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

QUESTIONNAIRE
for National Reports

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CHAPTER I

Application of the Regulation – in general

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

   In the UK, not all judgments are published. Official legal information on authorities is provided by the :

   - Official Law Reports published by the ICLR (https://www.iclr.co.uk/)
   - Weekly Law Reports (WLR) also published by the ICLR (https://www.iclr.co.uk/browse/26)
   - All England Law Reports (All ER) published by Butterworths/Lexis, and
   - other specialised publications (such as, for the purposes of the Brussels Ia Regulation) the Lloyd's Law Reports, published by Informa Professional

   Transcripts of some judgments of the highest courts are freely available online on the following databases:

   - the BAILII Databases (https://www.bailii.org/)
   - The judiciary website (https://www.judiciary.uk/judgments/)
   - The website of the Supreme Court (only UKSC) (https://www.supremecourt.uk/decided-cases/index.html) (since 2009)
   - House of Lords Website (http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm) (1996-2009)

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

   Please refer to our answer to question 5.

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

   It is generally agreed that the Recast Regulation has brought about significant reform regarding some key issues, such as *lis pendens* and choice-of-court

agreements. Nonetheless, some other problematic features remain, such as the scope of application of the arbitration exemption, which may be even more difficult to determine under the Recast Regulation, as well as the relationship with third States (see A. Dickinson, in Dickinson & Lein, *The Brussels I Regulation Recast*, OUP, 2015 (1.40)).

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?**

   Given the limited framework of this questionnaire, we may only point at some of the more important topics that would need further improvement:

   - arbitration exemption, with due regard to the risks of parallel proceedings and conflicting judgements;
   - relationship with third States, regarding both exclusive jurisdiction and *lis pendens*;
   - assessment of the validity of choice-of-courts agreements;
   - the dichotomy between "abolition of exequatur" and the grounds for refusal of recognition and enforcement

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

   English common law concepts deeply differ from the civil law-based autonomous concepts used by the Brussels I Regulation. Nonetheless, it is generally considered that English courts have engaged willingly in the exercise of fitting common law causes of actions into the European autonomous concepts. The main frictions arise out of :

   (i) the rigid structure of European autonomous concepts (in particular, the sharp divides between public and private law and tort and contract claims);

   (ii) the difficulty of adapting some English concepts which are unknown to civil law (e.g., constructive trusts) to the scheme of the Regulation

   (See, e.g., J. Harris, 'Understanding the English Response to the Europeanisation of Private International law', *Journal of Private International Law* (2008) 347-395).

   Authors have also pointed out the lack of guidance in the Regulation and have sometimes criticized the interpretation given by the ECJ to fill such gaps (see e.g., T.C. Hartley, 'The European Union and The Systematic Dismantling of the Common Law of Conflict of Laws, *ICLQ* (2005) 813-828).

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?**

   To our knowledge, this has not been an issue.

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?**

   To our knowledge, this has not been an issue.

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 primary source is the Civil Jurisdiction and Judgements Act 1982, which incorporated the Brussels and Lugano Conventions into UK law. Schedules 4 and 5 of the Act allocate jurisdiction between Scotland, England, Wales and Northern Ireland in civil and commercial cases. In a limited set of cases, the Civil Procedural Rules are applicable.

   Following Brexit, the Civil Jurisdiction and Judgments Act 1982 has been significantly amended. With effect from 31 December 2020, many provisions have been repealed, effectively removing the legal effect of the Brussels Regulations, the Lugano Convention 2007 and the agreement on jurisdiction between the EU and Denmark.

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 width of the scope of the arbitration exception has raised problems in the UK. The well-known *West Tankers* saga - regarding the possibility for an English court to issue an anti-suit injunction to protect an arbitration agreement from parallel proceedings in another Member State – is a well know example of such problems (see *West Tankers Inc V Ras Riunione Adriatica Di Sicurta Spa And Others (The Front Comor)* [2007] UKHL 4, [2007] ILPr 20, [2007] 1 Lloyd's Rep 391, [2007] 1 All ER (Comm) 794, (2007) 23 Const LJ 458, [2007] ArbLR 61, decided by the ECJ as *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* Case C-185/*07.* On this particular issue, it seems that English court's practice will not bbe affected by the entering intop force of the Recast Regulation. *In Nori Holdings Ltd & Ors v Public Joint-Stock Company Bank Otkritie* Financial Corporation [2018] EWHC 1343 (Comm), decided under the Brussels Recast Regulation, the English Commercial Court followed the *West Tankers* decision of the ECJ.

   Conversely, Recital (12), par. 2, is likely to affect the practice of the English courts regarding enforcement of judgments whose subject matter is the applicability of an arbitration agreement. In *National Navigation v. Endesa Generation SA [2009] EWCA Civ 1397*, a case decided under the Brussels I Regulation, the English Court of Appeal had held that a judgment issued in another Member State ruling on the preliminary issue of the validity and existence of an arbitration agreement was to be recognized and enforced under the rules of the Regulation. Courts will likely not be able to reach the same conclusion under the Recast Regulation.

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.**

    Discussions relating to the delineation between "civil and commercial proceedings" and "insolvency proceedings" took place under the Brussels I Regulation and are still relevant under the Recast Regulation. Nonetheless, a decision such as C-535/17 NK v BNP Paribas Fortis NV should not create confusion as it is aligned with the position of the English courts.

In *Re Rodenstock GmhH* [2011] EWHC 1104 (Ch), the High Court had established that the winding up of a solvent overseas company is not excluded from the Brussels I Regulation's substantive scope by virtue of article 1(2)(b).

In *Gibraltar Residential Properties Ltd v Gibralcon 2004 SA* [2010] EWHC 2595 (TCC), the High Court established that the fact that the defendant was subject to insolvency proceedings under the Insolvency Regulation (1346/2000/EC) in another member state was not, in itself, a ground for excluding the application of the Brussels I Regulation.

Similarly, the application of the Brussels Regulation is not necessarily excluded when the claim would not have been brought if it were not for the insolvency of one party (*Polymer Vision R & D Ltd and others v Van Dooren* [2011] EWHC 2951 (Comm)).

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

In *Yukos International UK BV v Merinson* [2018] EWHC 335 (Comm), following the termination of an employment contract, the employee (based in the Netherlands) and the company reached a settlement agreement which conferred exclusive jurisdiction on the courts of the Netherlands. The company then brought an action before English courts seeking damages for the employee's alleged breach of contractual obligations. The English court first affirmed that Dutch court settlement was a "court settlement" within the definition in Article 2 of Brussels Ia, and that the only ground on which this court could refuse enforcement would be if such enforcement were manifestly contrary to public policy (Articles 58 and 59). Nevertheless, the English court added that the court settlement did not have the nature of a judgement and was contractual in nature. The court concluded that "any court of a Member State which, under (Brussels Ia), would have jurisdiction to set aside the Settlement Agreement as a contract (…). The Dutch courts do not have exclusive jurisdiction in that regard to any greater extent that they would have in the case of any other contract."

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

To our knowledge, there is no case law on this issue.

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?**

    To our knowledge, this has not been an issue.

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'?**

    Generally speaking, English courts have interpreted broadly the concept of 'judgments' (see for instance *Deutsche Bank AG v Sebastian Holdings Inc & Alexander Vik,* on which see also our reply to question 39, and *Integral Petroleum SA v Petrogat* FZE [2018] EWHC 2686 (Comm)). The change in article 2(a) so to include provisional measures seem not to raise any not raised particular concern.

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?**

    To our knowledge, this issue has not been addressed directly by court. A proposal to clarify that only the court seised would have to be considered the court having "jurisdiction as to the substance of the matter" was put forward before the Recast, which did not adopt it (A. Dickinson, 'Provisional Measures in the "Brussels I" Review: Disturbing the Status Quo?', *Journal of Private International Law*, 2010 519-564).

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

    As a general rule, a provisional measure, such as an order for interim relief issued in another Member State, shall not affect in any way the ability of the court having jurisdiction as to the substance of the matter to deal with the matter as it deems fit (*Thomas Cook Tour Operations Ltd and another v Louis Hotels SA* [2013] EWHC 2469). In addition, in *Nike European Operations Netherlands BV v Rosicky* [2007] EWHC 1967 (Ch) the High Court had stated that any interim measure granted under Article 35 shall remain consistent and compatible with the future decision on 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?**
    That specific point is not commonly addressed in the relevant literature.

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

    To our knowledge, this has not been an issue.

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?

The number of single claims received by the Employment Tribunal gradually declined from 2009/10, in particular after the introduction of Employment Tribunal fees in 2013. There was a historically low number of claims in 2014/15 when mandatory Early Conciliation was introduced (see Ministry of Justice, Tribunals and Gender Recognition Statistics Quarterly, July to September 2016).

In 2016, the trend was reversed. The number of single claims received by the Employment Tribunal first slowly increased (2% increase reported in July-September 2016 compared to the same period of 2015), then considerably increased by 64% in 2017, the highest in the last four years (see Ministry of Justice, Tribunals and Gender Recognition Statistics Quarterly, July to September 2017).

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?**

    In literature, the question of whether the defendant must be domiciled in a Member State for article 26 to apply has been debated (see, e.g., See Garcimartin in Dickinson & Lein, *The Brussels I Regulation Recast*, OUP, 2015 (9.99)) although it is noted the CJEU suggested the corresponding provision in the 1968 Brussels Convention applies irrespective of the domicile of the defendant (Case C-412/98, *Group Josi Reinsurance Co SA v Universal General Insurance Co (UGIC)* ECLI:EU:C:2000:399)

    The scope of application *ratione personae* of article 26 has not been directly discussed.

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)?**

    Generally speaking, the conditions of application of article 29 are considered to be merely the identity of parties, object and cause, without any further requirements, such as domicile (see, e.g., R. Fentiman in Magnus/Makowski,

The Brussels Ibis Regulation, Ottoschmidt, 2016; P. P. Rodgerson in Dickinson and Lein (eds*.), The Brussels I Regulation Recast* (OUP 2015)).

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?**

    To our knowledge, this has not been an issue.

Alternative Grounds of Jurisdiction

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

    See the answers below.

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?**

    Issues that have been debated in courts and the literature are: (i) the distinction between tort and delict; (ii) the determination of the place of performance.

    (i) The distinction between tort and delict, which implies the exclusivity in definition of jurisdictional categories, and the need to determine whether a claim falls either under Art. 7(1) or Art. 7(2), has triggered debate in court and in the literature (see for example, A. Briggs, P Rees, *Civil Jurisdiction and Judgments* (2005 London, Lloyd's of London Press), at 28. In *XL Insurance Company SE v AXA Corporate Solutions Assurance* [2015] EWHC 3431 the High Court reviewed the ECJ's regarding the contract/tort distinction (such as *Kalfelis v Bankhaus Schroeder*, *Reunion v Spliethoff, Brogsitter*, C-548/12) as well as some English precedents (such as *Hewden v Wolfkran* [2007] 2 Lloyd's Rep 138 and *Kleinwort Benson v Glasgow City Council* [1999] 1 AC 153). It then held that "it is therefore not enough for Article 7 (1) purposes to show that there is a

contract with freely assumed obligations which is somewhere in the background, or even one which is a stepping stone to the ultimate liability of the defendant. It must be the basis for the obligation actually relied upon by the claimant as against the defendant". On the other hand, the High Court affirmed that "Just as, under Article 7 (1), the fact that there is a contract in the background (however important) does not necessarily bring the claim within it, so the fact that there may be a harmful event, properly so-called in the background (however important) does not itself bring a claim which is not within Article 7 (1), within Article 7 (2) […] there must be some event which is caused by some act or omission on the part of the defendant which causes damage to the claimant as a result of which the defendant becomes liable to the claimant in respect of that damage".

(ii) In *JEB Recoveries LLP v Binstock* [2016] EWCA Civ 1008, the English Court of Appeal reviewed EU and English precedents and gave indications as to the determination of the place of performance under Art. 5(1) of the Brussels I Regulation (which is also applicable under Art. 7(1) of the Brussels Ia Regulation). Based on a review of ECJ's authorities (such as *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* and *Color Drack GmbH v Lexx International Vertriebs GmbH*), the Court laid down some principles for the establishment of the place of performance. It held that "the place of performance must be understood as the place with the closest linking factor between the contract and the court having jurisdiction and, as a general rule, this will be at the place of the main provision of the services. […] it must be deduced, so far as possible, from the provisions of the contract itself". Where this proves impossible, then based on the place where "activities in performance of the contract have for the most part been carried out, provided that the provision of services in that place is not contrary to the parties' intentions as appears from the contract, or, if the latter method also is ineffective, "by another means which respects the objectives of predictability and proximity, and this will be the place where the party providing the services is domiciled".

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?**

Please refer to *JEB Recoveries LLP v Binstock* [2016] EWCA Civ 1008 in our answer to question 24, part (ii).

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?

Please find below an overview of some of the more important problematic issues:

(i) the wording 'matters relating to tort (please refer to our reply to question 24, part (i))

(ii) the wording 'place where the harmful event occurred or may occur', with respect to a series of cases:

- personality rights and identifying the "centre of interests" of a person: In *Saïd v Groupe L Express and another* [2018] EWHC 3593 (QB), the court stated that as a general principle, person's habitual residence is their centre of interests, and such presumption is not easily rebutted. Nonetheless, in that case the Court also stated that it is not always possible to identify a single country that could be described as a person's centre of interests, particularly where a person has several, diffuse international connections.
- cases of purely economic loss: in *Dolphin Maritime Services Ltd v Sveriges Angartygs Assurans Forenin*g [2009] EWHC 716 (Comm), the court found that if the loss is the non-receipt of funds which the claimant should have received, the loss occurs where the claimant should have received the payment. In *Ashley & Anor v Jimenez & Anor* [2019] EWHC 17, the Court found that if an obligation to restore the money has to be performed in England, that does not make England the place of the harmful event. Conversely, the place where the money has been wrongfully paid (in the case, by a bank in breach of a Quistclose trust) is the place where the harmful event occurred.
- conspiracy: In *Khrapunov v JSC BTA Bank* [2017] EWCA Civ 40, the court held that England was the place where the harmful event occurred was the alleged agreement between the conspirators, which was probably made in England, and was the foundation of their liability.

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?**
To our knowledge, this has not triggered discussion or resulted in court cases.

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?**

While the UK courts have developed solution to specific issues relating to the mentioned grounds of jurisdiction, they are all in line with the ECJ case-law, where available. We may not identify any significant controversy with respect to such provisions.

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 specific point has not prompted debate in the relevant literature.

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

For consumer contracts, it is generally considered that the provision limiting effectiveness of prorogation clauses not only apply to choice-of-court agreements providing for jurisdiction of a court in a Member State, but also to choice-of-court agreements assigning jurisdictions to courts of non-Member States (see A. Bonomi, 'Jurisdiction over Consumer Contracts', in A. Dickinson and E. Lein (eds*.), The Brussels I Regulation Recast* (OUP 2015)). However,

for contracts of employment, choice-of-court agreements conferring non-exclusive jurisdiction on the court of a non-Member State is effective when in favour of the employee (not the employer) (see L. Merrett, 'Jurisdiction over Individual contracts of Employment', in A. Dickinson and E. Lein (eds*.), The Brussels I Regulation Recast* (OUP 2015)).

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

The common law did not provide any specific regime for 'weaker parties' before the entrance into force of the Brussels system, so this particular issue has not been discussed significantly.

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?**

With respect to choice-of-courts agreements, in *Lackey v Mallorca Mega Resorts SL & Anor* [2019] EWHC 1028, the Court stated that if the insurer has already accepted the jurisdiction of English courts, the existence of the claim against the insurer permitted an additional, related, claim against the insured. The court ruled that it was bound by *Hoteles Pinero Canarias SL v Keefe*[2015] All ER (D) 213 (Jun), which held that there was no linguistic or purposive ground for requiring that there be some kind of policy dispute between insurer and insured for the provisions on insurance to apply.

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

The question of whether an investor is a consumer for the purposes of Articles 17 and 18 of the Recast Brussels Regulation has been considered in a number of cases. In *Ramona ANG v Reliantco Investments Ltd* [2019] EWHC 879 (Comm), the court held that whether an individual who invests is a consumer shall be fact-specific. In that case, the Court found that an investment by a private individual of her personal surplus in the hope of generating good returns is not generally a business activity, but a private consumption need. In a

previous decision, In *AMT Futures v Grundmann and others* [2016] EWHC 3606 (QB), the court found that the defendants, a group of German investors, were not consumers for the purposes of the Recast Brussels Regulation.

In *Les Ambassadeurs Club Ltd v Vona* [2018] EWHC 3149 (QB), the court considered whether Article 17(c) applied to a contract concluded between an Italian gambler and the owner of a London casino. The court first noted that the casino's website did not make any provisions for the Italian market and did not own a domain name in Italy. Then the court concluded that since the casino operator used agents to make contacts and recommend customers in Italy, the trader's intention to establish relations with Italian consumers was established. Articles 17(c) and 18(2) thus applied.

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?**

To our knowledge, this has not been an issue.

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 main difficulties in the application of Section 5 have arisen out of the definition of "matters relating to individual employment contracts" and they regard two aspects:

(i) the inclusion of legally "independent" workers in the definition of "employees", where they *de facto* operate as if they were employee and (ii) whether some claims could be classified as "matters relating to individual contracts of employment" and therefore came within Section 5.

(i) English courts would probably apply the traditional divide between employee who are under an "employment contract" *strictu sensu* and self-employed. Nonetheless, authors have suggested that Section 5 commands a more inclusive interpretation (Dicey, Morris, & Collins, [33]-[254]; see also L. Merret, 'Jurisdiction over Individual Contracts of Employment (Arts. 20-23)', in A. Dickinson and E. Lein (eds*.), The Brussels I Regulation Recast* (OUP 2015)).

(ii) In *Alfa Laval Tumba AB v Separator Spares International Ltd* [2012] EWCA Civ 1569, [2013] 1 WLR 110. The English Court of Appeal held that two claims, one for breach of copyright and misuse of confidential information (both non-contractual claims) brought against an employee by a former employer fell within the material scope of Section 5. The Court of Appeal based this decision on a literal reading of the provisions of the Regulation.Building on the *Alfa Laval* test, in *Bosworth v Arcadia Petroleum* Ltd [2016] EWCA Civ 818, the English Court opf Appeal held that "the correct approach as a matter of English law is to consider the question whether the reality and substance of the conduct relates to the individual contract of employment, having regard to the social purpose of Section 5 Recently, in *Merinson v Yukos International UK BV & Ors* [2019] EWCA Civ 830, the Court of Appeal relied on *Alfa Laval* to hold that where a "material nexus" exists between the claim and the contract of employment, such claim fall within the scope of Section 5. So, in *Merinson*, the Court of Appeal decided that claims related to a settlement between an employer and an employee, regarding both damages and annulment of such settlement, were "matters relating to an individual contract of employment".

Additionally, the application of the provision on the choice-of-court agreements was discussed in *Yukos International UK BV v Merinson* [2018] EWHC 335 (Comm). Following the termination of an employment contract, the employee (based in the Netherlands) and the company reached a settlement agreement which conferred exclusive jurisdiction on the courts of the Netherlands. The company then brought an action before English courts seeking damages for the employee's alleged breach of contractual obligations. One of the issues considered by the court was to know whether the settlement agreement was an agreement entered into after the dispute has arisen within the meaning of Article 23(1). The court established that for the purposes of Article 23(1), a dispute will have "arisen" if and only if: (a) the parties have disagreed upon a specific point, and (b) legal proceedings in relation to that specific point of disagreement are imminent or contemplated. The court concluded that this test was not met in the present case, as the dispute under the settlement agreement was different from the following dispute thereafter litigated.

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?

It does not appear English courts experienced difficulties in applying articles 24(1) and 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?**

Article 24(2) specifies that the court must apply its own rules of private international law to determine the seat. For this purpose, in the United Kingdom, the seat is defined by the Civil Jurisdiction and Judgements Order 2001 (2001 No. 3929), Schedule 1 Paragraph 10[1]:

Seat of company, or other legal person or association for purposes of Article 22(2) (section 43)

10. (1) The following provisions of this paragraph determine where a company, legal person or association has its seat for the purposes of Article 22(2) (which confers exclusive jurisdiction over proceedings relating to the formation or dissolution of such bodies, or to the decisions of their organs).

(2) A company, legal person or association has its seat in the United Kingdom if and only if—

(a) it was incorporated or formed under the law of a part of the United Kingdom; or

(b) its central management and control is exercised in the United Kingdom.

(3) Subject to sub-paragraph (4), a company, legal person or association has its seat in a Regulation State other than the United Kingdom if and only if—

(a) it was incorporated or formed under the law of that state; or

(b) its central management and control is exercised in that state.

(4) A company, legal person or association shall not be regarded as having its seat in a Regulation State other than the United Kingdom if -

(a) it has its seat in the United Kingdom by virtue of sub-paragraph (2)(a); or

(b) it is shown that the courts of that other state would not regard it for the purposes of Article 22(2) as having its seat there.

[1] The Civil Jurisdiction and Judgments Order 2001 (2001 No. 3929) Schedule 1 available at <https://www.legislation.gov.uk/uksi/2001/3929/schedule/1/made>.

It does not appear that English courts experienced difficulties in determining the seat.

Article 24(2) raised another question before English courts: in *Koza Ltd & Anor v Akcil & Ors* [2017] EWCA Civ 1609[2], the proceedings involved multiple issues, and the Court had to consider whether the main "object" of the proceedings was the validity of the decisions of the company, so as to fall under the scope of article 24(2). The Court answered in the affirmative, relying inter alia on C-144/10 *Berliner Verkehrsbetriebe, Anstalt des öffentlichen Rechts v JP Morgan Chase Bank NA* [2011] 1 WLR 2087 for its analysis.

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?**

Recurring issues before English courts regard:

(i) whether or not the proceedings concern the validity of the patent, and

(ii) the separation of infringement and validity issues.

In cases dating from 2017 to 2019, article 24(4) was discussed in similar scenarios: the claim was about infringement or liability, and the defendant, raised invalidity of the patent as a defence, challenging the jurisdiction of the English court. It was then up to the court to decide whether the validity of the patent was in issue.

In *Anan Kasei Co., Ltd, Rhodia Opérations S.A.S v Molycorp Chemicals & Oxides (Europe) Ltd* [2016] EWHC 1722 (Pat), the proceedings dealt with a claim for infringement in relation to the UK and German designations of a patent. The defendant challenged the jurisdiction of the English Court and issued proceedings before German courts on the basis of article 24(4).

The English court ruled that the claims of infringement and invalidity were indivisible. The English court added that deciding on the infringement claim would be an indirect decision on the validity of the patent, and would consequently increase the risk of conflicting decisions and undermine the principle of legal certainty. The court thus relinquished jurisdiction over the German designation of the patent.

[2] Available at < https://www.bailii.org/ew/cases/EWCA/Civ/2017/1609.html>.

In *Eli Lilly and Co v Genentech* Inc [2017] EWHC 3104 (Pat), the claimant sought declarations of non-infringement in relation to UK, French, Spanish, Irish, Italian and German designations of a patent owned by a US corporation (defendant). The defendant challenged the jurisdiction of the UK court on the basis of article 24(4), arguing it was not the appropriate forum to hear the claims in relation to the non-UK designations of the patents.

The court held that Article 24(4) was not engaged in this case as the claims for declarations of non-infringement in relation to the non-UK European designations of the patent did not put the validity of those patents in issue.

In *Chugai Pharmaceutical Co v UCB Pharma et al* [2017] EWHC 1216 (Pat), the claimant sought to establish its absence of liability towards the defendants, a Belgian company with an English branch. The defendants raised the issue of the validity of the patent as a defence. The judge referred to [2016] EWHC 1722 in his analysis, and held that the case was not a direct challenge to validity, but rather a claim for determination of royalty obligations. He confirmed the jurisdiction of English courts.

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.**

Following the recast of the Regulation, article 24(5) came under discussion before English courts in *Deutsche Bank AG v Sebastian Holdings Inc & Alexander Vik* [2017] EWHC 459 and then [2018] EWCA Civ 2011, where the courts had to consider whether a committal order fell within the scope of article 24(5).

The Court of Appeal established *in obiter* that the committal order did fall under the scope of application of article 24(5), and that permission for service out of jurisdiction was not required since article 24(5) applies regardless of domicile of the parties.

To decide whether the committal order fell under the scope of article 24(5), the Court took into account the nature of the initial order, and confirmed it was a "judgement" as understood by article 2 of Regulation BIa, and therefore the proceedings were "concerned with the enforcement of a judgement" under article 24(5).

40. **Does the removal of a conservatory third party attachment (in case of seizure) fall within the scope of 'enforcement' in the sense of Article 24 chapeau and fifth paragraph Brussels Ia leading to the exclusive**

jurisdiction of the court where the removal has to be enforced, or can jurisdiction of the removal be based on Article 35 leading to jurisdiction of the court that has granted leave to lay a conservatory third-party attachment (seisure)? In other words, is Article 24 interpreted extensively or narrowly in you Member State?
n/a

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 minimum degree of internationality required for the application of article 25 is debated in literature when the only international element is the choice-of-court agreement.

    An authoritative view is that article 25 would apply where the only international element is the choice of court itself. It is pointed out that the Recast Regulation does not expressly restrict the application of article 25 to cases of international jurisdiction (*Dicey, Morris & Collins on The Conflict of Laws*, 15th ed, Sweet & Maxwell, 2012 (12-122).

    This particular issue around article 25 does not appear to have been discussed before English courts.

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?**
    n/a

43. **Are there particular examples in which the formal requirements for validity of choice-of-court agreements (Article 25(1)(a-c)) caused difficulties in application for the judiciary or debate in literature? Which requirement has appeared most problematic in practice? When applying the respective requirements of an agreement 'in writing or evidenced in writing', 'practice which the parties have established between themselves' and 'international trade usages', which facts do the courts and/or literature deem decisive?**

The requirement of article 25(1)(a) of the Regulation BIa came under discussion in *Roberts v Soldiers, Sailors, Airmen and Families Association-Forces Help* [2016] EWHC 2744 (QB). As a distinct and separate argument from the main issue, one party brought up the following: whether agency by ostensible authority is an agreement "in writing or evidenced in writing" for the purposes of article 25(1)(a). The court eventually did not need to address it, and the issue remains open.

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?**

No such case has been brought before English courts.

Consent and the formal requirement of article 25(1)(a) were discussed in *Pan Ocean Co Ltd v China-Base Group Co Ltd and another* [2019] EWHC 982 (Comm). However the issue was not about substantive validity, but insufficient compliance with article 25(1)(a) (and thus no binding choice-of-court clause) as there was "no agreement (in the sense of consent) in writing or evidenced (or confirmed) in writing" (§32).

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?**

Please refer to our reply to question 47 and *LIC Telecommunications et al v VTB Capital et al* [2019] EWHC.

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?**

Please refer to our reply to question 47 and *LIC Telecommunications et al v VTB Capital et al* [2019] EWHC.

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?**

The question of substantive validity of a choice-of-court agreement under article 25 was discussed in the case of asymmetric jurisdiction clauses. The recurring issue is whether the validity of asymmetric clauses is a question of autonomous EU law or a question of national law.

In *Commerzbank v Liquimar Tankers* [2017] EWHC 161 (Comm), the defendants raised as a subsidiary argument that Article 25 requires the parties to have designated the courts of a Member State to enable the law applicable to the substantive validity of a jurisdiction clause to be identified and to provide certainty as to the forum in which a putative defendant can expect to be sued. The defendants concluded that such result is not achieved by a clause which designates the courts of all other competent states, including those of non-Member States, outside the territorial competence of the EU, which could mean suits in multiple jurisdictions. The court found, inter alia that in the asymmetric jurisdiction clause, the parties have designated the English court as having exclusive jurisdiction when the defendants sue, and that there is nothing in Article 25 indicating that a valid jurisdiction agreement has to exclude any courts, in particular non EU Courts.

In *LIC Telecommunications et al v VTB Capital et al* [2019] EWHC 1747 (Comm), the issue in relation to the clause was whether asymmetric clauses are valid as a matter of EU law. The court stated “it is now common ground that it is a question of autonomous EU law and not a question of national law. It was I believe accepted that the proviso "unless the agreement is null and void as to its substantive validity" refers to issues such as capacity, fraud and mistake, not whether particular kinds of "choice of court" agreements are permitted under the Regulation”.

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

Yes, the principle of severability of choice-of-court agreements, as mentioned in article 25(5), reflects the English common law position.

To that purpose, see for instance the following reminder in *Deutsche Bank AG and others v Asia Pacific Broadband Wireless Communications Inc and another* [2008] EWCA 1091, §24:

“The proposition that a jurisdiction clause, like an arbitration clause, is a separable agreement from the agreement as a whole (…) is uncontroversial as a

matter of domestic law (see *Mackender v Feldia* [1967] 2 QB 590 and *Fiona Trust v Privalov* [2008] 1 Lloyds Rep 254: 2007 Bus LR 1719)."

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?**

English courts did have to deal with an issue relating to the concept of "entering an appearance", but in application of article 24 of the 2007 Lugano Convention, which provides similarly as article 26(1) of Regulation BIa. In *Deutsche Bank AG London Branch v Petromena ASA* [2015] EWCA 226, the Court of Appeal considered, inter alia, whether the court had jurisdiction under article 24 of the 2007 Lugano Convention. The issue was to know whether a defendant "enters an appearance" by filing a second acknowledgment of service after the first application challenging jurisdiction has failed.

The Court held that it is "to national procedural rules that one must look, in the first instance, to determine whether an appearance has been entered". It further added "one of the ways in which (a defendant enters an appearance) under English procedural law is when the defendant returns a second acknowledgment of service after an unsuccessful challenge to the jurisdiction" (under UK Civil Procedure Rules part 11.8).

The Court of Appeal thus decided that by filing a second acknowledgment of service after its challenge to jurisdiction had failed, the defendant was to be considered as having accepted the jurisdiction of the English court and had entered an appearance for the purpose of Article 24 of the 2007 Lugano Convention.

In *Dexia Crediop SPA v Provincia Di Brescia* [2016] EWHC 3261 (Comm), the English Commercial Court brought a precision as to the application of article 26 of Regulation BIa: it may be possible for a defendant to enter into an appearance in relation to some declarations concerning the same contract, and not all of them.

In *Nica v Xian Jiaotong Liverpool University* [2018] ICR 535, article 26 of Regulation BIa was briefly brought up by the claimant who relied on it to argue that the Employment Tribunal had erred in finding the defendant had contested jurisdiction. However the claimant's argument was not considered as the Court of Appeal confirmed the Employment Tribunal's finding, namely that the latter lacked jurisdiction to determine the claim.

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).**

    Significant decisions on the 'same cause of action' were rendered under article 27 of the 2001 Brussels Regulation but are of continuing relevance under article 29 of the Recast Regulation. In *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2013] UKSC 70, the Supreme Court held that a claim for damages for breach of an exclusive English jurisdiction clause did not involve the same cause of action as the foreign proceedings alleged to be in breach of that agreement (similarly, *Barclays Bank plc v Ente Nazionale Di Previdenza Ed Assistenza Dei Medici E Degli Odontoiatri* [2016] EWCA Civ 1261).

    In the context of article 29(1) of the Recast, the interpretation of the 'same cause of action' was discussed in *Easy Rent A Car Ltd and another v Easygroup Ltd* [2019] EWCA Civ 477, in a dispute over trade mark infringement. Proceedings were first brought in Cyprus by the defendants. The claimants then issued English proceedings and challenged the jurisdiction of the Cypriot court. The defendants argued the English court should decline jurisdiction under article 29. The High Court dismissed the application of article 29, arguing that because the English action was based on tort and the Cypriot action was based on contracts, the legal basis and objects, and thus causes of action, were different ([2017] 10 WLUK 282).

    The Court of Appeal allowed the appeal on the ground that article 29 applied to the English proceedings. The Court established that the issue of consent was an essential element of both claims, therefore the claims involved the same "cause".

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?**
    n/a

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) reflects the position under English law: proceedings are started when the court issues a claim form (CPR 7.2).

    In *UBS AG and another v Kommunale Wasserwerke Leipzig GmbH* [2010] EWHC 2566 (Comm), it was stated that an English court is considered to be seised upon the issue of the claim form even if service takes place after a related claim is launched in another jurisdiction.

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?**

    Rules on amending existing claims or adding new claims will vary depending on whether or not the relevant limitation period has expired.

    Where the limitation period has not expired, subsequent amendments of claims do not affect the date of seising of the court. Amendments take effect from the date of the original document that it amended (doctrine of relation back). A party can amend its statement of case at any time without permission of the court before it has been served on any other party (CPR 17.1(1)). Once a statement of case has been served, a party may amend it only with the consent of all the other parties or with the court's permission (CPR 17.1(2)).

    When the relevant limitation period has expired, section 35 of the Limitation Act 1980 applies. Any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced on the same date as the original action (35(1)(b)). If the claim involves a new cause of action, the new cause of action must arise out of the same or substantially the same facts as are already in issue on any claim previously made in the original action (35(5)(b)).

One exception applies to third party proceedings, i.e. if the claim is brought against a person not previously a party to the action. In that case the action is considered commenced on the date on which those proceedings were commenced (35(1)(a)).

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

55. **Has the application of Article 31(2) proved to be counterproductive and resulting in delaying the proceedings by the obligation of the court seised to stay the proceedings until a designated court has decided on the validity of a choice- of- court agreement, even when a prorogation clause has never been entered into or is obviously invalid?**
To our knowledge, this has not been an issue.

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?**

Although this is true, there are issues that are not addressed by the Recast, namely disputes regarding property located in a non-EU states and disputes falling within the scope of a jurisdiction clause which designates the courts of a non-EU state.

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?**

In *Blomqvist v Zavarco Plc* [2015] EWHC 1898 the court addressed all the factors in Recital 24 and then all other circumstances, taking specifically into account: whether the related proceedings in Malaysia would obviate the need for the English action to be resumed, and whether it would be proper for shareholders whose right's may be affected to claim compensation in Malaysia, rather at the company's seat in England.

58. **Does the application of both provisions in your view amount to a sufficiently 'flexible mechanism' (see further Recital 23) to address the issue of parallel proceedings and *lis pendens* in relation to third states?**
The application of both provisions is generally considered as flexible, but it was noted that the treatment of third countries needs to be more thoroughly addressed.

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?**
To our knowledge, this has not been an issue.

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?**

In doctrine, the interpretation of "real" has been discussed, in particular its extent: does the Van Uden requirement extend to all types of provisional measures ("effective" connection) or only apply to provisional measures that take effect in rem? (see Dickinson, "Provisional Measures in the "Brussels I" Review: Disturbing the Status Quo?", *Journal of Private International Law*, 6:3, 547; Fentiman, *International Commercial Litigation*, Oxford University Press, 2010, 1.85). It is suggested the first approach is the more sensible one: the Van Uden requirement applies to all types of provisional measures, irrespective of their nature (Nuyts in Dickinson & Lein, *The Brussels I Regulation Recast*, Oxford University Press, 2015, 12.41).

English courts have been considering the existence of a "real connecting link" depending on the location of the assets, parties or activities at stake, and where the order must be executed. In *ICICI Bank UK plc v Diminco NV* [2014] EWHC 3124 (Comm., the condition of a "real connection link" was discussed in a case where a bank had applied for a worldwide freezing order and an order for the disclosure of domestic and foreign assets against a company (respondent) in support of its counterclaim in proceedings the respondent company had commenced in Belgium. The court declined to make an order for disclosure of assets outside England and Wales, citing the lack of connecting link between the territorial jurisdiction of the court and the foreign assets:

"So far as concerns assets located within England and Wales, there is a real connecting link, in the sense explained in Van Uden, between a freezing and disclosure order and the territorial jurisdiction of the Court. In relation to assets outside England and Wales, there is no such real connecting link. The Court is being asked to order disclosure of assets abroad of a foreign company over which it has no territorial or in personam jurisdiction. Moreover, the fact that the Defendant is not resident here and is not subject to the in personam jurisdiction of the Court or to this Court's enforcement processes makes it inexpedient to grant an order in relation to foreign assets; the court has no ability to enforce compliance with such an order and there is nothing which makes it appropriate for the English Court to act as the international policeman in relation to assets abroad because there is no effective sanction which the Court could apply if the order for disclosure in relation to foreign assets were disobeyed.".

In and *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm.), the court declined jurisdiction for want of a "real connecting link", following a similar rationale, namely that the English court had no control over the foreign assets:

"It is apparent from the passage from Van Uden cited above that the rationale for the requirement of a "real connecting link" is that the court considering whether to grant interim measures must be able to ensure the provisional character of those measures, by imposing any necessary conditions or safeguards on the grant of the measures in question. Accordingly, where the measures are concerned with assets which are to be available as security for a claim, it is to be expected that the court where the assets are located is the court which is in a position to exercise the necessary control over those assets, not only to ensure that they are indeed frozen, but also to ensure that the claimant does not obtain more than it is entitled to by way of provisional relief. This suggests, in my judgment, that for the purpose of the "real connecting link" requirement, the subject matter of an application for a freezing order over assets consists of the assets in question." (§94)

In *Royal Bank of Scotland plc v FAL Oil Co Ltd* [2012] EWHC 3628 (Comm.), the court found that the existence in London of credit facilities and bank accounts related to the transaction which was the subject of the proceedings constituted a sufficient "real connecting link" with the jurisdiction to justify the issue of a worldwide freezing injunction in aid of foreign proceedings. It is however to be noted that this case must be treated as exceptional in the light of its specific facts.

More recently, the Van Uden condition was cited in in *Banca Turco Romana* [2018] EWHC 662 (Comm), where even though a "real connecting link" existed, the English court discontinued the freezing order obtained by the claimant because of "deliberate", "substantial and serious" breaches of full and

frank disclosure by the latter about the existence of foreign proceedings. Ultimately, the materiality of the non-disclosure and the basis of the foreign parallel claim "seriously undermined the basis for seeking relief in England" and the existence of a "critical jurisdictional link" to English courts as argued by the claimant.

Relationship with other instruments

61. **Has the Hague Convention on Choice of Court Agreements to your knowledge ever been relied upon in declining jurisdiction in your Member State and allocating jurisdiction to third states party to that Convention? Please provide examples from case-law with a short summary.**
To our knowledge, this has not been the case.

CHAPTER III

Recognition and Enforcement

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

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?**
n/a

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?**
n/a

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?**
n/a

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

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?**
Not to our knowledge.

68. **Has Article 41(2) in particular attracted specific attention in your jurisdiction?**
Not to our knowledge.

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?**
n/a

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?**
n/a

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?**
To our knowledge, this has not been an issue.

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

    The issue as to whether fraud can be raised as an objection to enforcement in the EU, on public policy grounds, and as to how, if so, that interacts with Article 52, was raised in *Ras Al Khaimah Investment Authority* [2015] EWHC 2926 (Ch). The English court established that "a judgment obtained by fraud may be unenforceable as violating public policy. In this regard, the court would not (…) be revisiting the substance of a decision, contrary to Article 52; but would be asking itself the question, not asked by the court giving the judgment, as to whether that court had been misled into giving that judgment."

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?**
    n/a

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

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?**
    n/a

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

77. **Has the precedence of Art. 351 TFEU to Article 71 Brussels Ia, as established by the CJEU in *TNT v AXA* (C-533/08) and *Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV* (C-452/12) prompted any practical consequences in your jurisdiction?**
Not to our knowledge.

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

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?**
Not to our knowledge.

80. **Have Articles 71(a) – 71(d) been already applied in your jurisdiction?**
There is no reported case law.