Vereinheitlichung bestimmter Vorschriften über die Beförderung im internationalen Luftverkehr	Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention)

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, there are no (published) judgements involving delineation issues.

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

No, there are no (published) judgements involving these provisions.

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