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?

Since 1 September 2013 all civil law judgments, that have been adopted pursuant to proceedings open to the public and have entered into force, must be published online.[1] However, it is important to mention two limitations. Firstly, a judgment can be published only after the parties have gone through the appeal (and cassation) procedures or abstained from appealing. While appeal (cassation) proceedings are pending, the judgment is not final. Appellate and third instance (cassational) judgments are also published once they enter into force.

Secondly, a "judgment" in this context means a decision which resolves the merits of the case. Unfortunately, the issues covered by the Recast are not always resolved via judgments. For example, if a court refuses jurisdiction, then it does not resolve the merits. Its ruling will be called a "decision" and not a judgment. Similarly, rulings on recognition and enforcement of foreign judgments are "decisions" and not judgments. At the same time, if a court finds jurisdiction then it does it in the final ruling – a "judgment" - as the Latvian legal system knows no separate (positive) jurisdictional decisions. This means that judgments accepting jurisdiction must be published online.

Decisions that do not qualify as "judgments" are not always published online. In fact, the statute allows courts to decide what decisions are to be publish.[2] Therefore, some of them are published online but unknown number is missing. Moreover, all of the published rulings (judgments and other decisions) are available only in Latvian.

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

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[1] See, Art. 28.[2] (5) of the Law on Judicial Power (Likums "Par tiesu varu"), available at: https://likumi.lv/ta/en/en/id/62847-on-judicial-power. (English translation of the relevant provision: "Court judgments taken during an open court hearing shall be published on the Internet homepage after entering into effect thereof, unless it has been laid down otherwise in the law. Court decisions shall be published in the same manner in the amount stipulated by the Cabinet. In publishing court rulings, the part of information, which discloses the identity of a natural person, shall be hidden.").

[2] Pursuant to Art. 28.[2] (5) of the Law on Judicial Power, the government must specify the extent of online publication of judicial decisions (i.e., "non-judgments"). This is done in Art. 5.4.3 of the Rules on Publication of Judicial Information at the Internet Webpage and Processing of Judicial Rulings prior to their Handing out (Noteikumi par tiesu informācijas publicēšanu mājaslapā internetā un tiesu nolēmumu apstrādi pirms to izsniegšanas), available in Latvian at: https://likumi.lv/doc.php?id=187832. Art. 5.4.3 states that a decision adopted in public (open) proceedings that have entered into force is to be published, if: 1) it was adopted in a case that posed some interest to the society or 2) or the court considers that it deserves to be published.

Indeed, the practice of the CJEU has been referred to, in particular, by the Supreme Court and it seems to be very useful for the practice. For example, in 2017, the Supreme Court had to decide whether a decision by an English court was enforceable in Latvia if one of the defendants (in the English proceedings) had brought a counterclaim in the Israeli court against the original claimant.[3] In fact, the party opposing the recognition and enforcement of the decision, argued that the Latvian court had to address a preliminary question to the CJEU. The Supreme Court, however, relied extensively on the CJEU case law and resolved the dispute without any need to pose a preliminary question and green lighted the recognition and enforcement of the decision. This and similar cases show that in most disputes the practice of the CJEU is both indispensable and often sufficient to decide the case.

Moreover, it is possible to observe the growing importance of the CJEU case law at least in the practice of the Supreme Court. For example, in 2013 when the Supreme Court analyzed the notion of the public policy exception in the Brussels I Regulation, it relied on local scholars without even mentioning the CJEU practice.[4] In more recent cases, the Supreme Court has extensively relied on that practice.[5]

Unfortunately, in some cases, courts themselves have badly used the available guidance by the CJEU. For example, in the appellate court case dealing with the interpretation of the Art. 24(2) of the Recast, the appellate court reproached the first instance court for the use of the CJEU case law on Art. 22(2) of the Brussels I Regulation.[6] Pursuant to the appellate court, the case law was not applicable, because the text of Art. 24(2) significantly differed from that of Art. 22(2). Ironically, this difference appears only in the Latvia text of these provisions, but not in their English counterparts. The appellate court, however, used the Latvian version only and saw a genuine (though still mainly stylistic) difference between two texts. This example illustrates that courts are sometimes insufficiently familiar with the basic of EU law to take advantage of the guidance provided by the CJEU.

Finally, there are of course some CJEU rulings that are dubious. For example, the 12-76, *Tessili* case still is considered to be a relevant case for the correct understanding of Art. 7(1)(a) while its reasoning has lost its *ratio* once the Rome I and Rome II Regulations fully autonomized the notion of "obligation" for the purposes of EU law. It would seem obvious that nowadays Art. 7(1)(a) should be interpreted autonomously, but the practice of the CJEU prevents this positive development. Relying on my own practical experience, I would consider it difficult to persuade a Latvian court (with a possible exception of the Supreme Court) to make an extensive conflict-of-laws analysis to answer a jurisdictional question.

3. Which changes introduced in the Brussels Ia Regulation are perceived as improvements and which are viewed as major shortcomings likely to imply

[3] Supreme Court Department of Civil Cases 30.08.2017 decision in the case no. SKC-414/2017.

[4] Supreme Court Department of Civil Cases 4.12.2013 decision in the case no. SKC-2021/2013.

[5] The Supreme Court has extensively relied on the practice of the CJEU to interpret the public policy exception in two 2014 rulings: Supreme Court Department of Civil Cases 31.10.2014 decision in the case no. SKC-2793/2014, Supreme Court Department of Civil Cases 2.07.2014 decision in the case no. SKC-1255/2014.

[6] Riga Regional Court Civil Cases Division 12.10.2016 decision in the case no. C30486115.

difficulties in application – experience in practice and prevailing view in the literature in your jurisdiction?

It is impossible to speak about a developed doctrine of application of the Recast in Latvia which would allow to identify the "prevailing" opinion. The number of texts written about this area is very small. Hence, the number of theoretical works is insufficient to speak of any "prevailing view" whatsoever.

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?

Firstly, in my opinion, it is important to avoid the explicit or implicit use of conflict-of-laws rules as a tool for determining jurisdiction (Art. 7(1)(a); Art. 24(2); Art. 25(1)). Instead there should be autonomous connecting factors (e.g., for Arts. 7(1)(a) and 24(2)) and a reference to a substantive law of the court chosen in Art. 25(1) – excluding conflict-of-laws rules. Similarly, regarding Art. 25(1) there must be a solution for alternative choice-of-court agreements and, possibly, even for negative choice-of-court agreements.

Secondly, it seems necessary to include a much more explicit statement as to the relations between the Recast and arbitration, notably, to identify what court decisions related to arbitration are to be recognized and enforced based on the Recast.

Thirdly, it would be useful to specify whether the application of Art. 26 is dependent on the domicile of the defendant in a Member State.

Fourthly, based on the Latvian experience, I would suggest to finally include an autonomous notion of domicile for natural persons. In Latvian practice, courts often are confused with this notion, because the domestic civil procedure mostly relies on the notion of declared address while conflict-of-laws rules use the notion of domicile.[7] Different understanding of this notion may lead to negative jurisdictional conflicts when each state involved considers that the person is domiciled abroad. This can be solved by an introduction of an autonomous notion of domicile.

Fifthly, it seems that it is time to complete the system of the Recast and introduce general rules for situations when the defendant is domiciled outside the EU. This would greatly simplify private international law in Europe, diminishing the number of jurisdictional rules and improving transparency and legal certainty.

[7] Compare: Art. 26 of the Civil Procedure Law establishes a general rule of internal jurisdiction: claims are brought at the place where the defendant is declared (natural person) or where it has its legal address (legal person). Art. 27(1) provides a fallback rule that only in case the natural person lacks a declared address, it is the domicile that is used as a connecting factor. See, Civil Procedure Law (Civilprocesa likums), available at: https://likumi.lv/ta/en/en/id/50500-civil-procedure-law. At the same time, pursuant to Art. 8(1) of the Latvian Civil Law the legal capacity and capacity to act of natural persons shall be determined in accordance with the law of their place of residence. Art. 7(1) states that "place of residence (domicile) is that place where a person is voluntarily dwelling with the express or implied intent to permanently live or work there." See, Latvian Civil Law (Civillikums), available at: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Civil_Law.doc.

Sixthly, the Recast should specifically mention that the rules on special jurisdiction also determine domestic jurisdiction. Currently, it is stated in the Jenard Report[8], but since not all courts and counsel have sufficient knowledge of EU private international law and its sources, an explicit legislative position on this issue would be useful.

Seventhly, it might be useful to include an explicit rule as to the transferability of the choice-of-court agreement via succession, assignment, subrogation, etc.

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

In my opinion, this is probably one of the biggest problems in the Latvian case law: the tendency to interpret notions of the Brussels Regime in line with corresponding notions of domestic law. For example, a utility service provider brought a claim against the owner of the property who failed to pay for utilities.[9] The first instance court observed that the defendant was a consumer domiciled in the United Kingdom and declined jurisdiction. The appellate court agreed with the first finding but criticized the second one, noting that the first instance court had not substantiated its view why the defendant was considered to be a consumer. The objection was that the lower court simply presumed that any natural person owning a piece of property was considered to be a consumer, while in reality such a person could still use its property for commercial purposes. Hence, the appellate court returned the case for a retrial. In another case, the appellate court reproached the lower instance for not inquiring whether a "residential administration contract" was considered to be a consumer contract under Latvian law.[10] In both cases, it was obvious that the courts did not suspect that the notion of "consumer" was to be understood autonomously.

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?

I have not been able to find any cases where courts had struggled to determine national competence and that would have caused difficulties in the application of the Recast. However, see my answer to Questions 59 and 60: the problem with national rules may appear in the context of provisional measures.

7. Has it occurred or may it occur that there is no competent court according to the national rules on jurisdiction in your Member State, thereby resulting in a 'negative conflict of jurisdiction'? If so, how has this issue been addressed?

I have not identified such cases, however, the solution is found in Art. 31^1 of the Civil Procedure Law, which states that "If in accordance with international agreements

[8] P. Jenard, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1979, OJ C 59, 22.
[9] Riga Regional Court Civil Cases Division 18.12.2014 decision in the case No. CA-3257-14/24.
[10] Vidzeme Regional Court Civil Cases Division 29.01.2015 decision in the case No. CA0076-15/12.

binding upon the Republic of Latvia and legal norms of the European Union a case is within the jurisdiction of a Latvian court, however, the provisions of this Law regarding jurisdiction do not provide for the court before which an action should be brought, a plaintiff may bring an action before any Latvian court of his or her choice in conformity with the provisions of Sections 23 and 24 of this Law." Hence, negative conflicts are resolved in advance by the Latvian legislature.

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)?

Most of the rules both on territorial and subject-matter competence are codified in the Civil Procedure Law (Arts. 23- 31.[1]). However, in some cases when the competence to hear certain types of disputes is vested in one specific court, the relevant rules are contained in specific statutes (e.g., Art. 65 of the Patent Law[11]; Art. 49 of the Law on Designs[12]).

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.

Yes, it has been very problematic. Let me illustrate some problematic decisions. In one case, an arbitration tribunal in Lithuania rendered an award in favor of a Lithuanian party.[13] The losing party – a Latvian company – brought a set-off claim against the award. At the same time, the Lithuanian party managed to secure a decision of the Lithuanian Court of Appeals confirming that the party had justified its claim for provisional measures in favor of the award for the period of the set-off proceedings. The Lithuanian company wanted to enforce those measures in Latvia. The case went to the Latvian Supreme Court that employed the following reasoning: 1) arbitration was excluded from the scope of the Regulation; 2) the exclusion applied both to jurisdictional rules and rules on protective measures; 3) if the matter was not covered by the Regulation, it could not be used for recognition and enforcement of provisional measures.

Following the current language used by the Latvian Supreme Court, Recital 12 does not bring substantive changes. In 2019, the Supreme Court heard the case about the recognition and enforcement of the decision rendered by a Swiss court.[14] The facts of the case were following: a Latvian law firm had lost a case before an arbitration tribunal in Switzerland in a dispute against a Swiss law firm. The losing party wanted to reopen

[11] Patent Law (Patentu likums), available at: https://likumi.lv/ta/en/en/id/153574-patent-law.

[12] Law on Designs (Dizainparaugu likums), available at: https://likumi.lv/ta/en/en/id/96620-law-on-designs.

[13] Supreme Court Department of Civil Cases 16.03.2016 decision in the case no. C17103315/SKC-1196/2016.A similar reasoning was used by the appelate jurisdiction: Rīga Regional Court Civil Cases Division 9 July 2015 decision in the case No. C17103315.

[14] Supreme Court Department of Civil Cases 29.06.2018 decision in the case no. SKC-781/2018.

the proceedings, arguing that its counter-claim had to be accepted by the tribunal. In order to achieve this goal, it brought a claim before a Swiss court. However, the Swiss court refused to reopen the arbitration proceedings and also decided that the Latvian law firm had to compensate judicial expenses to the winning party.

The winning party requested the recognition and enforcement of the decision under the Lugano Convention. The question posed to the Supreme Court: was this question excluded from the scope of the Lugano Convention due to its relation to arbitration? The Supreme Court interpreted all three instruments – the Brussels I Regulation, the Recast and the Lugano Convention – uniformly. It particularly emphasized that the fact that Article 1(2)(d) of the Recast was not changed, but only Recital 12 was added indicated that the Recital was not intended to bring any changes and was suitable for interpretation of the Lugano Convention. As a result, the Supreme Court decided that the question of judicial expenses in a court proceeding was related to arbitration and thus excluded from the scope of the Lugano Convention.

Already based on these two decisions, I can conclude that Latvian courts favor absolute separation between arbitration and the Recast. But that is not what is needed. What we actually need is a subtle exemption from the scope of the Recast of arbitration issues to the degree necessary to avoid any disruption of the regime of the New York Convention. However, it should be made clear that different court decisions (e.g., on provisional measures) that only assist arbitration, but are not in any way covered by the New York Convention, fall within the scope of the Recast. This balance should not only be found but also clearly expressed in the text of the Regulation. Latvian practice shows that Recital 12 is not enough to achieve this objective.

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 latest case law, notably, C-535/17, *NK v BNP Paribas Fortis NV*, has not been referred to in the publicly available Latvian practice. However, the Supreme Court has addressed the distinction between the Brussels I Regulation and the Insolvency Regulation.[15] The case concerned the recognition of a decision by an Estonian court. The Estonian court had ruled that an agreement on the transfer of rights and obligations between two Estonian was invalid, because it was concluded during a certain period prior to the commencement of insolvency (bankruptcy) proceedings and the Estonian insolvency law allowed the administrator (trustee) to challenge such agreements. It seems that a Latvian company was also a party both to the original contract with the insolvent Estonian company and the agreement on the transfer of rights and obligations to a third (Estonian) company. The Latvian company opposed the recognition of the decision in Latvia. It argued that the agreement contained a choice-of-court agreement in favor of Latvian courts and, thus, the Estonian court assumed jurisdiction in violation of exclusive jurisdiction of Latvian courts under the Brussels I Regulation.

[15] Supreme Court Department of Civil Cases 19.02.2013 decision in the case no. SKC 1194/2013.

The Supreme Court, after extensive quotations from the CJEU case law, concluded that the Estonian ruling was made under the Insolvency Regulation and the Estonian court had the competence to take the decision. The Supreme Court noted that: 1) the agreement was challenged by the administrator (trustee); 2) the agreement was challenged on the basis of the Estonian insolvency (bankruptcy); 3) the objective of the challenge was to return the value of sold assets, therefore improving the position of the creditors in the insolvency procedure. These circumstances, in the Supreme Court's eyes, made the case sufficiently similar to that solved by the CJEU in the C-339/07, *Christopher Seagon* case. Based on the CJEU's reasoning in the latter case, the Supreme Court concluded that the case at hand was closely related to the insolvency proceedings and did not fall within the scope of the Brussels I Regulation. Instead, the Insolvency Regulation was applicable and pursuant to its Art. 3(1), the Estonian court had jurisdiction.

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

I have not identified any such cases.

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

I have not identified any such cases.

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?

I have not been able to identify any case interpreting or applying the definitions of Art. 2 of the Recast. However, in the context of the Brussels I Regulation, the first instance court had discussed the meaning of "judgment" (Art. 32).[16] In 2010, an English court had issued a worldwide freezing injunction against a natural person that was (probably) domiciled in Latvia. The injunction was recognized and enforced by a Latvian court. In 2014, another English court revoked the injunction. The Latvian first instance court, without any further reasoning, decided that the 2014-decision fully complied with the definition of the judgment under Art. 32 of the Brussels I Regulation and thus was to be recognized and enforced in Latvia.

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'?

[16] Riga City North District Court 8.07.2016 decision in the case no. C32224716.

This change has not been discussed in the literature and also there seems to be no court practice dealing with it.

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?

If I understand correctly then this question is closely tied to the next question and basically addresses the problem of a judgment on provisional measures made by a court that has jurisdiction under the Recast, but no proceedings on the merits of the case have been initiated. I have not found any publicly available decisions addressing this problem. However, pursuant to Prof. Kačevska, a leading Latvian expert on private international law, the notion "jurisdiction as to the substance of the matter" in the context of Art. 35 is implicitly understood to refer to the court that potentially could exercise the jurisdiction under the Recast.[17] By analogy, it would seem that the language of Art. 2(a) could be interpreted in the same way. In other words, once the court has jurisdiction under the Recast it has a specific right to render a judgment on the provisional measures. Otherwise, there would have been a problem of having identical language (Art. 2(a) and Art. 35) being interpreted differently. However, there seems to be no publicly available court practice confirming or rejecting this view.

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?

Please, see the answer to the previous question.

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?

There is no prevailing view or discussion on this point. Under the Brussels I Regulation, the Supreme Court heard a case on the recognition of the decision on provisional measures in support of the main proceedings.[18] The decision in question was the "Mareva Injunction" issued by the English court. The dispute as to the merits also took place in the England. The Supreme Court decided on the recognition and enforcement

[17] I. Kačevska, "Briseles I bis regula un pagaidu pasākumi starptautiskā šķīrējtiesas procesā", Jurista Vārds, 23.01.2018.

[18] Supreme Court Department of Civil Cases 13.05.2015 decision in the case no. SKC-1427/2015.

of that decision in Latvia. The Supreme Court's decision was somewhat confusing. On the one hand, the Supreme Court made it clear that the refusal to recognize or enforce the decision could have only been based on the general grounds for the refusal under the Brussels I Regulation. On the other hand, it did emphasize that the foreign court had jurisdiction to issue the specific decision under its own law and a similar rule was found in Latvian procedural law. This would imply that the Supreme Court itself reviewed the decision. However, the Supreme Court later in the decision specifically underlined that it was prohibited to review a foreign decision as to the merits of the case, leaving it open whether it was possible to do that regarding the jurisdiction of the foreign court. All in all, it would seem more in line with the overall reasoning in the Supreme Court's decision that pursuant to the Supreme Court, the current Art. 45(1) of the Recast sets the limits of review.

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

No, these definitions have not attracted particular attention and have not given rise to issues similar to those in the *Pula Parking* case.

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?

Unfortunately, I have not been able to find any such statistics.

20. As to the scope of application *ratione personae*, has it been dealt with in case law or discussed in the literature whether Article 26 applies regardless of the domicile of the defendant, considering that Article 6 does not specifically refer to Article 26?

This question has not been addressed by the practice or academic literature in Latvia.

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)?

Unfortunately, I have not found any case law or academic opinion and it is not unlikely that courts have very rarely if ever faced this problem since the entry into force of the Recast.

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?

I have not found any publicly available case where these problems would have arisen.

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?

There is no discussion in the literature, so I will answer this question mainly based on my own practical experience. Firstly, my experience shows that Latvian courts do not like to engage in conflict-of-laws exercises and when they do, they often do it incorrectly. In fact, in the great majority of cross-border cases, counsel do not even mention conflict-of-laws rules and courts apply by default *lex fori* without even considering any other option. For this reason, it is also almost impossible to persuade courts to apply conflict-of-laws rules to determine jurisdiction under Art. 7(1)(a). Moreover, Art. 7(1)(a) provides jurisdiction for each obligation which also complicates its application. In addition, if the Latvian Civil Law was to be applied to determine jurisdiction it would raise another problem. Art. 1820 of the Latvian Civil Law states that: "If nothing has been agreed to regarding the place of performance and it may not be determined from the nature of the transaction, then the performance may be requested or offered at any place where it can be provided without hardship or inconvenience to the other party." This would make it extremely complicated to determine the place where the obligation was to be performed. It is my conviction that the Brussels Regime should simplify the work of the Member State courts; however, Art. 7(1)(a) unnecessary complicates it. I would suggest introducing an autonomous "characteristic performance" rule for all contracts, supplementing it by some sort of a supplementary rule for contracts without a characteristic performance, but once again with a single jurisdiction for all obligations and no references to conflict-of-laws rules. Secondly, Art. 7(1)(b) is very difficult to apply when the service is rendered online. As a modern life becomes more and more related to information technologies and development of computer databases, maintenance of different information technology products, etc., there is a need for a clear jurisdictional rule for these cases.

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?

In my practice I have found that it is difficult to determine the place of performance in contracts where the service is a creation and maintenance of an online application, created by programmers working from different states by a company established in one of those states (a Member State), paid for by a buyer from another Member State in order to be used by another company in a third Member State. Moreover, in such cases when the product exists only on a computer screen it can be also difficult to distinguish a sale of goods and provision of services.

The cases that I worked on ended with settlements, therefore courts did not have to deal with these issues.

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?

I have not identified any case law interpreting the notion "unless otherwise agreed". However, in my practice I have participated in litigation where I argued about the meaning of jurisdictional rules of Art. 7(1)(b) of the Recast and equivalent rules of its predecessor. Those cases did not specifically touch the issue in question, however, they showed that it was difficult to make complex arguments about Art. 7(1)(b). Based on my experience, it would have been very complicated to persuade the court that Art. 7(1)(b), by default referring to one connecting factor – the place of delivery of goods/provision of services -, allowed one of the parties to bring a case to a different court (at the place of payment). Moreover, the purpose of Art. 7(1)(b) is to subject the whole contract to a single court without separating different obligations, therefore the question what obligation has given the rise to the dispute would seem inevitably irrelevant for the purposes of the provision.

It might be easier to persuade the court to use a different connecting factor if the contract explicitly defined "the place of performance of the contract". Therefore I may speculate that the language "unless otherwise agreed" might be successfully argued before a national court if parties were aware of Art. 7(1)(b) and used a precise language to derogate from that provision.

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?

I have not found any publicly available cases applying this provision.

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?

I have not found any publicly available cases applying this provision. Therefore, unsurprisingly, the issue has not sparked any academic discussion.

28. Have there been any significant controversies in connection with other rules on jurisdiction under Article 7, 8 and 9, if so which particular rule: regarding claims based on acts giving rise to criminal proceedings, interpretation of 'operations of a branch, agency or other establishment, claims relating to trusts, claims relating to salvage of a cargo or freight, proceedings involving multiple defendants, third-party proceedings, counterclaims, contractual claims related to a right *in rem* on immovable property, limitation of liability from the use or operation of a ship?

No, there has not been any significant controversies, but this is due to the fact that these other rules are comparatively rarely relevant in practice.

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?

So far, there seems to be no publicly available court practice in this regard. Likewise, this issue has not been raised by the Latvian scholars yet.

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?

Unfortunately, there is no defined opinion on this issue. However, it is important to note that disputes involving choice-of-court agreements in favor of third countries occasionally may be heard by Latvian courts, but this is a rather rare occasion – particularly, when dealing with "weaker parties". Hence, it might take some time until significant practice can be established.

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

It is important to note that legal literature regarding private international law in Latvia is at its early stage of development. Initially, Latvia was less linked to cross-border mobility. Since Latvia joined the EU, the cross-border mobility has become extensive to say the least. Nevertheless, academic literature is still mostly focused on domestic law. Therefore, such specific issues as a critical appraisal of the protection of weaker parties under the Recast (or its predecessor) have not been discussed among scholars.

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?

I have not identified any cases dealing with the Section 3 of the Recast (or its predecessor).

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?

There do not seem to be particular problems, however, it may be interesting to mention a few cases. In one case, a Latvian provider of financial services brought a claim before a Latvian court for the repayment of the loan against a natural person (consumer).[19] It turned out that at the moment when the claim was brought the defendant was domiciled in England. The first instance court applied the Brussels I Regulation. Notably, it established that under Art. 16 the consumer was to be sued in the place of domicile, but Art. 17(3) allowed to circumvent this rule by a choice-of-court agreement which was entered into by the consumer and the other party to the contract, both of whom were at the time of conclusion of the contract domiciled in the same Member State, and which conferred jurisdiction on the courts of that Member State, provided that such an agreement was not contrary to the law of that Member State. The court established three circumstances: 1) the contract contained an agreement that allowed the claimant to

[19] Dobele District Court 14.04.015 judgment in the case No. C13071014.

choose between the Latvian court or an arbitration institution tribunal by the Association of Commercial Banks; 2) when this agreement was concluded both parties were domiciled in Latvia; 3) a choice of Latvian courts was valid under Latvian law. Hence, the Latvian court had jurisdiction.

In another case, a company brought a claim against a consumer for repayment of the loan.[20] The first instance court accepted jurisdiction since the contract contained an alternative choice-of-court clause: Latvian courts or arbitration in Latvia. The first instance court decided that the arbitration clause was invalid from the point of view of the consumer law. While the choice-of-court agreement was valid.

The Appellate Court disagreed. It considered that the consumer law provided that the whole clause that hindered consumer's right to take a legal action or exercise any other legal remedy was invalid. Hence, the Appellate Court ruled that the choice-of-court agreement was also invalid. Further, the Appellate Court quoted passages 59 and 61 of the C-375/13, *Kolassa* ruling. This allowed the Appellate Court to criticize the first instance court for not making a thorough assessment of the defendant's domicile, i.e., whether he was domiciled in Latvia or France. As usual, the Appellate Court also mentioned that the first instance court had to look in Latvian public registers to identify the domicile – this is a typical problem in Latvia where the domicile of a natural person is often confused with the declared address. Unsurprisingly, further the Appellate Court mentioned a number of circumstances necessary to assess the domicile: 1) the explanations by the defendant and a long-term lease contract for a lease of flat in France; 2) the first instance court had looked through Latvian public registers that indicated the French address as the place of declaration. However, the Appellate Court made another search through the register and found that at the moment of brining the appeal, the register contained a Latvian address as the registered address; moreover, the register of immovables indicated that the defendant had an immovable in Latvia (where he was registered). This was enough for the Appellate Court to conclude that while the defendant temporarily lived in France, he had no intention to move permanently to France. This was further confirmed by a number of litigation procedures in Latvian and the sale of resale estate in Latvia. As the result, the Appellate Court decided that the defendant was domiciled in Latvia.

In a third case, the claim was brought by a bank against the former student who had not repaid the study loan and resided in the England.[21] The defendant did not appear before the court. The contact again contained an alternative dispute resolution clause. The court decided that the arbitration agreement violated consumer law and was invalid. Since both the claimant and defendant were domiciled in Latvia when the agreement was concluded, the Latvian court had jurisdiction.

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?

[20] Riga Regional Court Civil Cases Division 23.09.2015 judgment in the case no. C29695813.
[21] Liepaja Court 10.08.2015 judgment in the case no. C20164015.

There are no cases known to me applying Art. 18(2) of the Recast. However, see the answer to the previous question as this problem has been dealt with under the Brussels I Regulation.

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?

1) "'Matters relating to individual contracts of employment". I have not found any cases interpreting this concept.

2) "Branch, agency or establishment". In one of the cases, the court faced claim of a former employee against the Consulate of the Embassy of the Russian Federation.[22] The first instance court referred extensively to the C-154/11, *Mahamdia* case and concluded: 1) The Consulate working in the area of private law did not benefit from the immunity; 2) The Consulate was an establishment of the state it represented; 3) an entity with a branch, agency or establishment in a Member State was considered to be domiciled in that Member State even if the entity itself was domiciled outside the EU. Therefore, since the Consulate was domiciled in Latvia and so was the employee, Latvian courts had jurisdiction.

3) "Place where or from where the employee habitually carries out his work". I have not found any cases interpreting this concept.

4) The application of the provision on the choice-of-court agreements.

In one case, the Appellate Court indeed had to invalidate a choice-of-court agreement due to its incompatibility with the Brussels I Regulation.[23] A person working as a ship mechanic concluded a contract with a Latvian company for a work on the vessel registered in Panama. The contract provided for jurisdiction in the flag state (Panama). However, the employee brought the case before a Latvian court. The first instance court did not apply the Brussels I Regulation at all, arguing that it applies only among the Member States while Panama was not a Member State – ironically for the purposes of the conflict-laws questions, the court declared that since the claimant had never begun to actually work on the vessel the dispute was mostly related to Latvian legal system and not to that of Panama. Instead of applying the Brussels I Regulation, the first instance court based its jurisdiction on the Latvian domestic Sea Code.

The Appellate Court did apply the Brussels I Regulation. Notably, it applied Art. 21. Among other things, the court referred to the C-154/11, *Mahamdia* case, where the CJEU stated that: 1) "Regulation No 44/2001, in particular Chapter II of which Article 18 forms part, contains a set of rules forming a unified system, which apply not

[22] City of Riga Vidzeme Urban District Court 25.10.2016 judgment in the case no. C30622810.
[23] Riga Regional Court Civil Cases Division 16.02.2017 judgment in the case no. C30584711.

only to relations between different Member States but also to relations between a Member State and a third State;[24] 2) "Moreover, in accordance with the wording of Article 21 of Regulation No 44/2001, agreements on jurisdiction may 'allow' the employee to bring proceedings in courts other than those indicated in Articles 18 and 19. Consequently, that provision cannot be interpreted as meaning that an agreement on jurisdiction could apply exclusively and thus prohibit the employee from bringing proceedings before the courts which have jurisdiction under Articles 18 and 19."[25] These two passages allowed the Appellate Court to resolve the problem of jurisdiction: notwithstanding the choice-of-court clause, the employee had a right to sue in Latvia as it was both: the place of employee's and employer's domicile.

However, I must also observe that there have been other instances when employees that have worked on vessels registered abroad have sued the very ship and the Latvian first instance court has simply based its jurisdiction on the domestic Sea Code.[26] Hence, there may be other cases where courts failed to recognize the need to apply the Brussels Regime to begin with, in particularly, if they were not appealed.

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?

I have not identified any cases where courts would have discussed the notion of "in rem" under Art. 24(1) or applied Art. 31(1) of the Recast (or its predecessor).

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?

Art. 24(2) has been applied by the Appellate Court, but this exercise was methodologically incorrect.[27] In the case at hand, a Latvian company brought a claim against a US company, claiming: 1) the declaration that the two companies had concluded a partnership agreement with a view of buying shares of one of Latvian banks; 2) compensation of damages for expenses that the claimant made in the interests of the partnership, but that benefited the defendant alone.

[24] CJEU, Case C-154/11, *Mahamdia*, para. 40.
[25] Ibid., para. 63.
[26] Riga City North District 29.05.2014 judgment in the case no. C32294912.
[27] Riga Regional Court Civil Cases Division 12.10.2016 decision in the case no. C30486115.

The case was objectively complicated. Firstly, it dealt with a claim concerning the conclusion of a partnership agreement based on Art. 2241 of the Latvian Civil Law; such partnerships lack legal personality. Nonetheless, the Appellate Court considered that issue fell within the scope of Art. 24(2) as it concerned an association of legal persons. The Appellate Court particularly underlined that the Recast did not explain the meaning of the "associations of natural or legal persons" and hence it was for the Latvia law to define the notion. Secondly, the Appellate Court stated that, since the claimant and defendant had signed a partnership agreement indicated a specific purpose for the partnership and subjected it to Latvian law, the first instance court was to determine the domicile of the partnership pursuant to Art. 63 of the Recast. Hence, the court simply ignored an express reference to conflict-of-laws rules in Art. 24(2) of the Recast and used the autonomous definition of Art. 63.

However, this case would have been hard to solve pursuant to the conflict-of-laws method. Firstly, the Latvian legal system has not conflict-of-laws rules for association of legal persons or partnerships. The easy way out would have been to rely on Art. 19 of the Latvian Civil Law that states that the applicable law for obligations is determined by: 1) an agreement of the parties; 2) the place of performance of the obligation in question; 3) if such place cannot be established: the place of conclusion of the contract. Secondly, applying Art. 19 to the specific case it was possible to establish that parties had agreed to the application of Latvian law. However, Latvian Civil Law does not specify where is a domicile for a partnership contract, because these types of partnerships are not legal persons and hence need no domicile. Therefore, there could have been problems of determining the domicile under Latvian law.

Alternatively, the court could have been tempted to apply Art. 8(3) of the Latvian Civil Law: the rights and capacity of a legal person are determined by the law of the place of the board of directors. The reality is that this provision is not used in practice,[28] instead courts use the incorporation theory vis-à-vis both foreign and pseudo-foreign companies. And in any case, Art. 8(3) can hardly be applied to a partnership that most likely does not fall within its scope due to absence of legal personality.

All these considerations bring me to a conclusion that Art. 24(2) is an inadequate provision. Its complexity with a reference to conflict-of-laws rules cannot be justified; not to mention that more sophisticated parties (and their counsel) could start to argue on its compatibility with the freedom of establishment and the principle of mutual recognition of companies, etc. But even leaving aside that aspect, based on my practical experience, I do think that Latvian courts, that are not particularly specialized in private international law, would find it to be a reasonable exercise to dive into conflict-of-laws issues in order to establish jurisdiction. The great advantage of the Brussels Regime is its comparative simplicity and uniformity. Art. 24(2) is a very complex provision that is difficult to apply and that undermines uniformity via its reference to conflict-of-laws rules.

[28] A. Mieriņa, Starptautiskās privāttiesības: ģenēze un sistēma, Rīga, LU Akadēmiskais apgāds, 2015, 175; G. Precinieks, "Eiropas Savienības dalībvalstī reģistrētai sabiedrībai piemērojamais likums: vai atvadas no kolīzijtiesiskā regulējuma?", in Tiesību integrācija un jaunrade – kā rast pareizo līdzsvaru: Latvijas Universitātes 71. zinātniskās konferences rakstu krājums, Rīga, LU Akadēmiskais apgāds, 2013, 188, 195-196.

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?

I have only identified one case dealing with Art. 24(4) of the Recast. In 2019, the Supreme Court ruled that Art. 24(4) did not apply to a claim asking a declaration of invalidity of the assignment of a trade mark.[29] The claim was brought by a Latvian company that requested declaration of invalidity of an agreement by which a New Zealand company assigned the trade mark to a third party. The claimant argued that the New Zealand company's entry was deleted from the commercial register[30] and thus it lacked the capacity to conclude the agreement.

The Supreme Court started its reasoning by observing that neither the first instance court, nor the Appellate Court had thoroughly considered the issue of jurisdiction and the applicability of Art. 24(4). In the Supreme Court's view, it was important to note that the claim was not about the validity of the trade mark, but the assignment agreement. To substantiate its position, the Supreme Court referred to the CJEU's C-417/15, *Schmidt* case, where the CJEU stated that "an action seeking the avoidance of a gift of immovable property on the ground of the donor's incapacity to contract does not fall within the exclusive jurisdiction of the courts of the Member State […]."[31] The Supreme Court relied on this passage by analogy to conclude that the same applied to Art. 24(4).

Nevertheless, the Supreme Court still established Latvian jurisdiction. Since the trade mark was registered in Latvia, the place of performance of the obligation was in Latvia. However, in the next paragraph, the Supreme Court substituted the "obligation" for the contract and came to a wrong conclusion that the place of performance of the contract was in Latvia. In reality, the claim did not target any specific obligation, but requested the declaration of invalidity of the contract and thus the special jurisdiction was arguably not applicable whatsoever. Moreover, at the next step, the Supreme Court began to determine domestic jurisdiction under domestic law. However, this is a constant mistake in Latvian court practice: Latvian courts ignore that the special jurisdiction also determines the domestic competence. This aspect of the Recast must be clarified in its text.[32]

39. Given the variety of measures in national law that may be regarded as 'proceedings concerned with the enforcement of judgements', which criteria

[29] Supreme Court Department of Civil Cases 21.03.2019 judgment in the case no. SKC-193/2019.
[30] The Supreme Court did not specify from which commercial register: Latvian or that of New Zealand.
[31] CJEU, C-417/15, *Wolfgang Schmidt*, para. 43.
[32] See, my answer to the Question 4.

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.

I have not identified any cases where courts would have discussed the applicability of Art. 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?

I have not identified any cases where this question would have been invoked.

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?

This issue seemed to be touched upon in one Supreme Court decision. In 2011, the Supreme Court had to decide what were the legal consequences of an agreement between the forwarding agent and the carrier to have their disputes decided by an Estonian court.[33] The companies had a service provision contract containing a choice-of-court clause. Both companies were domiciled in Latvia, although specific carriages were international. The Supreme Court referred to Recital 11 and Art. 23 of the Brussels I Regulation. After reciting their texts, the court stated that Art. 23 applied to agreements when at least one party was "registered" in the EU. Hence, in the Court's opinion, it followed that the provision applied when both parties were domiciled in different EU Member State. It also meant that it applied when they were both domiciled in one Member State but agreed to submit their dispute to another Member State. These conclusions were substantiated by a reference to German commentaries to the Brussels I Regulation.[34]

I must observe that as I said before in this decision the relations of the parties had some element of internationality: the carriages were done across state borders. But the decision never even once mentioned this fact and its language was plain and simple:

[33] Supreme Court Department of Civil Cases 12.10.2011 decision in the case no. SKC –1319/2011.

[34] Specifically: H. J. Musielak, *Kommentar zur Ziviprozessordnung*, 8. Auflage, München, Verlag Franz Vahlen München, 2011, VO (EG) 44/2001 Art 23; T. Rauscher, P. Wax, J. Wenzel, *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*, 3. Band, München, Verlag C.H.Beck, 2008, EuGVO Art. 23.

two persons domiciled in one Member State were allowed to make a binding choice-of-court agreement in favour of a court of another Member State. Thus, it ruled out any requirement of internationality.

At the same time, it is important to note that Latvian court practice is still at the stage of early development and it is far from obvious that that decision of the Supreme Court will have any relevance in the future.

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

I have not found any decisions applying Art. 25 of the Recast where a party to the choice-of-court agreement was domiciled in a third state. Therefore, I cannot make any conclusions regarding the increase of such litigation. Overall, the Latvian courts are probably not the most attractive courts for foreign parties. For this reason, I would not expect significant increase in the number of cross-border litigation. But these remain my speculations.

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?

I have not identified any cases where the formal validity would have been an issue.

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?

I have not found any such cases.

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?

I have not found any such cases.

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?

I have not found any cases dealing with this problem. Similarly, it has not been addressed in the literature. However, objectively there might be a problem. The issue cannot be resolved by the Rome I Regulation as it does not apply to the choice-of-court agreements. Thus, the issue is going to be determined by domestic law unless the specific Member State extends the scope of the Rome I Regulation to such agreements. This might lead to a number of problems.

Firstly, if the claim is brought in Latvia but there is a choice of a foreign court then the Latvian court will have to refer to foreign conflict-of-laws rules to assess the substantive validity of the agreement. Latvian courts are very unwilling to apply conflict-of-laws rules and foreign law. Likewise the parties might be advised by their lawyers not even to raise the issue as it implies additional costs of translating and submitting foreign legislation and still does not ensure legal certainty: nobody knows how the Latvian court will deal with such an issue, possibly even ignore it and as a result one can end up with a string of appeals only to decide the question of jurisdiction. This, in turn, means expenses that are often unreasonable for an economy with a smaller market and a result, smaller claims.

Secondly, the Latvian legal order has conflict-of-laws rules that determine the law applicable to contractual obligations, but not to procedural agreements. If these rules are going to be applied by analogy, then it will be the place of performance of the agreement that will supply the applicable law. According to the most reasonable interpretation, it will be the substantive law of the state whose court was chosen. However, one could reasonably ask: why not to establish a uniform rule saying that the substantive law of the state of the court, to simplify the task for judiciaries.

Thirdly, it is not clear whether the "substantive validity" also covers interpretation. If the "substantive validity" covers "interpretation" this should be stated clearly in the provision. Otherwise, at least, the Latvian courts will ignore this rule for a long time. Fourthly, the provision is not workable for alternative and negative choice-of-court agreements. This problem should also be addressed by the EU legislator.

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?

Please, see my previous commentary.

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?

There seems to be no general opinion on this question in the Latvian theory or practice.

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?

I have not identified any cases where courts would have applied Art. 26 of the Recast (or its predecessor).

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).

Firstly, it is important to note that Latvian courts constantly reject the possibility to obtain purely declarative (prejudicial) judgments in Latvia due to the absence of respective provisions in the Civil Procedure Law. Certainly, some of the actions still carry the element of declarative requests: e.g., a claim for recognition of invalidity of a contract or the rescission of the contract. However, in general there is no procedure for obtaining declarative judgment. Secondly, I have not identified any cases where Art. 29 of the Recast and its predecessor had been applied.

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?

I have not found any indications that such guidelines or practices exist.

There indeed could be practical obstacles. Firstly, linguistic obstacles. Secondly, procedural ones, the Latvian civil procedure law is governed by the principle of equality between parties, hence, usually it is for the party to prove its case. Normally, courts may lack incentive or even consider that to be a violation of the principle to engage themselves in contacting foreign courts. All in all, I have not found any indications that such practices exist.

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)?

Pursuant to Art. 131 of the Civil Procedure Law once the claimant lodges the document instituting the proceedings, the court has to make a decision to: accept the document and commence the proceedings, reject the action or, in case of formal defects, to give additional time to cure the defects. Hence, the court is seized without the defendant being serviced the documents. In other words, Latvian procedure complies with option (a) of Art. 32. Nevertheless, scholars do note that procedurally the proceedings do not begin on the date when the court receives the document instituting the proceedings, but when it decides that the proceedings are to be initiated.[35]

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?

Art. 74(3)(3) of the Civil Procedure Law provides that up to the moment when the court has begun to hear the substance of the case, the claimant can modify the claim provided in document instituting the proceedings. Such changes are only allowed up to this moment. After that they are prohibited. However, it is always the principle that no subsequent changes can modify post factum the moment when the proceedings were initiated.

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))?

I have not identified any cases dealing with this issue.

[35] K. Torgāns (ed.), Civilprocesa likuma komentāri. I daļa (1.-28. Nodaļas). Riga, Tiesu namu aģentūra, 2011, 325.

55. Has the application of Article 31(2) proved to be counterproductive and resulting in delaying the proceedings by the obligation of the court seised to stay the proceedings until a designated court has decided on the validity of a choice- of- court agreement, even when a prorogation clause has never been entered into or is obviously invalid?

There is no publicly available court practice that would allow to make an assessment of the (counter)productivity of Art. 31(2).

56. Has the combined application of Articles 33 and 34 in your view contributed to greater procedural efficiency and accordingly diminished the risk of delays in resolving disputes as well as the risk of irreconcilable judgments between a third state and your Member State?

Since there is no publicly available court practice applying these provisions, it is impossible to say how they would have been applied by Latvian courts and what would have been the positive or negative effects of their application. However, overall, I do consider that Arts. 33 and 34 are an important addition to the Brussels Regime. My opinion is that since the Latvian legislation, court practice and even doctrine are not sufficiently developed in the area of private international law, the Latvian legal system greatly benefits from a more complete and elaborated regime of the EU legislation in this area. Arts. 33 and 34, in a long run, add to legal certainty and efficiency and will diminish the risk of irreconcilable judgments. In a short run, until these provisions are interpreted (hopefully, in an adequate manner) by the Supreme Court, their efficiency may suffer from the inexperience of the local courts. But as time goes by, the Latvian legal system will be able to benefit from these provisions and the practice of the CJEU, interpreting them.

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?

Once again, since there is no publicly available practice, it is impossible to answer this question. However, I must note that for Latvian courts, due to their limited exposure and experience in private international law, it might be difficult to perform a balanced and profound assessment of different factual circumstances. In particular, since Arts. 33 and 34 would probably never become provisions that are often applied by courts, then it might be difficult for Latvian to create an elaborate practice on their application. However, lack of legal certainty and uniformity are usually the price to pay for flexibility.

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

Yes, I do consider that since Arts. 33 and 34 only allow (and not impose) the court to stay the proceedings (the use of the verb "may") with an exception of Art. 33(3), then it is a sufficiently flexible mechanism.

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?

I was unable to identify any cases where this problem would have been discussed. However, from the practice it seems that courts consider that all measures provided in Art. 138 of the Civil Procedure Law are certainly covered by Art. 35. For example, one first instance court, based on Art. 31 of the Brussels I Regulation, established a prohibition for a bank to make transfers to a certain company and seized funds of that company in its bank account in Latvia.[36]

However, Prof. Kačevska has legitimately argued that the Recast should do more on harmonizing the available provisional measures, to avoid their disparity among Member States.[37] She has identified a very serious problem in the Latvian legal system. Latvia has an infamous problem with biased and possibly even corrupt arbitration proceedings.[38] The inability of the national legislator to solve this problem has led it to favor only institutional arbitration as it does not trust *ad hoc* arbitration.[39] As a result, Art. 139(2) of the Civil Procedure Law specifies that a provisional measure can be requested only in favor of institutional arbitration proceedings. Prof. Kačevska has pointed out that this provision may make it impossible to use the Recast to obtain provisional measures in favor of an *ad hoc* arbitration.

I would like to add that Art. 139(2) also states that the anticipatory request for provisional measures is to be lodged before a court which will have the jurisdiction to hear the substantive claim. This provision, of course, implies that also non-anticipatory provisional measures are requested before the court hearing the main dispute. The provision, if applied to cross-border cases, could paralyze the functioning of Art. 35 of the Recast as nobody would be able to request provisional measures in favour of foreign proceedings.

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?

[36] Riga City Kurzeme District Court 10.06.2014 decision in the case no. 3-12/0056/5. (Rīgas pilsētas Kurzemes rajona tiesas 10.06.2014. lēmums lietā Nr. 3-12/0056/5).

[37] See, I. Kačevska, "Briseles I bis regula un pagaidu pasākumi starptautiskā šķīrējtiesas procesā", Jurista Vārds, 23.01.2018.

[38] Ibid. See also, T. Krūmiņš, "Arbitration in Latvia: A Cautionary Tale?", (2017) 34 Journal of International Arbitration, 2007, vol. 34(2), 303–331.

[39] I. Kačevska, "Briseles I bis regula un pagaidu pasākumi starptautiskā šķīrējtiesas procesā", Jurista Vārds, 23.01.2018.

Prof. Kačevska has noted that once again there can be a problem with Art. 35 and provisional measures in support of arbitration. The already mentioned Art. 139(2) of the Civil Procedure Law states that: "An application for securing a claim before an action is brought shall be submitted to the court in which the action, regarding the claim sought to be secured, is to be brought. If the parties have agreed to submit the dispute to a permanent arbitration court, an application shall be submitted to a court based on the location of the debtor or his or her property." In a few court decisions, it has been ruled that funds located in a bank account do not amount to "property" in the context of Art. 139(2) and hence in case a party would rely on Art. 35 of the Recast to seize the bank account in favor of an arbitration proceedings, some Latvian court would refuse the request. Prof. Kačevska notes that this goes against the C-391/95, *Van Uden* and that a location of the bank account would satisfy the territorial-link requirement.[40]

In practice, C-391/95, *Van Uden* case has been used in a reverse manner to justify enactment of provisional measures with extraterritorial effects by the appellate court. The request provisional measures was brought by the Latvian State (via its Ministry of Culture) against a Latvian company in a dispute over intellectual property rights.[41] The claimant argued that it requested provisional measures to be established not only for seizure of the defendant's asset in Latvia but also on foreign assets. The court justified the enactment of such by the reference to C-391/95, *Van Uden* case, because it allowed the court, having jurisdiction as to the merits of the case, to enact provisional measures with extraterritorial effects.

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.

I have not identified any cases applying the Hague Convention on Choice of Court Agreements in any context.

[40] Ibid.

[41] Rīga Regional Court Civil Cases Division 25.03.2014 decision in the case No. C30171108.

CHAPTER III

Recognition and Enforcement

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

I have not identified any cases where the procedure of Art. 36(2) would have been applied.

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?

According to the information provided by the Council of Sworn Baillifs, twice a year, the Council organizes different trainings for bailiffs that sometimes also deal with enforcement of foreign rulings, but they are not focusing exclusively on the Recast.

64. Has there been a concentration of local jurisdiction (venue) at the national or regional level in your jurisdiction institutionalising specialised enforcement agents for the enforcement of judgments rendered in other Member States?

No, there is no concentration of specialized enforcement agents for foreign judgments.

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?

No, there are no such measures.

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 such statistics (at least publicly available). Hence, it is impossible to make an evaluation of the effect of the direct enforcement on the dynamics of the enforcement of foreign judgments.

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?

So far, the practice does not seem to have come across the such problems.

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

So far, it does not seem to have been discussed in academic literature or invoked in the publicly available case-law.

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?

The search in the public database of court judgments failed to identify any such decisions. However, decisions on non-recognition are not made in the form of judgments, therefore courts are not obliged to publish them online. For that reason, there are probably some judicial decisions where Art. 46 has been applied but it is impossible to determine their number.

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?

It was impossible to find information on any change in a number of challenges or their success after the introduction of the "reverse procedure".

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 is no publicly available case-law that would allow to make any conclusions in this respect. My own practice shows that recognition of foreign judgments in employment cases is not an everyday phenomenon. Usually those are decisions in commercial cases that are enforced in Latvia.

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

The Supreme Court has clearly established that foreign judgments falling within the scope of the Brussels Regime cannot be reviewed on merits.[42] I have not been able to obtain information showing that this position of the Supreme Court was ignored by other courts. However, it is important to note that enforcement agents cannot review

[42] Supreme Court Department of Civil Cases 31.10.2014 decision in the case no. SKC-2793/2014; Supreme Court Department of Civil Cases 2.07.2014 decision in the case no. SKC-1255/2014.
[42] Riga Regional Court Civil Cases Division 12.10.2016 decision in the case no. C30486115.

the merits of the case in principles, their function is to enforce the decision and not to assess its legality or correctness.

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?

Based on the study of publicly accessible databases, I can conclude that there are no decisions where Art. 54 would have been used.

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?

Unfortunately, the representative of the Council of Sworn Bailiffs informed me that they have no such information.

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) of Directive 93/13/EEC or rather its transposition in domestic legislation has been used by domestic courts on a number of occasions. In most cases, the provision has been used in domestic cases in order to nullify the arbitration agreement in the contract. However, in the answer to the question 33, I do mention one case where the court ruled that the consumer law rendered a choice-of-court agreement invalid.

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

To the best of my knowledge Art. 79 has not been invoked by courts. However, in principle, Latvia has an agreement on judicial cooperation with Poland and a tri-party agreement with Lithuania and Estonia. These agreements deal with some issues that are not covered by the Recast or other EU legal instruments: capacity, conclusion of marriage, property law, etc. Curiously, these agreements may affect the application of Art. 25 of the Recast. Art. 25 subjects substantive validity of the choice-of-court agreement to the law of the Member State whose court is chosen by the parties. For example, if the parties have allegedly chosen the Polish court, but the claimant sues in Latvia, the question may be how to determine the validity of the agreement. Art. 39 of the bilateral agreement between Poland and Latvia states that the contractual relations are regulated by the legislation of the contracting party in whose territory the contract was concluded unless the parties to obligation law relations are not subject to the legislation they have chosen themselves. This case would pose numerous questions: 1)

does Art. 39 of the bilateral agreement apply to "non-obligation law" contracts like choice-of-court agreement; 2) if it does apply, then what is its personal scope: is it important that are parties are domiciled in Latvia or Poland or have Latvian or Polish nationality; 3) how to determine the place of conclusion of the contract. This example shows that Art. 25 in combination with different international conventions can greatly complicate the application of the Recast without any true justification.

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?

According to the CJEU cases: *TNT v AXA* (C-533/08) and *Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV* (C-452/12), the *lex specialis* status of prior convention is limited, i.e., they have priority over the Recast only if they comply with its underlying principles. In Latvia there is a large number of cases on the CMR and ocassional practice on bilateral treaties on judicial assistance with third states (Russia, Ukraine and Belarus), however, the practice has not grasped this problem. In fact, the search through the publicly accessible case-law database did not lead to identification of even one court decision where the two above mentioned cases of the CJEU would have been referred to. In other words, the Latvian legal system has so far not identified any cases where the approached expressed by the CJEU in those cases would have been useful.

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

I have identified numerous cases by Latvian courts applying the CMR, however Art. 31 CMR has been among the least applied provisions of that Convention. Hence, it was not possible to identify any cases where Art. 71 of the Recast would come into play either in respect of the CMR or any other convention. Moreover, in some cases, courts have determined the jurisdiction under the Brussels I Regulation and then applied the CMR as to the substance of the case, ignoring Art. 31.[43] Such mistakes usually do not lead to incorrect results. However, in one particular case, the situation was not so obvious. A French court decided a case seemingly applying the CMR. The judgment creditor wanted to recognize and enforce it under the Brussels I Regulation in Latvia. The Latvian Supreme Court ruled that it was recognizable and enforceable. However, in its reasoning, the Supreme Court analysed whether the defendants – domiciled in Latvia – could have been sued in France under the said Regulation.[44] Nonetheless, the Supreme Court never posed a question whether Art. 31 CMR could have been the provision to look at. Hence, we can observe that courts sometimes ignore the rule of precedence of "special" international conventions dealing with jurisdiction.

[43] Rezeknes court 25.04.2017 judgment in the case No. C26136015.

[44] Supreme Court Department of Civil Cases 29.11.2012 decision in the case no. SKC-2269/2012.

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?

I have been unable to find such cases.

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

I have been unable to find cases where these articles would have been applied.