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Report on the application of Regulation (EU) No. 1215/2012 on jurisdiction and enforcement of judgments in civil and commercial matters by Portuguese courts

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

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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?

Only judgments that are rendered in second and third instances are normally published. They are available online at www.dgsi.pt.

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

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The number of Portuguese published judgments applying the Brussels Ia Regulation is still limited. The CJEU case law has provided important guidance applying the Brussels and Lugano Conventions and the Brussels I and Ia Regulations but it was not sufficient due to different reasons.

The main reasons are the following:

- In some cases, the Portuguese courts were not aware of the relevant CJEU case law or did not interpret it accurately.
- The Portuguese courts, in some cases, had to decide issues that were not previously addressed by the CJEU or in which the CJEU's judgments raised problems of concretization.
- In some cases, the Portuguese courts were faced with issues which those instruments left for the domestic laws.

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 prevailing view in the Portuguese literature generally favors the changes introduced in the Brussels Ia Regulation.

In my works, I have addressed some criticism to the abolishing of exequatur. In my opinion, this weakens the autonomy of the legal systems of the Member States. I also pointed out that this is mitigated by the possibility of control of the grounds for refusal of enforcement at the enforcement stage on the application of the person against whom enforcement is sought.

In any case, I believe that the control of the grounds for refusal of recognition and enforcement which concern public interests should not depend on the initiative of the opposing party.

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?

In line with the response given to the previous question, I think that control ex officio of the grounds for refusal of recognition and enforcement concerning public interests should be provided.

On the other hand, the adoption of domestic implementation rules regarding the issues which remain under the domestic procedural rules, as done in other Member States, can avoid some difficulties in applying the Regulation, in particular, in matters of recognition and enforcement of judgments.

The most common difficulties, divergences, and, in my opinion, errors in applying the Regulation rules on jurisdiction concern the determination of the place of delivery of goods or of provision of services in contractual matters under Article 7(1)(b) and the validity of jurisdiction agreements under Article 25(1).

In the first case, these problems often result from the interpretation of the contract, but some help could be provided by an express solution for the cases in which there is no explicit or implicit agreement on the place of delivery of the goods or of the provision of services. The resort to the choice of law rules, excluded by the CJEU case law, would seem preferable to very vague criteria.

In the second case, these problems are related with the difficulty to cope with the overwhelming case law on jurisdiction agreements, but some help could also be provided with a specification of the issues comprised in the "substantive validity" and by the express clarification that the validity of jurisdiction agreements does not depend on domestic rules of the derogated forum (except for those transposing EU directives within their respective scope of application).

Furthermore, some difficulties stem from divergences among the different linguistic versions of the Regulation. These divergences are, in general, known, and could be overcome by a reformulation in line with the CJEU case law.

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 the early days of the Brussels Convention and of the 1988 Lugano Convention that tension was detectable, but thereafter the principle of "autonomous interpretation" has been steadily followed.

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

In the literature, it has been understood that when the Regulation jurisdiction rule does not determine the territorial competent court the domestic rules apply, namely,

as a last resort, the residual head of territorial jurisdiction (Article 80(3) of Civil Procedure Code)[1].

As far as I know, this understanding has not caused difficulties, but a judgment rendered by the Tribunal da Relação de Lisboa addressed the issue of the relationship between a jurisdiction agreement referring to a specific Portuguese court and a domestic rule of territorial jurisdiction excluding agreements regarding the territorial competent court[2]. The court held, correctly, that, according to the Brussels I Regulation, the jurisdiction agreement should be fully respected.

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?

According to the reply given to the previous question, the residual head of territorial jurisdiction prevents "negative conflicts of jurisdiction" in these cases.

8. Are the rules on relative and territorial competence regulated in the same legislative act or are instead contained in different statutory laws (e.g., Code of Civil Procedure and statutory law on organisation of judiciary or other statute)?

The rules on subject-matter and territorial competence are contained in domestic statutes, mainly in the Civil Procedure Code.

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.

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[1] Cf. Miguel TEIXEIRA DE SOUSA e Dário MOURA VICENTE – *Comentário à Convenção de Bruxelas*, Lisboa, 1994, 20-30; Luís de LIMA PINHEIRO – *Direito Internacional Privado*, vol. III, t. I – *Competência Internacional*, 3rd ed., Lisbon, 2019, 80 and 226.

[2] Cf. RLx 21/4/2009, proc. no. 4265/07.9TVLSB-7.

I am only aware of a judgment by the Tribunal da Relação de Lisboa which decided that the Brussels I Regulation is not applicable to the recognition of part of a judgment confirming an arbitral award[3]. Recital 12 of Brussels Ia Regulation is considered helpful, but there is some criticism regarding the duty to recognize judgments that disregarded valid arbitration agreements which can lead to arbitral awards that shall also be recognized under the New York Convention[4].

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.

I am aware of 3 cases in which the demarcation between the scope of the Brussels regime and of the scope of the Insolvency regime was at stake.

The first case concerned the provisional seizure of assets of a company that subsequently was subject to insolvency proceedings in another Member State. The Tribunal da Relação do Porto held that the EC Insolvency Regulation, and not the Brussels I Regulation, was applicable[5]. In fact, the provisional measure could be seen as instrumental in relation to the insolvency proceedings, but the judgment was grounded instead on Article 15 of the EC Regulation which, in my opinion, only deals with declarative proceedings.

In the other two cases, apparently connected with the same insolvency proceedings, the Tribunal da Relação de Lisboa held that proceedings for declaration of nullity of a mortgage on a immovable, initiated by the mortgagor after being subject to insolvency proceedings, fell under the exclusive jurisdiction provided in Article 22(1) of Brussels I Regulation, rather than under the jurisdiction competent for the insolvency proceedings under the EC Insolvency Regulation[6]. To this purpose, the court invoked Article 5 and Recital 25 of this Regulation but, in my opinion, they concern the applicable law and not the jurisdiction. The decisive criterium, also alluded in the first of these judgments, should be grounded on whether

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[3] Cf. RLx 27/9/2007, proc. no. 5177/2007-2.

[4] Cf. Luís de LIMA PINHEIRO – *Direito Internacional privado*, vol. III. T. II – *Reconhecimento de Decisões Estrangeiras*, 3rd ed., Lisbon, 2019, 93.

[5] Cf. RPt 5/6/2008, proc. no. 0833213.

[6] Cf. RLx 21/1/2017, proc. no. 647/14.8TBFUN-A.L1-7, and 18/1/2018, proc. no. 646/14.0TBFUN-A.L1-6.

the proceedings were based upon common rules of civil or commercial law or upon specific rules of insolvency law[7].

The CJEU's reasoning in the case *NK* is in line with this criterium but, according to paragraph 17, it seems that the proceedings at stake were based upon a specific solution of insolvency law resulting from case law. Therefore, by holding that they were subject to Brussels I Regulation, the judgment raises more doubts than provides help.

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

As far as I know, there is no published Portuguese court case on recognition and enforcement of court settlements.

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 am aware of a judgment rendered by the Supremo Tribunal de Justiça concerning the application of Article 57 of Brussels I Regulation. The decision held that, within the scope of application of Brussels I Regulation, an authentic instrument enforceable in the Member State of origin only is enforceable in Portugal in accordance with Article 57 of the Regulation, even if according to Portuguese domestic law no *exequatur* would be required[8].

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?

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[7] Cf. CJEU 4/9/2014, on the case *Nickel & Goeldner Spedition*, no 27. See also Article 6(1) of the EU Insolvency Regulation.

[8] Cf. STJ 16/6/2005, proc. no. 05B1547).

As far as I know, there is no published Portuguese judgment or controversy in the Portuguese literature regarding Article 2 definitions.

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'?

As far as I know, the definition of "judgment" in Article 2(a) has not been questioned in the Portuguese literature or case law.

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 I know, Portuguese authors have not taken position regarding this issue. In my view, the correct understanding points to the jurisdiction that can be established according to the rules of the Regulation even before the initiation of the main proceedings[9].

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?

Regarding the first question, see the reply to the previous question. In my view, the filing of the claim in another Member State has no relevance for the enforce-

[9] See further MAGNUS/MANKOWSKI/PERTEGÁS SENDER/GARBER – *Brussels Ibis Regulation. Commentary*, Cologne, 2016, Article 35, paras. 29 et seq.

ment of a provisional measure issued in a Member State with jurisdiction as to the substance of the matter.

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

The issue requires further clarification, but it seems that the Member State courts may control if the court of origin has based its jurisdiction on the rules of the Regulation or if this basis can be inferred from the content of the judgment[10].

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*)?

As far as I know, the definition of the "judgment" did not attract particular attention in Portugal[11].

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

[10] See, for instance, RAUSCHER/LEIBLE – *Brüssel Ia-VO. Kommentar*, 4.ª ed., Cologne, 2016, Article 35, para. 40, with reference to CJEU case C-99/96 *Mietz*, para. 50.

[11] See, for the most developed analysis, LIMA PINHEIRO, Direito Internacional Privado III/II, cit., 73 et seq.

21(2)). Are there any statistics available illustrating an increased number of suit actions filed by consumers and/or employees in your jurisdiction?

I am not aware of any increase number of actions filed by consumers and/or employees in international cases in Portugal.

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?

I have sustained that the inclusion of Article 26 in Section 7 following Article 25, which is applicable regardless of the domicile of the parties, weighs in favor of the understanding, already prevailing under Article 24 of Brussel I Regulation, that the provision is applicable regardless of the domicile of the parties[12]. As far as I know, no other work has taken position regarding this issue in relation to Article 26.

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)?

According to the CJEU case law regarding the Brussels Convention, the provisions on *lis pendens* and related actions are applicable regardless of the domicile of the parties[13] and the local court cannot control the jurisdiction of the court first seized when the jurisdiction of the local court is grounded on heads of non exclusive legal jurisdiction or prorogated jurisdiction[14]. It seems that Article 29 only changes this understanding regarding the cases in which the local court has exclusive jurisdiction by effect of a jurisdiction agreement (Articles 29(1) and 31(2)).

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[12] LIMA PINHEIRO, Direito Internacional Privado, III/I, cit., 240-241.

[13] Cf. CJEU case C-351/89 *Overseas Union Insurance*, paras. 14-18.

[14] Cf. CJEU case C-351/89 *Overseas Union Insurance*, paras 20 et seq., and case C-116/02 *Gasser*, para. 54.

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 am not aware of any difficulty with the temporal scope of the Brussels Ia Regulation before Portuguese courts or other authorities.

Alternative Grounds of Jurisdiction

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

See the reply to question 4.

24. Which issue(s) proved particularly problematic in the context of Article 7(1): interpretation of the concept 'matters relating to a contract', distinction between the types of contracts, principle of 'autonomous interpretation' of the Regulation, determination of the place of performance? How were the difficulties encountered dealt with?

The most problematic issue is the determination of the place of performance under (1)(b). In some cases, provisions of the contract regarding the place of performance were not respected or correctly understood. Namely, it has happened that resort was made to the place of final destination of the goods in cases in which another place of performance was agreed.

25. Is the place where the goods were delivered or services provided decisive for determining jurisdiction even when the place of payment is agreed upon and a failure to pay the price has solely given rise to the dispute? If so, what is the prevailing view in the literature and case law on how the wording 'unless otherwise agreed' in Article 7(1)(b) is to be understood?

In general, within the scope of Brussels I and Ia Regulations the place of delivery of the goods or of provision of the services was considered decisive regarding the sale of goods and the provision of services even if the payment of the price was at stake. As far as I know, the Portuguese literature has not taken any position regarding the expression "unless otherwise agreed". In the case law, it has been understood as a reference to a jurisdiction agreement, which does not seem a correct interpretation.

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 am not aware of any published Portuguese court cases applying Article 7(2). Article 5(3) of Brussels I Regulation was correctly applied in most cases without noticeable difficulties. At least in two cases, however, it was understood incorrectly that the place where a consequential financial loss caused by damage occurred in another Member State could be relevant to determine the jurisdiction[15].

In a case concerning defamation perpetrated through the internet, the Tribunal da Relação de Lisboa held that the Portuguese courts had jurisdiction for the action in tort because the victim was resident in Portugal. No reference was made to the CJEU judgment in the case C-509/09 *eDate Advertising*[16].

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?

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[15] Cf. RCb 11/11/2003, proc. no. 2581/03, and RPt 15/10/2004, proc. no. 0434740.

[16] Cf. RLx 18/6/2013, proc. no. 3398/11.1TVLSB.L1-7.

I am not aware of any published Portuguese court case applying Article 7(4). In my textbook I examine this provision briefly[17].

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?

As far as I know, there were no significant controversies in connection with other rules on jurisdiction under Articles 7, 8 and 9.

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 I know, no views were expressed in the Portuguese case law and literature regarding the consequences of non-compliance with Article 26(2).

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?

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[17] See LIMA PINHEIRO, Direito Internacional Privado, III/I, cit., 141-142.

I have expressed the opinion that the derogation of the courts of a Member State jurisdiction in favor of the courts of a third State is limited by the exclusive heads of jurisdiction laid down by the Regulation and by the limits to the effectiveness of jurisdiction agreements in cases involving 'weaker parties'[18]. Other authors have advocated, regarding the Brussels Convention, that such an effect depend only on the domestic law of the Member State at stake[19].

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

In general, the Portuguese literature makes a positive evaluation of the provisions of Sections 3, 4, and 5[20].

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 am not aware of any difficulties in applying Section 3 by Portuguese courts.

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?

I am not aware of any difficulties in applying Section 4 by Portuguese courts.

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[18] LIMA PINHEIRO, Direito Internacional Privado, III/I, cit., 220.

[19] TEIXEIRA DE SOUSA/MOURA VICENTE, cit., 38, but see, for the view expressed before, Miguel TEIXEIRA DE SOUSA – *Direito Processual Civil Europeu*, Lisbon, 2003, 92.

[20] See, namely, Rui MOURA RAMOS – *Direito Internacional Privado da União Europeia*, Coimbra, 2016, 297 and 300 et seq.; LIMA PINHEIRO, Direito Internacional Privado, III/I, cit., 156 et seq.

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?

See reply to the previous question.

35. Have there been difficulties in applying Section 5 of the Regulation on the jurisdiction in matters relating to employment contracts, if so which aspect(s): the interpretation of the concept of 'matters relating to individual contracts of employment', the interpretation of the concept of 'branch, agency or establishment', 'place where or from where the employee habitually carries out his work', the application of the provision on the choice-of-court agreements?

In general, I am not aware of any difficulties in applying Section 5 by Portuguese courts. In one judgment, however, there was an incorrect interpretation of Article 23, holding, against the worker, the validity of jurisdiction agreements contained in the contract of employment conferring exclusive jurisdiction to the courts of a Member State[21].

Exclusive jurisdiction

36. Article 24(1) uses the expression rights '*in rem'*, but provides no definition. The same holds true for case-law of the CJEU, even though it has to some extent clarified the concept by holding that it is not sufficient that the action merely concerns a right *in rem* or is connected with such right. Do the courts in your Member State experience difficulties in distinguishing between disputes which have 'as their object' 'rights *in rem'* from those that merely relate to such rights and accordingly do not fall within the exclusive jurisdiction? If so, how are these problems solved? Have there been any problems with applying Article 31(1) in this respect?

The issue of the scope of this exclusive head of jurisdiction was raised in some cases, namely the following.

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[21] Cf. RLx 7/11/2018, proc. no. 27383/17.0T8LSB.L1-4. See also, regarding the 2007 Lugano Convention, RLx 25/11/2010, proc. no. 131/06.3TTLRS.L1-4.

The Supremo Tribunal de Justiça held that a foreign divorce judgment including allocation of matrimonial property immovables located in Portugal could be recognized because there is no exclusive jurisdiction of the Portuguese courts on the matter[22]. The judgment refers mainly to domestic jurisdiction rules, but also to Article 16(1) of the Brussels Convention and to the respective CJEU case law.

As already mentioned, the Tribunal da Relação de Lisboa held that proceedings for declaration of nullity of a mortgage on an immovable fell under Article 22(1) of Brussels I Regulation (and not under the EC Insolvency Regulation)[23].

The Tribunal da Relação de Lisboa and the Supremo Tribunal de Justiça held that proceedings concerning administration of an immovable connected with the matrimonial property regime does not fall under Article 24(1) because it is a matter excluded from the Regulation's scope (Article 1(2)(a))[24].

I am not aware of any problems with the application of Article 31(1) by Portuguese courts in this respect.

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?

For determining the seat of the company, it is applicable Article 3(1) of the Commercial Companies Code, providing that commercial companies are subject to the law of the main and effective seat of their administration. According to the second part of this provision, however, the company with formal seat in Portugal can not oppose to third parties a governing foreign law. In face of this provision, I have sustained that where the company has only the formal seat or the administration seat in Portugal, for the establishment of the Portuguese courts' jurisdiction one must pay attention to the seat that is the connecting factor used to determine the law applicable to the issue at stake[25].

As far as I know, there is no published judgment by Portuguese courts concerning this Regulation provision.

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[22] STJ 13/1/2005, proc. no. 04B3808.

[23] RLx 18/1/2018, proc. no. 646/14.0TBFUN-A.L1-6.

[24] RLx 24/5/2018 and STJ 15/1/2019, proc. no. 27881/15.0T8LSB-A.L1.A.S1.

[25] Cf. MAGNUS/MANKOWSKI/PINHEIRO, Brussels Íbis Regulation, cit., Article 24 para. 42.

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?

As far as I know, there is no published judgment of Portuguese courts applying Article 24(4). Nonetheless, the rule was referred to, in *obita*, in judgments concerning the arbitrability of intellectual property disputes.

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.

This head of exclusive jurisdiction raised some difficulties in Portuguese courts.

In one judgment, the Supremo Tribunal de Justiça ignored Article 16(5) of the Brussels Convention and accepted the derogatory effect of a jurisdiction agreement regarding enforcement proceedings[26].

In another judgment[27], the same court stated, correctly, in *obita*, that the opposition to enforcement falls under this head of jurisdiction, but that Article 16(5) of the Brussels Convention does not authorize the pleading, in the place of enforcement courts, of set-off between the right whose enforcement is being sought and a claim over which these courts would not have jurisdiction if it was raised independently.

The Tribunal da Relação do Porto held that Article 22(5) of Brussels I Regulation embraces, in general, enforcement proceedings[28], an understanding which is not uncontroversial in Portuguese literature[29].

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[26] STJ 11/7/2002, proc. no. 02B2894.

[27] STJ 14/3/2013, proc. no. 4867/08.6TBOER-A.L1.S1.

[28] RPt 21/9/2002, proc. no. 1900/08.5TJVNF-B.P1.

[29] See, for a different view, Miguel TEIXEIRA DE SOUSA – "A competência internacional exclusiva dos tribunais portugueses: alguns equívocos", *Cadernos de Direito Privado* (2004/5) 49-57, 53-54; Dário MOURA VICENTE – "Comércio eletrónico e competência internacional", *in Direito Inter-*

Two judgments held, based upon Article 22(5) of Brussels I Regulation, that the Portuguese courts had no jurisdiction for the enforcement proceedings concerning the seizure of a bank account located in a foreign country[30] or the seizure of a credit over a company located in a foreign country[31]. These judgments are concerned with the problem of establishing the jurisdiction for enforcement concerning non-tangible assets.

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?

As far as I know, this issue has not been addressed by Portuguese case law or literature.

Prorogation of jurisdiction and tacit prorogation

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

Portuguese case law has steadily understood that application of Article 25 requires a minimum degree of internationality. One decision by the Tribunal da Relação de Lisboa seems to waive this requirement[32], but the flexible criterium of interna-

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nacional Privado. Ensaios, vol. I, 263-277, Coimbra, 2005, 288; and Rui MOURA RAMOS – "O Direito Processual Civil Internacional no Novo Código de Processo Civil", *RLJ* 143 (2013) no 3983, 82-106, no 5.

[30] RPt 25/1/2011, proc. no. 7495/09.5TBVNG-A.P1.

[31] RLx 6/6/2012, proc. no. 4472/09.0TTLSB-B.L1-4.

[32] RLx 8/9/2015, proc. no. 542/14.0TVLSB-1.

tionality adopted in other judgments would lead to the same result in this particular case. In effect, according to the case law[33], the internationality can result from the close connection between the contract at stake, whose elements are located in Portugal, and another contract with foreign connecting factors and from the intervention of one of the parties as a multibranch party, which may act through subsidiaries located abroad.

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 am not aware of any increase of the number of litigations in which jurisdiction has been based on jurisdiction agreements falling under the Regulation.

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

In the light of CJEU case law, I do not consider easy to separate the formal requirements laid down by Article 25(1) from the consent issues.

Regarding Portuguese case law, it may be said that the most critical issue concerns the situations in which the jurisdiction clause is contained in a document sent by one of the parties to the other and there is no written acceptance (nor rejection) by the other party. In some cases, the possibility of waiving the written acceptance based upon practices which the parties have established between themselves or usages of trade was not taken into consideration, and therefore, the court inferred directly from the lack of written acceptance that there was no valid jurisdiction agreement. In other cases, a mere reference to the usual employment of these clauses in the trade concerned was considered sufficient to waive a written acceptance.

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[33] Cf. STJ 26/1/2016, proc. no. 540/14.4TVLSB.S1, 4/2/2016, proc. no. 536/14.6TVLSB.L1.S1, and 21/4/2016, proc. no. 538/14.2TVLSB.L1.S1, and RLx 4/6/2015, proc. no. 536/14.6TVLSB.L1-6.

44. Is there case-law in your Member State in which the formal requirement(s) of Article 25 (1)(a-c) have been fulfilled, but the choice of court agreement was held invalid from the point of view of substantive validity due to a lack of consent? If the answer is in the affirmative, what were the considerations made by the court?

In addition to the reply given to the previous question, it can be remarked that there are judgments in which a jurisdiction clause, fulfilling the formal requirements of Article 17 of Brussels Convention or of Article 23 of Brussels I Regulation, was considered excluded from the particular contract by operation of the domestic rules on incorporation in the particular contract of general conditions of contract. In general, this approach is not followed by most recent judgments (but see *infra* reply to question 75).

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?

As far as I know, Portuguese courts have never experienced problems with the term "null and void".

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 am not aware of any difficulties in the application of Article 25(1) by Portuguese courts concerning the reference to Private International Law. In the literature, it is advocated the resort to an analogical application of Rome I Regulation[34]. In any case, this solution depends on the Private International Law system of each Member State and concerns only the issues not addressed directly by Article 25(1) and falling under the scope of the Rome I Regulation.

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[34] See Rui PEREIRA DIAS – *Pactos de Jurisdição Societários*, Coimbra, 2018, 318 et seq., and LIMA PINHEIRO, Direito Internacional Privado, III/I, cit., 365.

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?

As far as I know, there is no Portuguese published case law or literature addressing the substantive validity of non-exclusive jurisdiction agreements.

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?

It cannot be said that the doctrine of severability of jurisdiction clauses was firmly established in Portugal, but, as far as I know, when not explicitly accepted, it was implicitly accepted.

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?

Articles 18 of Brussels Convention, 24 of Brussels I Regulation and 26 of Brussels Ia Regulation have very often been considered by Portuguese courts, but normally the solutions resulted clearly from the wording of the provisions or from the CJEU case law.

A less common situation was addressed by the Tribunal da Relação do Porto[35], holding that an email message, sent by the lawyer of the notified defendant, alleging that he was a complete stranger to the case and that it was a case of a mistaken identity, does not amount to an appearance in the court.

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

[35] RPt 23/6/2015, proc. no. 333/14.9TVPRT.P1.

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).

The Tribunal da Relação de Coimbra decided a case in which in an enforcement proceeding the defendant alleged *lis pendens* in relation to an enforcement proceeding pending in another Member State invoking Article 29[36]. Referring only to domestic rules, the court held that an enforcement proceeding based upon authentic instruments does not have the same cause as an enforcement proceeding based upon a negotiable instrument in which the defendant is mentioned as guarantor. In my opinion, Article 29 is not applicable to enforcement proceedings. This understanding was adopted by the Tribunal da Relação de Guimarães in a case in which the identity of the cause of action was not at stake[37].

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 am not familiar with the courts practice, but I believe that if the elements provided by the parties are not enough the Portuguese courts will contact the other courts involved, namely for the purpose of Article 29(2). Except for the work overload of the judges, I do not see practical obstacles or considerations hindering the contact with courts of other Member States. For this purpose, the information available on the European E-Justice Portal and the European Judicial Network in civil and commercial matters can be useful.

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

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[36] RCb 7/2/2017, proc. no. 3775/12.0TJCBR-A.C1.

[37] RGu 28/2/2019, proc. no. 291/17.8T8MNC-A. G1.

(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)?

In Portugal, a court shall be deemed seized when the document instituting the proceedings is lodged with the court (Article 259(1) of the Civil Procedure Code). The proceeding is deemed pending as from this moment.

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?

As far as I know, subsequent amendments of claims do not affect the date of seizing in Portugal.

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 am not aware of any published judgments of Portuguese courts dealing with this issue.

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?

I am not aware of any published judgments of Portuguese courts dealing with this issue.

56. Has the combined application of Articles 33 and 34 in your view contributed to greater procedural efficiency and accordingly diminished the

risk of delays in resolving disputes as well as the risk of irreconcilable judgments between a third state and your Member State?

I am not aware of any published judgments of Portuguese courts dealing with this issue.

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?

See the reply to the previous question.

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?

Articles 33 and 34 are, in my opinion, an important innovation introduced by Brussels Ia Regulation. The admissibility of a margin of discretion regarding the relevance of *lis pendens* and pending related actions in third States courts is welcome. In any case, it should be combined with a limited reflexive effect of exclusive heads of jurisdiction established by the Regulation in order to take into account, within certain limits, the exclusive jurisdiction of third States courts, even if there is no pending action[38].

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?

As far as I know, the concept of "provisional measures" in the context of Article 35 and of its predecessors has not raised difficulties in the few Portuguese court cases published concerning the matter.

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[38] See MAGNUS/MANKOWSKI/LIMA PINHEIRO, *Brussels Íbis Regulation*, cit., Article 24 paras. 9 et seq., and LIMA PINHEIRO, Direito Internacional Privado, III/I, cit., 192 et seq.

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?

I have only knowledge of one judgment dealing with this territorial connection. In this case, the Supremo Tribunal de Justiça, based on the conclusion of the case *Van Uden*, held that a Portuguese court did not have jurisdiction for the provisional seizure of a bank account located abroad[39].

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 I know, there is no published Portuguese court judgment applying The Hague Convention on Choice of Court Agreements.

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?

As far as know, the procedure established in Article 36(2), as well as the procedure established in its predecessors, has never been addressed in a published Portuguese court case.

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[39] STJ 8/11/2011, proc. no. 1037/10.7TBACB-B.C1.

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?

I am not aware of any specific training or instruction concerning the direct enforcement in Portuguese courts of judgments rendered in other Member States under Brussels Ia Regulation.

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 are no specific legislative or administrative measures regarding the enforcement of judgments under Brussels Ia Regulation.

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?

See the reply to the previous question.

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?

I am not aware of any enhanced number of attempts to enforce judgments rendered in other Member States due to the applicability of Brussels Ia Regulation.

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?

I am not aware of any problems concerning the coordination between Brussels Ia Regulation and domestic Portuguese rules on enforcement, but it is very likely that they will occur in the lack of implementing rules.

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

Article 41(2) is mentioned in my textbook but, as far as I know, did not attract specific attention on the Portuguese case law and literature. It seems that this provision shall be interpreted in line with the CJEU case law regarding enforcement[40].

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?

As far as I know, there are no statistics available regarding proceedings for refusal of enforcement.

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?

As far as I know, there is no published Portuguese court case concerning Article 45(1), and I do not have any other data on its application by Portuguese courts.

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?

See the reply to previous question.

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[40] See, on this case law, LIMA PINHEIRO, Direito Internacional Privado, III/II, cit., 93-94.

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

As far as I know, Portuguese courts comply with the prohibition of *revision au fond*.

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?

As far as I know, there is no published Portuguese court case concerning Article 54, and I do not have any other data on its application by Portuguese courts.

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?

The only published Portuguese court case regarding translation in the context of recognition or enforcement of judgments rendered in other Member States that I have found regards the 1988 Lugano Convention. In this case, the court just held that the translation was not mandatory[41]. I do not have any other relevant data.

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?

As far as I know, within the context of jurisdiction Annex (1)(q) of Directive 93/13/EEC has never been invoked in a published Portuguese court case. Never-

[41] STJ 24/2/1999, proc. no. 67/99 [*CJ/STJ* (1999-I) 122.

theless, at least 2 judgments held that jurisdiction agreements contained in consumer contracts which fall under the scope of Brussels Regulations are, in general, subject to the control instituted by domestic rules transposing the Directive[42].

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

As far as I know, there is no published Portuguese court case applying Article 70 of Brussels I or Ia Regulations.

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?

As far as I know, this CJEU case law has not had, until now, any practical consequences in published Portuguese court cases.

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

As far as I know, Article 71 of Brussels I and Ia Regulations was only applied regarding the CMR Convention[43]

79. Have there been problems in your Member State with the delineation of the application of Article 25 Brussel Ia and The Hague Convention on Choice-of-Court agreements?

As previously stated, I am not aware of any published Portuguese court case applying The Hague Convention on Choice of Court Agreements. The same applies to problems of delimitation between the scope of Article 25 and the scope of this Convention. The issue is briefly addressed in my textbook[44].

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[42] Cf. RLx 19/11/2013, proc. no. 1001/10.6TVLSB.L1-1, and 6/10/2015, proc. no. 1001/10.6TVLSB.L2-1.

[43] Cf. RCb 24/3/2009, proc. no. 220/07.7TBVZL-A.C1, and RGu 14/3/2019, proc. no. 42116/18.6YIPRT.G1.

[44] Cf. LIMA PINHEIRO, Direito Internacional Privado, III/I, cit., 105 and 372-373.

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

As far as I know, there are no published Portuguese court cases applying Articles 71(a) – 71(d).

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