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

QUESTIONNAIRE
for National Reports

MALTA

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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?

   Yes, these judgments are published online.

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

   Generally, yes. Maltese courts frequently refer to judgments delivered by the CJEU.

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

   The abolition of exequatur for the enforcement of foreign judgments has certainly been a massive improvement from its predecessor. No major shortcomings were detected from a Malta perspective.

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?

   None in particular.

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

   Yes. There have been a few odd cases were the national courts have applied the national law concept to the dispute and overlooked the fact that there is a uniform/independent definition of the same concept at Union level. Some of these cases were reported in the responses to the questions below.

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

rules on territorial jurisdiction caused difficulties in the application of the Regulation?

No. National rules on the competency of court or tribunal to hear a specific dispute generally relate to matters which, in our experience, rarely contain a cross-border element, for example, tenancy disputes. Moreover, the introduction in 2018 of a dedicated commercial court, namely, the Civil Court (Commerce Section), has not affected this position even though it hears select commercial disputes having a cross-border element.

As to national rules on territorial jurisdiction, we have observed a pattern in Maltese jurisprudence where Courts would justify their jurisdiction with reference principally to the Regulation 44/2001 or Regulation 1215/2012 (sometimes both), but also, with reference to national civil procedural law on jurisdiction (which do not apply where a matter falls within the scope of either Regulation 44/2001 or Regulation 1215/2012). The effect on the dispute is neutral, however, it is submitted that this might be indicative of lack of confidence in the application of the Brussels I/a Regulation and a misunderstanding of the effects of its application.

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

We are not aware of any instances where this happened. We do not envisage any such situations either.

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)?

They are contained in different statutory laws, but principally, in the Code of Organisation and Civil Procedure.[4]

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.

[4] Chapter 12 of the Laws of Malta.

None which were relating to either Regulation 44/2001 or Regulation 1215/2012.

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.

No. The Malta courts have made the distinction on numerous occasions.

However, there have been instances where Maltese courts have recognized and enforced foreign judgments on the basis of <u>both</u> the Insolvency Regulation 1346/2000 and also Regulation 44/2001,[5] showing a failure to appreciate the exclusive nature of these two regulations.

The distinction has been made clearer in subsequent judgments. In *Advocate Marino Torre in his capacity as bankruptcy curator of Giapa s.r.l. versus Lidia Randazzo and others* delivered by the Court of Appeal (Ref. 77/2016/SM) delivered on 28 April 2017, the respondents appealed from a judgment of the First Hall civil Court, the court of first instance, which recognized and enforced a judgment delivered by the *Tribunale di Palermo* which found that the respondents, being the heirs of one of the ex-directors of the claimant company in liquidation, were to be held liable for debts incurred by the company and were ordered to re-integrate a substantial sum to the estate of the claimant company in liquidation. The court of first instance held that it recognized and enforced that judgment in terms of the Insolvency Regulation and also Regulation 44/2001 and Regulation 1215/2012. The respondents' appeal was such that the "judicial proceedings" in question fell outside the scope of Regulation 44/2001 and Regulation 1215/2012, but also outside the scope of the Insolvency Regulation. The Court of Appeal rejected the appeal on the basis that the judicial proceedings initiated by the bankruptcy curator were "*directly from the insolvency proceedings and which are closely linked with them*" in terms of Article 25(1) of the Insolvency Regulation, and therefore, fell within its scope.

In a series of cases decided on 15 December 2016 by the First Hall Civil Court in the names *Brian Tonna in his capacity as liquidator of European Insurance Group Limited versus Luciano Rotondi and others*, the court at first instance delivered 3 judgments in connection with separate actions:

[5] *Dr. Henri Mizzi noe versus Philip John Day*, First Hall Civil Court (11 July 2011) [Ref. 679/2010]; *Dr. Massimo Vella noe versus Registrar of Companies*, First Hall Civil Court (19 June 2014) [Ref. 45/2014]; *Dr. Mario de Marco noe versus Stephen Anthony Newman et*, First Hall Civil Court (14 November 2017) [Ref. 139/2017].

- **1082/2013/JZM: The cause of action of these judicial proceedings is wrongful trading which is a remedy provided for in the Malta Companies Act[6] exclusively vested in the liquidator, following the winding-up of a company, against the ex-directors (who knew that there was no reasonable prospect that the company would avoid being dissolved due to its insolvency) to make a payment towards the company's estate.**
- **1083/2013/JZM: The cause of action of these judicial proceedings is "fraudulent trading" which is a remedy provided for in the Malta Companies Act exercisable only after the winding-up of a company and vested in the liquidator or creditors of the company against the ex-directors (who carried on the business of the company with intent to defraud despite its insolvency) to be liable for the debts of the company.**
- **1084/2013/JZM: The cause of action of these judicial proceedings is a claim of damages instituted by the liquidator against the ex-directors of the company.**

The Civil Court First Hall held that the wrongful trading (1082/2013/JZM) and the fraudulent trading (1083/2013/JZM) cases fell outside the scope of Regulation 44/2001 due to Article 2(b) of the Regulation 44/2001.The Court referred to various judgments of the Courts of Justice of the European Union, namely, C-133/78 *Gourdain*; C-330/07 *Deko-Marty Belgium*; C-111/08 *SCT Industri*; C-292/08 *German Graphics* ; C-213/10 *F-Tex SIA* and C157/18 *Kintra UAB*. It then went on to hold that these actions were "connected and resulting from the insolvency proceedings" and for that reason fell outside the scope of Regulation 44/2001. This conclusion was based on the fact that both actions required that the company was in a state of insolvency. The Court went on to seise jurisdiction in these cases on the basis of national civil procedural rules on jurisdiction.

As to 1084/2013/JZM, the Court held that the damages claim fell within the scope of Regulation 44/2001 since it was not directly connected to the insolvency proceedings.

We are not aware of any Maltese cases which referred to Case C-535/17.

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

We are not aware of any.

[6] Chapter 386 of the Laws of Malta.

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

Yes. The Civil Court First Hall in the judgment *Fl-atti tal-ittra ufficjali numru 363/2018 datata l-1 ta' Frar 2018 fl-ismijiet Dr Ann Fenech mandatarja u għan-nom u in rapprezentanza tal-bank credit Suisse AG inkorporat gewwa l-Isvizzera vs Pal Shipping Trader Two Co Ltd*, (Ref. 120/2018) decided on the 28 February 2018, declared that a maritime mortgage constitutes an authentic instrument for the purpose of issuing a European Enforcement Order in accordance with Regulation No. 805/2004.

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?

Not as far as we are aware.

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'?

We are aware of at least one case in which provisional measures were considered, on a *prima facie* basis, as a judgment by the Maltese courts.[7]

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?

As far as we are aware, this matter was not specifically decided upon within the context of Regulation 44/2001 or Regulation 1215/2012. We are aware of a handful of cases in which provisional measures were issued by the Maltese courts in support of foreign judicial proceedings already commenced in the EU within the scope of Regulation 1215/2012. These provisional measures are issued on an *ex parte* basis in terms of Article 35

[7] *Tyrell Corporation Limited versus Apassionata World GmbH and others*, First Hall Civil Court (2 October 2017) [Ref: 1429/2017]. This provisional measure was subsequently revoked for reasons unrelated to Regulation 1215/2012, see decree issued in the same names with Ref. 1095/2017 and dated 14 December 2017.

of Regulation 1215/20102. We are not aware of any challenges to the issue of such provisional measures.

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?

    We are not aware of any decisions which deal with this point. As explained in our response to question 15, provisional measures are generally issued in Malta in support of foreign judicial proceedings in the EU which have been initiated or will be in a span of 20 days from the issue of the provisional measure by a Maltese court.

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?

    We are not aware of any such decisions.

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*)?

    We are not aware of any such decisions.

CHAPTER II

Personal scope (scope *ratione personae*)

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

    No.

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?

    We are not aware of any such decisions.

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)?

    We are only aware of a few cases that dealt with the plea of *lis pendens* and in most of those cases the plea was rejected and the Malta court continued to hear the case.[8] However, it must be said that the domicile of the defendant was not a material consideration in those cases.

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?

    Yes.

    In *Fabrizio Pirello versus Bare Sport Europe Limited and other* delivered First Hall Civil Court on 15 October 2018 (Ref. 849/2018/GM), the Court wrongly held that that the abolition of *exequatur* applies to any judgments delivered AFTER 10 January 2015 although the judicial proceedings leading to it were instituted in 2004. This matter was not overturned at appeal, however, during the appeal proceedings other procedural pleas was raised and considered.

    In another case, *Maltrad (Holdings) Limited versus Norbert Coll* delivered by the Court of Appeal on 27 March 2015 (Ref. 832/2009/1) it held that

[8] *Lexington Services Limited versus Mortimer J. Walters*, First Hall Civil Court (21 March 2018) [Ref. 360/2017/MH]; *Balticmax Holding Company Limited and others versus Vroon Containrers B.V. and others,* Civil Court (Commerce Section), (29 November 2018) [Ref. 605/2017]. The plea was upheld in *Brian Tonna in his capacity as liquidator of European Insrance Group Limited versus Luciano Rotondi and others* , First Hall Civil Court (15 December 206) [Ref. 1084/2013/JZM].

Regulation 1215/2012 applied to judicial proceedings initiated in 2009 on the basis that rules of procedure are held to be apply to pending proceedings once they come into force. The Court of Appeal also remarked that Article 7 and Article 5 are very similar in any case.

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?

Yes. We have observed that in most cases where there is no jurisdiction agreement, none of the special rules under Section 3 would apply and no grounds for exclusive jurisdiction exists, Article 7 tends to be the more frequent basis for jurisdiction.

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?

No.

In *HSBC Bank Malta plc vs Standard Chartered plc,* delivered by the Court of Appeal on 28 April 2017 (Ref. 533/201313/1), a case within the scope of Regulation 44/2001, the place of performance of a letter of credit was held to be the place where the payment under it was to be made which was held to be Malta.

In *David Abela pro et noe versus Giuliano Papagni* delivered by the First Hall Civil Court on 11 July 2016 (Ref. 1181/2014/LM), the claimant put forward a number of claims for non-payment by an Italian company who was not party to the lawsuit), specifically, by invoking a personal guarantee undertaken by the respondent for the debts of the latter company. As to the first 5 claims, the First Hall Civil Court noted that these were either relating to services rendered in Italy, or matters relating to bank accounts in Italy or monies lent to the Italian company. On this basis, the First Hall Civil Court reached the conclusion that it had no jurisdiction to hear those claims on the basis that the place of performance of the respective obligations was in Italy. As to the last 6th claim, the First Hall Civil Court held that it had jurisdiction to hear the claim since it was related to services which were rendered by the claimant in Malta.

In *Carpet Cleaning Plus Limited versus Ioannis Ntavanellos* delivered by the First Hall Civil Court (Ref. 622/2015/AF) on 20 June 2018 the First Hall

Civil Court declined jurisdiction on the basis of Article 7(1)(b)(i) that the place of delivery of goods was Greece and not in Malta. This conclusion was reached with reference to various judgments of the CJEU, including, C-381/08 *Car Trim GmbH* and C-87/10 *Electrosteel Europe*, but more importantly, on the fact that the parties agreed to the sale of the goods on the basis of EXW (ex-works) Greece in terms of the ICC Inco Terms.

In four cases filed by the Federated Association of Travel and Tourism Agents against Deutsche Lufthansa, Swiss International Air Lines Ltd, Austrian Airlines AG, Brussels Airlines and the International Air Transport Association, the First Hall Civil Court summarily dealt with the issue of Article 7(1)(b) by way of a judgment delivered on 27 June 2019 (Ref. 609/2017/MCH; 610/2017/MCH; 611/2017/MCH; 612/2017/MCH). The First Hall Civil Court simply said that the travel agents had an agreement with the airlines in question to sell air tickets in Malta and that this constituted a service which is being performed here in Malta.

In *Barry Michael Whitmore vs Elizabeth Fraissenon* delivered by the First Hall of the Civil Court (Ref. 352/2018) on the 17th of June 2021, the issue arose as to whether a dispute concerning unjustified enrichment was a matter related to a contract and thus fell under Article 7(1) or whether it could be deemed as a tortious issue and thus falling under Article 7(2). The Court found that there was existing jurisprudence favouring both schools of thought, however, it ultimately decided to apply the general rule of jurisdiction under Article 4.

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?

    See replies to 24 above. The matter of interpretation of "unless otherwise agreed" has not been specifically dealt with in Malta.

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?

In some instances, it has.

In *Bet-at-home.com Entertainment Ltd (C 35055) vs Vectra S.A. (KRS 0000089460)* decided by the Civil Court First Hall (Reg. No. 600/2017 MH) on the 19th June 2019, the facts concerned an action brought by a Maltese gaming company against a Polish internet service provider that blocked access to its website for its customers. The court assessed where the '*place where the harmful event occurred or may occur'* was in this instance, and resorted to Recital 12 of the regulation as providing a connection where there exists a close link between the court and the action. Based on the facts, the court saw that the defendant only provided its services in Poland, to Polish customers, but that also the claimant company had not suffered any material damage in Poland, but in Malta, since its operations and assets were solely based in Malta. The Court decided that although the first origins of the damage occurred in Poland, the direct and immediate effects occurred in Malta, and thus Malta was the place where the harmful event occurred.

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?

As far as we are aware, no.

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?

Not particularly. We do refer to the judgment delivered on 6 March 2019 by the First Hall Civil Court (Ref. 923/2017/LM) in the names of *Istituto per le Opere di Religione versus Futura Funds SICAV plc et* where the claimant filed a lawsuit in Malta for breach of fiduciary obligations against 6 respondents. The last respondent who was domiciled in Italy pled the lack of jurisdiction in terms of the Regulations. The First Hall Civil Court remarked that none of the other 5 respondents raised the plea of jurisdiction, and rather, 2 of whom where in fact domiciled here and filed counter-claims, while the remaining 3 were not domiciled here. The First Hall Civil Court based its jurisdiction against the 6th respondent on the basis of Article 8(1) in view that the claims for fiduciary obligations raised by the claimant were addressed to all of the respondents, indiscriminately and jointly and severally. This, the Court argued, satisfied the requirement of "so closely connected". The First Hall Civil Court also went on to remark

that the claim was founded on a specific provision in Maltese law, and therefore, it was more expedient, due to the interpretation of a Maltese law, for the matter to be heard before a Maltese court or tribunal.

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?

    As far as we are aware, this issue has not been raised in Malta in any reported judgments.

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?

    As far as we are aware, this has not been dealt with, however, we do not see why Articles 15, 19 and 23 may not be applied to a jurisdiction agreement in favour of a third country.

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

    We are not aware of any such literature.

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?

    No.

    In *Joseph Farrugia vs Allianz SpA* delivered by the First Hall Civil Court on 5 December 2018 (Ref. 697/2018/LM), the Court held that it had jurisdiction to hear the claim of a Malta domiciled claimant against a foreign insurer who had issued cover to a third party driver who had

caused per injury to the claimant in a traffic accident in Sicily. The Court specifically applied Articles 11(b) and 13(2) of Regulation 1215/2012.

An earlier case within the scope of Regulation 44/2001, *Joseph Grixti and other versus Linear Assicurazione SpA* delivered by the First Hall Civil Court on 27 November 2016 (Ref. 134/2015/LM), adopted the same approach.

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 are no reported judgments on the provisions relating to consumers in Regulation 44/2001 and in Regulation 1215/2012.

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?

We are not aware of any decided cases relating with such situations.

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?

No.

In *VistaJet Limited versus Silvia Pusceddu* delivered by the First Hall, Civil Court on 5 October 2018 (Ref. 1152/2015), a training agreement signed between the claimant employer and the respondent employee was deemed to fall within the definition of an "individual contract of employment". The First Hall Civil Court noted the "training contract" was signed on the same day as the "employment contract" and that the two were linked and evidently showing a relationship of subordination. The First Hall Civil Court made specific reference to C-47/14 *Holterman*.

An earlier case within the scope of Regulation 44/2001, *L.R. Composizione Profumati Srl versus Ocean Group Limited and others* delivered by the First Hall Civil Court on 11 May 2015 (Ref. 562/2014), also refused to hear the case on the basis that cause of action was in relation to a contract of employment which was concluded and performed in Sicily not in Malta.

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?

    We are not aware of any cases dealing with rights *in rem*.

37. For the purposes of applying Article 24(2), which rule of private international law applies for determining the seat of the company in your legal system? Do the courts in your Member State experience difficulties in this respect and, if so, how are these problems dealt with?

    The place of incorporation is generally applied to determine the seat of a company. No particular difficulties were observed vis-a-vis Regulation 44/2001 or Regulation 1215/2012.

    A recent case, *Balticmax Holding Company Limited and others versus Vroon Containrers B.V. and others,* delivered by the Civil Court (Commerce Section) on 29 November 2018 (Ref. 605/2017) held that it had exclusive jurisdiction to deal with a matter relating to shares issued in a company incorporated in Malta on the basis of Article 24(2) of Regulation 1215/2012.

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?

    We are not aware of such decided cases.

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.

We are not aware of any such cases which have dealt with this point.

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?

We are not aware of any such cases which have dealt with this point.

Prorogation of jurisdiction and tacit prorogation

41. Application of Article 25 requires a minimum degree of internationality. Is there any particular case-law and/or literature, in your Member State in which this minimum degree of internationality has been discussed and/or a certain threshold has been set? If yes, what are the considerations and/or arguments that have been made?

No. However, it would appear that in all cases where the Maltese courts have recognised an exclusive jurisdiction agreement, there was an evident international dimension to the dispute.[9]

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?

So far it has not.

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?

No reported cases within the scope of Regulation 1215/2012.

[9] See for example *P.W.A. Co Limited vs Luisa Spagnoli SpA*, First Hall Civil Court (12 April 2013) [Ref. 590/2012/AE]; *Boston Prime Limited versus FXDD Malta Limited*, First Hall Civil Court (15 March 2019) [Ref. 1152/2016/MH].

Within the scope of Regulation 44/2001, *MyGuide Limited versus No Stop Technology Limited* delivered by the First hall Civil Court on 30 June 2011 [Ref. 1049/2010/MCH] the Court held that the reference to the "Terms and Conditions" (which included an exclusive jurisdiction clause in favour of foreign courts) on the invoices sent after the sale of goods were concluded did not satisfy the requirements of Article 23(1)(a-c) of that Regulation.

An unproblematic application of the equivalent of Article 23(1)(a) of Regulation 44/2001 was *Zealand Holdings Inc. versus Amsterdam Trade Bank NV*, First Hall Civil Court (11 December 2014) [Ref. 31/2014/MCH] where the jurisdiction agreement was clearly provided for in the signed agreement between the parties.

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?

We are not aware of 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?

We are not aware of any such decided 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?

We are not aware of any such decided cases.

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?

We are not aware of any such decided cases.

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?

We are not aware of any such decided cases.

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?

No. We have identified at least a couple of cases where the Maltese courts held that the fact that: (i) the defendant failed to raise the plea of lack of jurisdiction *in limine litis;* or also (ii) allowed the case to go into the merits despite the plea raised *in limine litis*; to be a submission to that court's jurisdiction.[10]

In one case in the names of *Cassar Fuel Ltd vs AOT Trading AG*[11], the court allowed the case to go into the merits despite the plea of jurisdiction having been raised *in limine litis*. However, this was corrected by the Court of Appeal which declared *obiter* that other pleas on the substance of the dispute may also be raised in conjunction with jurisdictional pleas.

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).

It does not appear that courts have experience any particular problems when interpreting the concept of "same cause of action".

A good example is *Brian Tonna nomine versus Luciano Rotondi and others,* First Hall Civil Court (Ref. 1084/13/JZM) delivered on 15 December 2016. This claim was for a declaration of responsibility and eventual liquidation of damages filed by the liquidator of a wound-up insurance company against various past directors. 3 of the directors in question raised the plea of *lis pendens* on the basis of civil judicial proceedings filed by the same company but under the direction of the preceding liquidator in Italy. The Court observed that the merits of those proceedings and the current ones were "similar" with "common denominators" being the liquidation and payment of damages suffered by the company. Interestingly, the Court dismissed the defence raised by the claimant that the definition of "same

[10] *Boarding School (Malta) Ltd vs Maizie Williams,* First Hall Civil Court (5 December 2012) [Ref. 200/2011/MCH]*; Raymond Debono versus Lisa Debono*, First Hall Civil Court (31 October 2017) [Ref. 666/11/JZM], currently under appeal; *Balticmax Holding Company Limited and others versus Vroon Containers B.V. and others,* Civil Court (Commerce Section), (29 November 2018) [Ref. 605/2017].
[11] *Cassar Fuel Ltd vs AOT Trading AG*, First Hall, Civil Court (28 November 2019) [Ref. 820/2015]

party" is not satisfied in view that different liquidators had instituted the judicial proceedings in Italy and those in Malta.

On the other hand, in *eHealth Limited versus Sergio Giglio and others*, First Hall Civil Court (Ref. 351/2017/LM) delivered on 23 May 2018, two preliminary pleas demanding the stay of the Malta proceedings on the basis of Articles 29 and 30 of the Regulations were rejected. The First Hall Civil Court did so by interpreting the concepts of "same party" and "same cause of action" with reference to the national concepts of *lis pendens* according to Maltese civil procedural law and jurisprudence. This judgment has since been overturned by the Court of Appeal.[12]

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?

There is no evidence of such practice of contacting courts of other Member States. As far as we are aware, there are no such standard internal procedural guidelines. Generally, judges and court officials working with the superior courts, that is, the First Hall Civil Court and the Court of Appeal have a decent command of the English language and are used to coordinating with foreign courts, in particular, in the execution of Letters of Request under EU Regulation 1393/2007 and the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

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)?

Under Maltese civil procedural law, the moment of "seizure" would tally with the day on which the document instituting the proceedings (generally, the "sworn application") is physically filed at the Registry of the Civil Courts of Malta.

[12] *eHealth vs Sergio Giglio and others*, Court of Appeal (20 July 2020) [Ref. 85/20 MCH]

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?

    No.

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))?

    As far as we are aware, the Maltese courts did not apply this Article to date.

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?

    So far, no. There is one case which dealt with a plea raised on the basis of Article 31(2). *In Lexington Services Limited versus Mortimer J. Walters*, First Hall Civil Court (Ref. 360/2017/MH) delivered on 21 March 2018, the claimant filed a lawsuit claiming breaches of fiduciary obligations and fraudulent conduct committed by the respondent. Following the filing of the lawsuit, service thereof on the respondent and the filing of a statement of defence by the respondent, the respondent (among others) filed a lawsuit on the same subject-matter in Ireland. Following the filing of the Irish proceedings, the respondent filed an application for a stay before the First Hall Civil Court on the basis on Article 31 (2) citing a choice of court clause in a Settlement Agreement signed between the claimant and the respondent (among other parties). The First Hall Civil Court rejected the application on the basis that the claims did not fall within the scope of the choice of court clause as they were claims relating to conduct which was committed after the signature of the Settlement Agreement and conduct which was fraudulent and in breach of fiduciary obligations. For this reason, the claims in the Malta lawsuit were separate and independent from those relating to the Settlement Agreement. The First Hall Civil Court also commented that the Malta Lawsuit is unlikely to depend on the outcome of the Irish proceedings and this was evident from the nature and drafting of the claims demanded—therefore there was no utility for the stay. The First Hall Civil Court also commented that the wording of the choice of court agreement, which read "any dispute arising out or in connection with this agreement", did not capture the personal conduct of the respondent as described in the sworn application.

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?

As far as we are aware, the Maltese courts have not applied these Articles to date.

57. Apart from concerns regarding procedural efficiency, are connections between the facts of the case and the parties in relation to the third state typically also taken into account by the courts in your Member State in determining their jurisdiction under Articles 33 and 34, bearing in mind the aims as expounded by Recital 24 of the Regulation?

As far as we are aware, the Maltese courts have not applied these Articles to date.

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?

As far as we are aware, the Maltese courts have not applied these Articles to date.

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?

It does not appear to be the case. We are aware of at least a dozen instances where the Malta courts upheld *ex parte* applications for interim measures (which are available under Maltese civil procedural law) in support of judicial proceedings initiated or pending before a court of another EU Member State to which the Regulation applies.

In *Massimo Vita versus Iannelli Ferdinando and other* delivered by the First Hall Civil Court on 7 July 2016 (Ref. 762/2016/JZM), the claimant applied for a warrant of prohibitory injunction against the respondent to bar the transfer of a vessel in support of pending Italian proceedings. The respondent pled that the Italian proceedings were not, in fact, initiated, and therefore, the claimant could not rely on Article 35 to that end. The First Hall Civil Court held that the warrant of prohibitory injunction available under Maltese civil procedural law is a "provisional / protective measure" under the Regulations, but then it stopped short of a definitive determination as to whether Italian proceedings were in fact initiated. It held that it was not competent to do so, despite the fact that legal opinions by ex parte Italian lawyers were submitted as part of the evidence. Rather, the First Hall Civil Court said that there are three criteria for Article 35 to apply: i) An application to the courts of a Member State; ii) For

provisional, including protective, measures as may be available under the law of that Member State; and iii) Even if the courts of another Member State have jurisdiction as to the substance of the matter. It held that each of these criteria were satisfied, and therefore, there was no need to determine whether the Italian proceedings were in fact initiated.

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?

This point does seem to have been considered by the Maltese courts.

In *eHealth Limited vs Sergio Giglio and others*, the First Hall of the Civil Court on the 23rd of May 2018 in proceedings with reference number 351/2017/LM noted that a Member State which has jurisdiction over the substance of an action is also able to issue provisional measures in connection with that same action in accordance with national rules. However, the Court held that it is unable to issue provisional measures affecting the property situated in another jurisdiction as it does not have control over such property.

However, and purely by way of an analogy, a similar argument was raised in a challenge against interim measures obtained on *ex parte* basis by a claimant in support of international arbitration proceedings in *Dr. Louis Cassar Pullicino nomine vs Dr. Ann Fenech Nomine*, First Hall Civil Court (Ref. 731/2018) delivered on 1 August 2018. In this case, the debtor challenged the issue of a precautionary garnishee order against on the basis that he was absent from Malta—which was not contested. The First Hall Civil Court said that national rules on jurisdiction (which apply to disputes outside the scope of the Regulations) only apply to lawsuits and do not apply to interim measures. It went on to add that Maltese civil procedural law allows the issue of interim measures in support of international arbitration proceedings without requiring that the debtor is present here or otherwise that the First Hall Civil Court has jurisdiction.

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.

As far as we are aware, no.

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?

This optional procedure was first used in *Advocate Norval Desira nomine versus Oil & Ship Consultancy Limited* delivered by the First Hall Civil Court (Ref. 1099/18/FDP) on 2 July 2019. In this case, the respondent, duly served with the application, did not object to the recognition of the foreign judgment.

This procedure was used again in *Nuovi Cantieri Apuania SpA vs Featherstar Limited* having reference number 903/2019 and delivered on the 26th of November 2020. Other cases include *Advocate Dr Tonio Grech noe vs Dr Dustin Camilleri et*[13] and *Advocate Dr Tonio Grech noe vs Dr Yanica Bugeja et*[14].

As a sidenote, there remain several cases in which the enforcing judgment-creditor requests Maltese Courts to declare a foreign judgement enforceable in accordance with Regulation 44/2001, despite the fact that they fall within the scope of Regulation 1215/2012. Notwithstanding this, Maltese Courts have been willing to convert the action to that contemplated by Article 36(2), *ex officio* (of their own motion). This is evident in several local judgements, namely, *Alfred Schwab noe vs Mr Green Ltd*[15]*; G.C. SpA vs Palumbo Malta Shipyard Ltd*[16]*; Johann Stelingwerf vs Denise Caruana*[17]*; and Advocate Dr Yanika Micallef vs United Game Tech Management Ltd*[18].

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?

As far as we are aware, no.

[13] *Advocate Dr Tonio Grech noe vs Dr Dustin Camilleri et*, First Hall, Civil Court (3rd December 2019) [Ref. 391/2019]
[14] *Advocate Dr Tonio Grech noe vs Dr Yanica Bugeja et*, First Hall, Civil Court (7th November 2019) [Ref. 457/2019]
[15] *Alfred Schwab noe vs Mr Green Ltd*, First Hall, Civil Court (20th July 2021) [Ref. 582/2021]
[16] *G.C. SpA vs Palumbo Malta Shipyard Ltd*, First Hall, Civil Court (15th October 2020) [Ref. 876/2018]
[17] *Johann Stelingwerf vs Denise Caruana*, First Hall, Civil Court (30th January 2020) [Ref. 403/2019]
[18] *Advocate Dr Yanika Micallef vs United Game Tech Management Ltd*, First Hall, Civil Court (20th January 2021) [Ref. 1204/19/FDP]

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?

As far as we are aware, no.

65. Have there been other specific legislative or administrative measures in your jurisdiction possibly facilitating the direct access of creditors or applicants from other Member States to the enforcement agents?

As far as we are aware, no.

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?

As far as we are aware, no. Attempts to enforce foreign judgments in Malta are usually influenced by the presence of assets in Malta. There is no such data available, in particular, since some of the attempts to enforce foreign judgments are withdrawn and those would not be publicly available with ease.

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 no.

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

So far no.

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

No.

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?

No.

We are not able to remark anything on this matter. There are no decided cases of such challenges within the scope of Regulation 1215/2012.

There are numerous cases within the scope of Regulation 44/2001 in which these defences were raised.[19]

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?

No material difference was observed.

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

We have found no case law to suggest otherwise.

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?

We are not aware that this was ever raised or that Article 54 of Regulation 1215/2012 was ever dealt with.

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?

This point was not specifically dealt with by judgments relating to Article 37(2) of Regulation 1215/2012, however, it is practice to produce a translation of that judgment in English.

[19] See amongst others: *GIE Pari Mutuel Urbain (PMU) v Bell Med Ltd and others*, Court of Appeal (28 September 2007) [Ref. 217/2006/1]; *Christa Plaza versus Express Tours & Packages Limited*, Court of Appeal (3 December 2010) [Ref. 76/2008/1]; *V.O.F. Vastgoed B&B versus Maray & Grant Limited and other*, Court of Appeal (15 December 2015) [Ref. 886/12/SM]; *Brauerei C. & A. Veltins GmbH & Co. KG versus Lior Bebera,* First Hall Civil Court (15 December 2016) [Ref. 433/2016], paras 22-30; *Advocate Marino Torre in his capacity as bankruptcy curator of Giapa s.r.l. versus Lidia Randazzo and others*, Court of Appeal (28 April 2017) [Ref. 77/2016/SM], and *Dr Edward Debono noe vs Ronald Gaerty and Mary Gaerty,* First Hall of the Civil Court (5th October 2021) [Ref1055/2018/FDP].

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?

    None.

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

    There are none.

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?

    None.

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

    None.

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?

    So far no.

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

    So far no.