

Responses to Questionnaire 1

1. Introduction/background information

In general, the jurisdiction of the Irish courts in civil and commercial matters is not split according to case type (though special procedural rules or arrangements apply, for example, in family law cases), and courts at every level may deal with any kind of civil matter provided the claim is within the maximum monetary limit which the court may award. In the case of the Circuit and District Courts, the case must be commenced at the correct venue. The High Court, which ordinarily sits only in Dublin, is the Irish court of unlimited original jurisdiction. The Supreme Court (which also sits in Dublin) is the Irish court of final appeal.

The Circuit Court and District Court are courts of limited local jurisdiction. The subject-matter jurisdiction of each is prescribed by statute, but includes what would be regarded as civil or commercial claims in each case. The Circuit Court sits permanently in Dublin and Cork and outside these cities, there are scheduled or special sittings at approximately 55 large towns. The Circuit Court's monetary jurisdiction is limited to €38,092 in contract and tort claims. The District Court sits permanently in Dublin and Cork, and periodically in about 180 towns throughout Ireland. Its jurisdiction in contract and tort cases is limited to claims of up to €6,350. A less formal small claims procedure for consumer claims of up to €2,000 also operates in the District Court.

The procedures operated in each court are set out in secondary legislation known as rules of court. The current rules of court are the Rules of the Superior Courts 1986 ("RSC"), Circuit Court Rules 2001 ("CCR") and District Court Rules 1997 ("DCR"), though each set is frequently amended to take account of changes to applicable primary legislation and other developments and requirements.

Detailed annual statistics on the number of cases begun and concluded in the Irish Courts are published each year by the Courts Service (the body responsible for managing court support services) in its Annual Report. The annual reports for 2003 and 2004 are available on the Courts Service's website www.courts.ie.

New cases are broken down by case type, but the statistical data does not indicate the number of cases which involve non-Irish parties as plaintiff or defendant. There are long-established rules in the Irish courts which permit service of Irish proceedings on non-Irish defendants with the permission of the court (currently in Order 11, RSC and corresponding provisions of the CCR and DCR). Since 1988, these have been supplemented by rules prescribing the procedures which apply where the court's jurisdiction arises under the Brussels Convention 1968 and, more recently, those rules have been amended to prescribe the procedures which apply where the court's jurisdiction arises under Regulation 44/2001 (currently in Order 11A, RSC and corresponding provisions of the CCR and DCR). In practice, the Order 11 procedure is largely confined in civil and commercial cases to those where one or more of the defendants is in a state which is neither a Member State of the European Union or a Contracting Party to the Lugano Convention.

It is not possible to tell precisely what number or proportion of cases involve the Order 11 or Order 11A procedure. However, our impression is that probably fewer than 3% of cases before the Irish courts involve foreign defendants and the total number of cases commenced

in reliance on a jurisdiction conferred by Regulation 44/2001 is at present probably no more than a few hundred from among the total number of cases begun at each court level each year.

The total number of cases begun at each court level in Ireland in 2003 and 2004 was approximately as follows:

Year	High Court	Circuit Court	District Court
2003	21,000	41,000	87,000
2004	25,500	40,000	71,000

As to cases which proceed to a final determination by the court, it is extremely common in the High Court and Supreme Court for written judgments to issue, especially where complex issues of law or fact require to be decided. Accordingly, most cases decided by those courts which involved an issue arising under Regulation 44/2001 lead to a written judgment, of which several hundred are produced each year. On average, there are no more than four or five written Supreme and High Court judgments each year (less than 1% of the total) which consider issues in relation to Regulation 44/2001 in a substantive way. However, it is important to note that there are many other decided cases involving a non-Irish party or parties, including cases where the jurisdiction conferred by Regulation 44/2001 has been invoked, but no dispute has arisen about how Regulation 44/2001 operates in the particular case.

Written judgments are uncommon in the Circuit Court and are almost never given in the District Court, but we estimate that the proportion of decisions in those courts dealing substantively with issues involving Regulation 44/2001 is similar.

Accordingly our specific answers to the questions are as follows:

Probably no more than about 20 decisions concerning Regulation 44 and/or the Brussels Convention are given in Ireland in any calendar year. These represent less than 1% of the total number of cases.

2 Most of the reported decisions in Ireland involve the Irish Court retaining jurisdiction (we would estimate about 80%). The provisions most commonly relied on are Articles 5.1 and 5.3.

3 Statistics relating to the number of applications for a declaration of enforceability are not maintained separately, as the application is initiated in court without being assigned a court record number (from which statistics are derived). However, our impression is that in practice a declaration is ultimately given in almost every case in which the application is properly made and the required proofs are produced. Where there is a defect in the application due to the non-production of a necessary document, for example, the usual practice is to adjourn or postpone the application for a short time to allow the applicant to produce the necessary document to complete the application. Accordingly, having regard to the recorded number of cases in which an order granting a declaration of enforceability is made, we believe that approximately 50 new applications are made per year in Ireland.

4 The reported number of cases assigned a record number (from which we assume a declaration of enforceability was made) was 47 in 2003 and 39 in 2004.

5 As indicated above, it is not possible to identify the number of such cases where a declaration has been refused in the first instance. These applications are made to the Master of the High Court (who is assigned such cases under the European Communities (Civil and Commercial Judgments) Regulations 2002, Statutory Instrument 52 of 2002). The ordinary practice in the Master's Court is to have the affidavit and exhibited documents supporting the application lodged shortly in advance of the time at which the application will be heard. If, having considered the affidavit and documents exhibited, the Master is satisfied that all of the necessary proofs have been produced, the order will generally be made as a matter of course. As indicated, if there is some defect in the papers presented, the Master will identify this and suggest the steps which the applicant should take in order to refresh the application. Our impression is that where the lawyers representing the applicant are familiar with, or have experience of, the local procedure in relation to the operation of Regulation 44/2001, the application is likely to succeed in the first instance.

6 The number of cases in which the Master's initial decision granting a declaration of enforceability is revoked on appeal are not separately counted (although obviously given the small number of cases which involve a declaration, the number of appeals is smaller again). We believe that there have been very few, if any, cases in the Irish Courts where the declaration has been revoked on appeal. We are not aware of any reported case in recent years in which this has happened.

7 When the application papers are ready, there is no extended waiting time to be listed for the hearing of the application. Accordingly, the amount of time required to obtain a decision containing a declaration of enforceability is quite short, often no more than a week or so if the papers are in order.

8 The most frequently applied provisions are Articles 5.1 and 5.3.

Responses to Questionnaire 2

2.1. The conditions of recognition and enforcement of judgments, authentic instruments and courts settlements within Ireland as provided for in Regulation 44/2001 are elaborated upon in the procedures set out in the rules of court. At present, the detail of the relevant rules so far as the High Court is concerned is contained in Order 42A, RSC, a copy of which is attached. We do not believe that the procedural rules contain any separate national conditions or conditions additional to what is prescribed in Regulation 44/2001. However, in addition to producing the judgment and certificate, an affidavit in support of the application must, according to Order 42A, rule 6, RSC, also state:

- (1) whether the judgment provides for the payment of a sum or sums of money;
- (2) whether interest is recoverable on the judgment or part thereof in accordance with the law of the state in which the judgment was given, and if so, the rate of interest, the date from which the interest is recoverable, and the date on which interest ceases to accrue;
- (3) an address within Ireland for service of proceedings on the party making the application and, to the best of the deponent's knowledge and belief, the name and usual or last known address or place of business of the person against whom judgment was given;
- (4) the grounds on which the right to enforce the judgment is vested in the party making the application (e.g. if the applicant is not the judgment creditor);
- (5) as the case may require, that at the date of the application the judgment has not been satisfied, or the judgment has not been fully satisfied, and the part or amount in respect of which it remains unsatisfied.

2.2. Ireland's only land border with another Member State is with the United Kingdom, along the border with Northern Ireland. However, we do not believe that there is anything to suggest that cross-border litigation accumulates in the border region. In fact, although most of the cases dealt with in Ireland involve the United Kingdom, there are relatively few cases from the border region.

2.3. The vast majority of cases dealt with in Ireland originate in the United Kingdom as Member State of origin.

2.4. We are not aware of any particular problems arising from the use of the standard form concerning Article 54, the production of which is regulated by Order 42A, rule 22, RSC.

2.5. We have experienced cases where the judgment creditor has neglected to produce the certificate form the court in the member state of origin; however, the usual practice in Ireland is, unless the case is for some reason unusually urgent, not to begin the application for a declaration of enforceability until the certificate has been produced. We do not believe that any particularly difficulty arises in relation to the production of the certificate.

2.6. As the majority of cases dealt with in Ireland originate in the United Kingdom, with whom Ireland shares a common language, there are rarely, if ever, any language problems arising. In the small number of cases originating in other Member States, translation into English is usually readily available. Translation into Irish is also permitted, but never availed of.

2.7 Yes, unless the original document is in English or Irish. Order 42A, rule 20, RSC provides "Where any judgment, order or document which is required for the purposes of this Order is not in one of the official languages of the State, a translation thereof into the Irish or English language certified by a person competent and qualified for the purpose in one of the Contracting States of the 1968 Convention or Contracting States of the Lugano Convention, shall be admissible as evidence of same. The competence and qualification of the translator shall be verified by affidavit."

2.7.1 We are not aware of any definitive practice in this regard, particularly because the number of cases which involve translation in Ireland is very small. Order 42A, rule 20, RSC, which deals with translation, specifies that where "... any judgment, order or document which is required for the purposes of this Order is not in one of the official languages of the State, a translation thereof into the Irish or English language certified by a person competent and qualified for the purpose". It is a matter for the party making the application to present the materials required in accordance with the requirements of Regulation 44/2001 and Order 42A. As the rule refers to translation of a "judgment", we suspect that in practice, the applicant may take a view that where there is a clearly delineated operative part in a very long written decision of a foreign court, it is only that operative part which should be treated as the "judgment" for the purpose of the local rule, though we are not aware any particular trend which could be identified in this regard.

2.7.2. Where the applicant must pay in the first instance the costs of translation, we imagine that this is likely to act as a disincentive to judgment creditors who might otherwise seek enforcement in Ireland where the amount at issue is small. However, we suspect that the translation costs are relatively small as a proportion of the total costs incurred, including principally legal costs (and all of the costs may be recovered if enforcement is ultimately effective). Therefore we do not imagine that the requirement of translation actually discourages people from bringing relevant applications in many cases.

2.8. Ordinarily, a successful applicant is entitled to the costs of the application against the judgment debtor. This follows from the general principles established in Order 99, RSC which provide that while the costs of and incidental to every proceeding in the Superior Courts (Supreme Court and High Court) shall be in the discretion of those courts, costs ordinarily follow the event (i.e. they are awarded to the successful party) unless the court for special reason otherwise directs.

2.8.1 The principal charges arising in Ireland in an application for a declaration of enforceability will be the costs of retaining Irish lawyers (a solicitor and/or barrister), if retained, to prepare the affidavit supporting the application, attend and make the application in the Master's Court, and serve the order granting the declaration of enforceability on the judgment debtor. It is not mandatory to retain lawyers for this purpose (the judgment creditor could, for example, make the application in person), though in every case of which we are aware, local lawyers are retained. The court costs will comprise a court fee of €15 on the affidavit, regardless of the value of the claim. Court fees in Ireland are generally at standard

rates and do not vary depending on the value of the matter at issue. Solicitors are prohibited by the Solicitors Act 1994 from charging fees based on a percentage of the value of the claim or amount at issue or recovered.

2.8.2 The basis upon which a solicitor's charges are calculated in Ireland are primarily a matter of contract between the solicitor and client. Where there is any issue about the proper amount of a solicitor's charges, the charges payable by the client (or by the person obliged to indemnify the client) may be measured by an independent court officer, the Taxing Master. The criteria normally applied in such a measurement will normally be:

- (a) the complexity of the matter;
- (b) the urgency of the matter;
- (c) the difficulty or the novelty of the questions raised;
- (d) the skill, labour, specialised knowledge and responsibility involved;
- (e) the number and importance of the documents prepared or examined;
- (f) the amount or value of any transaction involved;
- (g) the importance of the matter to the client;
- (h) the time reasonably spent by the solicitor and his firm on the matter;
- (i) the place(s) and the circumstances in which the matter is pursued.

Where work is of a routine nature, solicitors will provide an advance estimate of the charges likely to be incurred and many solicitors are prepared to agree a fixed fee for a particular piece of work. Many solicitors are also prepared to agree to be paid by reference to the time spent on the matter in question, at rates which vary from firm to firm and depend also on the seniority of the individual carrying out the work concerned. We believe that it is usual for charges of a couple of thousand euros including outlay to be incurred in cases involving applications for declarations of enforceability.

2.8.3 Yes. Where costs are awarded against the judgment debtor, the judgment creditor should ordinarily be entitled to recover what are called "party and party" costs, which are generally taken to include costs properly and necessarily incurred by the successful party in asserting his or its legal rights against the unsuccessful party, but do not include any special fees paid by the successful party or any fees incurred by the successful party which were not necessary to the attainment of the result in the case.

2.8.3.1 Unless otherwise provided, or agreed, the function of measuring costs recoverable is performed by an officer attached to the High Court known as the Taxing Master. The process involves the successful party who has been awarded costs lodging a draft bill of costs with the Taxing Master and attending with the unsuccessful party to review the bill, to which the Taxing Master may make adjustments. In most cases, the amount of the costs which are recoverable is agreed between the parties without having to attend before the Taxing Master.

It is possible under Order 99, rule 5, RSC, that the Court or the Master may, in awarding costs, direct that a sum in gross be paid in lieu of taxed costs. This means that the Court or the Master can be asked to specify the precise amount of costs which will be recovered, so as to avoid the necessity of agreeing costs or bringing the matter to the Taxing Master. We doubt that this possibility is much used in cases involving declarations of enforceability, though it seems to us that it might be appropriate and could lead to greater efficiency for judgment creditors in dealing with such cases.

2.8.3.2 There is no distinction in Ireland between the procedures for executing the amount of a judgment and the procedures for executing in respect of measured costs. In practice, most

parties will seek to negotiate an arrangement for payment of costs in the context of attempting to execute on the declaration of enforceability.

2.8.3.3 Where the sum involved is large, it is common for the successful party to proceed to execution (once the time for appeal has expired) without waiting to have their costs measured. In many cases, the steps taken towards execution lead to an overall settlement, which includes costs. It is possible to execute separately in respect of costs, though this can involve issuing a second set of processes. It does take some considerable time for costs to be taxed in the Taxing Master's office, so where a party waits for costs to be taxed before seeking to execute, there can be a delay of several months.

2.9 The practice in Ireland is that the declaration of enforceability is served by the successful applicant (judgment creditor), not by the court. The fact that a period of one month is allowed within which the judgment debtor may appeal against the declaration inevitably provides an opportunity for the judgment debtor to attempt to put assets beyond execution. However, there are important protections for the element of surprise, in particular the availability of interim measures, the most significant in Ireland being a Mareva or asset freezing injunction. Additionally, the availability of the European Enforcement Order procedure for uncontested claims (given effect in the RSC by Statutory Instrument 3 of 2006) maintains the element of surprise in cases in which that procedure is available. The usual series of steps in Ireland is as follows:

- (1) the judgment creditor's lawyers prepare the application and lodge the affidavit in the Master's Court;
- (2) the Master considers the affidavit and some days later delivers his ruling on the application in Court;
- (3) if interim measures have been granted in accordance with Article 47.2, the judgment creditor's lawyers will usually advise any affected third parties (e.g. banks) directly by telephone;
- (4) the written order issues from the Court some time later;
- (5) the judgment creditor's lawyers serve the written order on the judgment debtor and (where there are interim measures) on any affected third parties;
- (6) execution on foot of the declaration of enforceability is stayed (may not occur) for one month from service of the declaration of enforceability in accordance with Article 47.3.

2.10 We are not aware of any reported authority on legal aid being granted in Ireland in accordance with Article 50. In Irish practice, lack of resources on the part of a litigant is not a ground for exemption from court fees (which are at relatively modest levels); exemptions arise instead depending on the nature of the case – for example court fees are not payable in family law cases.

2.11 Authentic instruments and court settlements are not a feature of Irish litigation practice and therefore they would be unusual when brought before the Irish courts. We suspect that because of this, Irish parties to proceedings in other Member States would be somewhat hesitant to involve themselves with authentic instruments or Court settlements which might be recognised in Ireland. Additionally, most Irish cases concerning declarations of enforceability originate in the United Kingdom, where authentic instruments and court settlements are we believe likewise not a feature of litigation practice. Ultimately, we are not

aware of any reported Irish cases involving either authentic instruments or court settlements. As to appealable judgments, we believe the ordinary practice in Ireland would be to stay the proceedings for a declaration of enforceability if it was clear that an appeal against the judgment had been lodged in the court of origin.

2.12 We are not aware of any problems arising regarding the national procedural laws referred to in Annex I of the Regulation. We do not believe that any issue in relation to the possible application of these rules has ever arisen in a reported case in Ireland.

2.13 The production of the certificate in the form prescribed in Annex V of the Regulation is required in appropriate cases by Order 42A, rule 22(3), RSC. To obtain the certificate, the person seeking it must file an affidavit with the appropriate court registrar containing the information set out in Order 42A, rule 22(2), RSC. The production of the certificate in the form prescribed in Annex VI of the Regulation is never required in Ireland as there are no cases relating to authentic instruments. We are not aware of any problems in relation to the production of the Annex V certificate.

2.14 We believe the Master (and a Judge where necessary) would have readily available a version of the printed form concerning Article 54 (Annex V). However, because the number of cases involving translation in Ireland is very small, we do not believe any issue arises.

2.15 There may be arguments for placing the obligation on the public authorities of the Member States to use lawyers in the service of the state to move applications for declarations of enforceability where requested by foreign judgment creditors, as this would remove the cost of retaining private local lawyers for that purpose. For example, where requests arise for assistance under Regulation 1206/2001 in relation to the taking of evidence, these are normally dealt with in Ireland by the Courts Service (the body which manages and provides administrative support to the courts) without the need for retaining Irish lawyers.

However, the principal difficulty in relation to execution of foreign judgments in Ireland is not as regards obtaining the declaration of enforceability but rather as regards the mechanics of execution, which are substantially left in the hands of the judgment creditor. Many of the relevant procedures are governed by archaic laws which have not been modernised and there can often be difficulties in achieving effective enforcement. There is no public office available to take on execution on behalf of judgment creditors (whether Irish or non-Irish) and we suspect the cost of establishing and resourcing such an office (which, for reasons of equality, would have to be available to Irish as well as foreign judgment creditors) would make it unlikely to be proposed.

Having regard to the movement towards streamlining of procedures, for example by use of the European Enforcement Order and the proposed European Order for Payment Procedure, one could speculate about the prospect of Europe-wide effectiveness of civil and commercial judgments for specified money amounts without exequatur at some point in the future. That time may remain some way off and what may be of greater present interest is whether there are intermediate positions which might be reached, such as a European system for the transmission and exchange of information of use to judgment creditors about judgment debtors in cases to which Regulation 44 applies.

2.16 As indicated above, enforcement measures in Ireland are in the hands of the judgment creditor so it depends on the creditor. In relation to assembling the documents necessary to pursue an application for a declaration of enforceability in another Member State, this should in principle be possible in relation to an Irish judgment when the Court's order has been "perfected" (i.e. the written order has been drawn up and, if necessary, stamped or sealed by the court registrar). Where there is a written judgment upon which the Court's decision is based, the decision itself is usually not given until the written judgment is available. The time for the issue of written orders can vary, though most court registrars are extremely co-operative in producing written orders on an expedited basis where requested by the successful party, when there is a special element of urgency concerning some action which is to follow. We believe that relevant certificates are also issued very quickly.

2.17 We are not aware of any reported cases in Ireland in which a substantive objection to the judgment claim has been raised. Where a substantive objection is raised by the judgment debtor, this is ordinarily treated as a matter which must be taken up, if at all, in the Member State of origin. There is no provision in Ireland corresponding to what is described of the German implementing statute. However, if the judgment creditor had been paid in part, or had entered into an enforceable agreement to set off his debt against claims by the debtor, or otherwise to compromise his rights under the judgment, these matters should be disclosed in the affidavit grounding the application for a declaration of enforceability.

Responses to Questionnaire 3

1.1 We are not aware of any particular problems in judicial practice in Ireland with the autonomous interpretation of “civil and commercial matters”. There is no reported case in Ireland where this definition has been substantially considered.

1.2 We are not aware of any reported Irish cases involving the assertion by a public authority of a claim against a private person. However, we see no reason in principle why Regulation 44 should not be invoked by a public authority in an Irish court, provided the claim was a civil or commercial matter. By way of example, the Irish Courts, applying the doctrine of foreign sovereign immunity, will not entertain cases against a foreign public authority where that public authority was acting *jure imperii*, but will entertain such claims where the foreign public authority was acting *jure gestionis*. See cases such as *Government of Canada –v- Employment Appeals Tribunal* [1992] ILRM 325; *Schmidt –v- Home Secretary* [1997] 2 IR 121. The principle would seem to us capable of application in reverse, so that an ordinary commercial contract claim where the foreign public authority was acting *jure gestionis* should be admissible.

1.31 We do not believe that there are any significant issues in relation to claims concerning maintenance and living costs. Ireland is a party to the New York Convention on the recovery abroad of maintenance (20 June 1956) so is used to the enforcement of foreign maintenance orders, which do not offend against the prohibition in Article 1.2(a) in this context. The only Irish case law in relation to claims concerning maintenance costs is the case of *Farrell -v- Long* (Case C-295/95) which the Irish Courts referred to the ECJ to ascertain the correct interpretation of a “maintenance creditor” for the purposes of Article 5(2) of the Convention. In that case the applicant who was domiciled in Ireland sought to bring an action for maintenance against the respondent who was an Irish citizen resident in Belgium. The applicant contended that the Irish Courts had jurisdiction under Article 5(2) of the Convention. The respondent disputed this asserting that the term “maintenance creditor” employed in Article 5(2) referred only to a person already in possession of a maintenance order and not a person, such as the applicant who was seeking such an order for the first time. Where the difficulty arose was that the Irish legislation which incorporated the Convention, the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 defined a maintenance creditor as “the person entitled to the payments for which [a maintenance] order provides”. The ECJ recalled its consistent case law to the effect that the terms of the convention must generally be interpreted autonomously to ensure that there is effective and uniform application. The ECJ held that there was nothing in the Convention to suggest that the term “maintenance creditor” should be interpreted in accordance with the *lex fori*. The ECJ looked at the objective of Article 5(2) whose purpose it found to be the protection of the maintenance applicant who is generally the weaker party. The ECJ noted that Article 5(2) is framed in general terms and does not draw a distinction between those already recognised and those not yet recognised as entitled to maintenance.

1.3.2 In relation to insolvency matters, we believe that there is no prospect of Irish proceedings being served outside Ireland on a foreign defendant which offend against the prohibition in Article 1.2(b). This is because the procedures for bankruptcy or corporate

insolvency are commenced in Ireland by distinct initiating documents and there is no danger of mere debt recovery proceedings being transformed into such proceedings.

1.4 We are not aware of any case in Ireland in which this issue has arisen. If the issue arose, we believe that regard would be had to Regulation 1408/71 as a means of reaching the correct meaning of Article 1.2(c).

1.5 There is no particular demand in Ireland for the extension of Regulation 44 to arbitration. Foreign arbitration awards under the New York Convention (Convention on the recognition and enforcement of foreign arbitral awards done at New York on 10 June 1958) and the Washington Convention (Convention on the settlement of investment disputes between States and nationals of other States open for signature in Washington on 18 March 1965) can already be enforced in Ireland. The Irish Court may give permission to serve proceedings out of the jurisdiction in such a case under Order 11, rule 1(q), RSC.

In Ireland the position of arbitrations has been further addressed by a recent amendment to Order 11, RSC concerning the enforcement of foreign judgments by means of the common law principles of *forum conveniens*. Statutory Instrument No. 109 of 2006: Rules of the Superior Courts (Arbitration) 2006 extended the Order 11 jurisdiction to cases where "relief is sought within the jurisdiction in connection with an international commercial arbitration (within the meaning of section 3(1) of the Arbitration (International Commercial) Act 1998), regardless of the place of arbitration." An arbitration under the 1998 Act is one which conforms to the model law as per the UNCITRAL Model Law on International Commercial Arbitration.

1.6 In judging whether due service has occurred and whether defective service can be remedied a court is to apply the law applicable in its state of origin. The guarantees of due service and sufficiency of time uphold one of the important principles of natural justice - *audi alteram partem*, an element of 'due process' - which has long been recognised in the Irish Courts. While the guarantees of due service and sufficiency of time remain as yet to be considered by the Irish Courts in the context of Regulation 44, it is well established that a party in Irish proceedings must be given a fair opportunity to prepare his case, to know the case he has to meet, to present his evidence and to test the evidence of his opponent.

1.7 The special rules on recognition and enforcement procedures in Ireland are set out in Order 42A, RSC (discussed in the response to Questionnaire 2). It is not mandatory to be represented by an Irish lawyer in these procedures. A natural person may represent himself or herself, although there is doubt whether a body corporate can be represented by an officer or employee and in such cases the practical effect is that a body corporate must retain a lawyer.

See also the response to question 4.2 on Article 47 below in relation to the *Elwyn (Cottons)* cases in 1989 wherein the Court noted the need for clarification of the procedure for an appeal of a refusal to grant protective measures. In that case the plaintiff "appealed" the refusal through the mechanism of judicial review although in the subsequent case the court noted that it was not clear that the usual appeal mechanisms in relation to decisions of the Master of the High Court under would not suffice.

This dilemma may have been resolved by the amendment of Order 63, RSC relating to general appeals of decisions of the Master which now expressly excludes matters relating to

European Enforcement Orders for uncontested claims. Statutory Instrument No. 3 of 2006 amended Order 63 to expressly provide that "Save in the case of a European Enforcement Order certificate issued in accordance with Order 42B, any party aggrieved by an order, including an order as to costs, made by the Master may, within six days from the perfecting of the same, or if made *ex parte* from notice of the same, or in the case of a refusal from the date of such refusal, apply to the Court to discharge such order or to make the order refused". (This is in recognition of EEOs not being appealable). However as there has not been any further case law on the matter it remains to be seen whether a judicial review application by a party aggrieved by a decision of the Master under Regulation 44 would still be entertained. Hogan notes in his article "Procedure and Practice and the Judgments Convention" that this issue was essentially side stepped in the later case of *Rhatigan -v- Textiles y Confecciones Europeas S.A.* [1990] IR 3 where the plaintiff sought to resist enforcement on the basis of technical defects. Hogan notes that as the grounds for resisting enforcement relied on by the plaintiff in *Rhatigan* were not grounds contained in either Article 27 or 28 [now 34 and 35] the plaintiff's action was essentially a type of judicial review proceeding claiming that the Master's enforcement order was a nullity; however the plaintiff's proceedings were confusingly described as an 'appeal'.

1.8 Ireland has not agreed any relevant bilateral or multilateral Convention with any other state.

2.1.1 There has not of yet been any academic commentary on the functioning of the Regulation but Roderick Bourke in his lecture entitled "The Irish Experience of the Brussels Convention" discussed the operation of the Brussels Convention at length as follows:-
"Lawyers find, in practice, the Convention to be more certain and more useful for their clients than the old [Order 11, RSC which incorporated the principle of *forum conveniens* into Irish law] discretionary regime. Under that regime (which of course still applies to cases involving defendants from outside the area where the Convention applies) one must get leave of the court to issue proceedings on defendants outside the jurisdiction. This leave is dependent upon satisfying one of the criteria of Order 11. Even if leave is granted, the defendant could seek to dispute jurisdiction more easily than where jurisdiction is asserted under the Convention. Problems of enforcement of an Irish judgment abroad in the old regime also made litigation in Ireland against defendants from elsewhere a very uncertain and unsatisfactory process. Under the Convention, in most cases it is clear whether or not jurisdiction exists and of course a judgment is usually easier to enforce than under the old regime".

Bourke goes on to note "the Convention is intended to limit forum shopping and to make issues of jurisdiction as clear as possible."

The recent Irish case of *Burke -v- Unex Sports GmbH* [2005] IEHC 68 illustrates the accepted supremacy of the principle of uniformity of practice and procedure in litigation across the European Union. In that case an Irish citizen, who had purchased a motorcycle helmet from a German retailer sought to claim that he was badly injured in motorcycle accident in Ireland from a defect in the helmet. The High Court noted that prior to the trial the plaintiff had amended his plenary summons to delete the reference to Article 5(1) and now intended to attempt to precede solely in tort against the German retailer. The Irish Court found that the Regulation must be interpreted strictly so as to ensure its uniform application among the Member States and that as Germany was the place of delivery of the helmet and the place

where the retailer company resided, the plaintiff ought to have brought his action in Germany.

The Court based its decision on the ECJ case of *Kalfelis -v- Schroder* [1988] (Case C-51/97). In *Kalfelis* the ECJ held that the provisions of Articles 5 and 6 constitute "derogations from the principle that jurisdiction is vested in the courts of the state where the defendant is domiciled and as such must be interpreted restrictively". The court approved the following passage from *Kalfelis*:-

"In order to ensure uniformity in all the member states it must be recognised that the concept of 'matters relating to tort, delict and quasi delict' covers all actions which seek to establish the liability of the defendant and which are not 'related to a contract' in the meaning of Article 5(1)."

The Irish Court found that the phrases "matters relating to contract" (Article 5(1)) and "matters relating to tort, delict or quasi delict" (Article 5(3)) had to be given what it described as an autonomous or independent European Community meaning". The phrases could not be interpreted solely by reference to the national law of the domicile member states of the parties for the purposes of establishing jurisdiction under the regulation.

Whilst the national law of Ireland had established that the existence of a contractual relationship between the parties did not preclude a claim based in tort (*Finlay -v- Murtagh* [1979] IR 249), in EU member states the principle of 'mutual exclusivity' applies and no action in tort is possible between two parties to a contract. It followed that the Irish court found it could not overlook the existence of the retail contract and allow a claim grounded solely in tort. The court found that as Germany was the place of delivery of the helmet and the place where the retailer company resided, the Plaintiff ought to have brought his action in Germany for the purposes of Article 5(1) and no claim grounded in tort could be upheld here.

Accordingly the Irish Court declined jurisdiction notwithstanding the plaintiff's fear that he was now out of time to bring Court proceedings in Germany. The Court noted that there was nothing in the Brussels I Regulation which allowed it to determine jurisdiction by reference to a possible detriment to the plaintiff by being out of time.

2.1.2 [We have interpreted this question from the French version of the questionnaire as asking "Do the Courts of the Member State comply with the assertion of the ECJ that only the grounds of jurisdiction identified by article 5 are valid?" - i.e. have the courts claimed a jurisdiction which exceeds Article 5.]

In Ireland a complementary common law system of *forum conveniens* under Order 11, RSC means that practitioners have an alternative and in some cases broader means of claiming jurisdiction and thus practitioners have not attempted to enlarge the scope of the grounds of jurisdiction under Article 5.

Further in recent corporate and criminal assets cases, the Irish courts have avoided the traditional constraints of Order 11 by looking to whether the Oireachtas (Parliament) was to be treated as having intended that the legislation should involve applications being served extraterritorially.

In *Re Euroking Miracle (Ireland) Limited* [2003] 2 IR the issue arose when an application was made to restrict a number of company directors who were residing in the UK. In concluding that the Oireachtas had intended that section 150 of the Companies Act 1990 as enacted would have extra judicial effect Justice Finlay Geoghegan noted :-

"having regard to the frequency with which persons resident outside the State are appointed directors of Irish Companies, it would be clearly absurd to suggest that the Oireachtas in

enacting these provisions in the public interest, intended to restrict only directors of insolvent companies who happened to be resident within the State and leave dishonest or irresponsible non-resident directors with unrestricted freedom to be directors of any Irish companies in the future. The use of the phrase "any person" in section 149 (2) underlines what appears to be the obvious intent of the Oireachtas that the restrictions provided for in section 150 should apply to all persons who agree to act as directors of Irish companies, irrespective of where they happen to be resident."

In *Euroking* the Court referred to dictum of Mr. Justice Finnegan in the earlier case of *McKenna -v- E.H.* [2002] 2 IR 72 which concerned an application under the Proceeds of Crime Act 1996. Finnegan stated:-

"If it is the intention of the Oireachtas, and I am satisfied that it is, that persons resident outside the jurisdiction, with assets inside the jurisdiction, which represent the proceeds of crime should be subject to the procedures of the Act, then I am satisfied that it is the duty of the court to give effect to that intention and if necessary, have resort to the inherent jurisdiction of the court pending the introduction of appropriate rules of procedure to give effect to the intention."

2.1.3 We believe that setting out a series of fact-specific grounds of jurisdiction remains the safest course. Subject to what is said in the previous reply, this is the traditional approach in Ireland to the exceptional cases where a foreign person can be served with Irish proceedings. (See Order 11, RSC). We also believe that setting out specifically the grounds of jurisdiction creates a higher level of certainty.

2.1.4 We do not believe that the operation of Article 4.2 creates any discrimination in fact in respect of parties who are domiciled in third states.

2.1.5 There is no formal procedure specified in the Rules of Court by which the Irish Court would declare of its motion that it has no jurisdiction. However, as a matter of general principle, the Court will not entertain or deal with an application unless it is satisfied that there is a basis upon which it has jurisdiction. This principle applies whether the case is purely domestic or relates to Regulation 44. One of the bases of the principle is that the Court will not make an order which it has no authority to make, or which will be deprived of effect, by reason of the fact that the person against whom an order is made is not properly amenable to enforcement of the Irish Court's order.

Where what is at issue is a choice of *forum clause*, any application contesting jurisdiction will usually involve the person asserting that the Irish Court has no jurisdiction swearing an affidavit setting out that the grounds upon which he says that the Irish Court does not have jurisdiction. The entire contract or agreement is normally exhibited to that affidavit. Because the general rule as to interpretation of documents in Ireland requires that the document be construed as a whole, it would not be sufficient to produce only the relevant clause, as the Court must assess the proper meaning of the clause in the context of the entire document. Accordingly, the Court will both require the moving party in a contested case to produce evidence as to why they say the Irish Court has no jurisdiction, and will also have the opportunity of considering the contract as a whole.

Even in a case where the issue is not contested, the onus remains on the plaintiff to establish that the Irish Court has jurisdiction and that onus of satisfying the Court will usually require the plaintiff to demonstrate the Court's jurisdiction having regard to the contract itself.

2.1.6 The issue of jurisdiction can be dealt with as a discrete matter, and usually is, especially in cases where the evidence on the issue can be isolated and the Court can deal with it quickly. In High Court proceedings, the party contesting jurisdiction is required to bring an application in that regard promptly after entering a conditional or qualified appearance. However, it is possible, though rare, that the court hearing the application will allow the issue of jurisdiction to stand over to be considered in full at the trial of the matter. Unlike the position on a preliminary application, the Court at the trial has the benefit of the full pleadings, discovery of documents, so that the trial judge has a better understanding of the exact nature of the claims being advanced and the issues which arise (these may be less clear on a preliminary application). The Court therefore retains an ability to decline jurisdiction in respect of all or part of the matter at the trial.

A good example of this practice in operation is *Short –v- Ireland*, where the Supreme Court refused a defendant’s preliminary application to set aside the proceedings for lack of jurisdiction and left those issues for the trial judge to decide and on the trial of certain issues, the trial judge decided that he did not have jurisdiction in relation to certain parts of the claim.

In cases where jurisdiction is dealt with as a separate issue, this can tend significantly to reduce the overall cost for a party who succeeds in asserting that there is no jurisdiction in the Irish Courts, because that party avoids potentially being exposed to the full costs of a trial. We do not think that it should be assumed that the opposing party will necessarily begin proceedings in the member state which has jurisdiction, as he may be concerned about his unfamiliarity with the procedure in that state, concerned about costs likely to be incurred in that state or the ability to manage litigation from a distance, or may be out of time to issue such proceedings.

It is beyond doubt that having a separate application on jurisdiction potentially protracts the action and potentially delays the decision in the main proceedings, but only if the jurisdiction application fails. However, where those proceedings are not properly before the Irish Court there is no delay in reality, as the main proceedings will never come to trial in Ireland.

2.2.1 Bourke comments that "the domicile test for individuals is fairly clear... most Irish practitioners know it doesn't mean domicile in the common law sense. The new, clear definition of the "statutory seat" of a company in Article 60 of Regulation 44/2001 is a welcome development as the provision in Article 53 of the Convention is somewhat vague to common law lawyers."

In the case of *Deutsche Bank -v- Murtagh* [1995] 2IR 122 the Irish Courts gave practical guidance on the interpretation of 'domicile' under Article 2 and Article 52 (now 59 of Regulation 44/2001) of the Convention. The High Court found that the notion of domicile was to be interpreted in Irish law as referring to the place where a defendant is "ordinarily resident". On the facts the High Court were satisfied that the defendants in that case although respectively British and German nationals were ordinarily resident in Ireland because they owned substantial property within the state where they had resided with their children for twelve months, they had no other residence outside Ireland, the children attended schools in Ireland and the defendants had bank accounts there. The Court held that the defendants' possible future plans were irrelevant to the determination of their ordinary residence. The decision in *Murtagh* resonates with the earlier decision in *Grehan -v- Medical Incorporated and Valley Pines Associates* [1986] IR 528 where the court held that "the reference to 'domicile' ... does not refer to domicile in the sense which it is currently

understood in the conflict of law rules of this country but rather to the question of habitual residence."

2.2.2 Yes. See previous answer.

2.2.3 Bourke comments that "Many of the Irish cases in the decade after 1988 have concerned attempts to apply the Article 5.1 test of identifying the place of performance of the obligation in question and where there are several obligations to, to identify the principal obligation, in order to establish the relevant jurisdiction in which to sue... The ECJ decisions in *Shenavai* and *DeBloos* as applied by the Supreme Court have brought some clarity to this area but practitioners have found it difficult to apply the tests in many circumstances." Novy in his article "Article 5(1) of the Brussels Convention: The Unworkability of Special Jurisdiction in 'Matters Relating to Contract'" comments "Article 5 has proven problematic... [its] scope is unclear, its reach uncertain, its concepts are vaguely defined and its practical application is troublesome".

The Court in *General Monitors Ireland Ltd v Ses-Asa Protection SPA* High Court Finlay Geoghegan J 28 June 2005 construed Article 5(1)(a) of the Regulation in the same way as Article 5(1) of the Brussels Convention and accordingly referenced much of its case law on the Convention. There has as yet not been any judicial consideration of the effect of Article 5(1) (b) second inst. but in *General Monitors* the Court commented that in Article 5(1) (a) of Regulation 44/2001 the European Council continued to rely upon the place of the "obligation in question" to determine jurisdiction and that insofar as Article 5 (1) (b) introduced a deeming provision it is only in relation to the place of performance of that obligation. A good example of Article 5(1) (a) in operation in Ireland is *Rye Valley Foods Ltd-v- Fisher Frozen Foods Ltd*, High Court, Unreported, O'Sullivan J, 10 May 2000. There, the defendant, an English company, supplied fruit and vegetables to the plaintiff Irish company. The goods were usually ordered by telephone and delivered by the defendant to Ireland, with the price including a transport charge, though occasionally the plaintiff made supplemental orders of which it took delivery in England and transported itself. In January 1997, the plaintiff took delivery of a consignment of bean sprouts (which it alleged were defective) in England on foot of such a supplemental order. The plaintiff sued in contract and tort. The defendant applied to have service of the notice of summons set aside on the ground that under Article 2 it should properly be sued in England. Rejecting the suggestion that the arrangements were governed by an umbrella agreement involving delivery in Ireland, O'Sullivan J held that the alleged manifestation of defects in the bean sprouts which became apparent in the plaintiff's premises in Ireland did not constitute a breach of contract occurring in Ireland but potential evidence of such a breach occurring in England. The defendant's contractual obligation was to deliver, in England, goods of merchantable quality and fit for the agreed purpose.

2.2.4 There has not been any useful Irish judicial consideration of this issue. At page 83 of his article, Novy raises the question as to how the courts would determine jurisdiction where the obligation in question is performable in a number of member states, and which, if any, of these states would have jurisdiction.

2.2.5 The most significant decision on Article 5(1) was the Supreme Court decision in *Handbridge Ltd. -v- British Aerospace Communications Limited* [1994] ILRM 39. BAC were a UK domiciled company, engaged in the development of the 'Space Talk Project' for the hubbed transmission and receipt of data via satellite. BAC approved *Handbridge* an Irish

domiciled company as the manufacturer and supplier of personal computers for use in various elements of the project. *Handbridge* issued proceedings in the Irish Courts claiming that BAC was in breach of an agreement made partly orally and partly in writing and partly by conduct for the purchase of a specified minimum amount of computers per annum. BAC sought to strike out the action for failure to satisfy Article 5 (1) as BAC claimed that as the Space Talk project had never progressed beyond research and development there had been no effective contract for the purchase of further computers.

In giving its judgment the Supreme Court set out the following guidelines regarding Article 5.1 of the Brussels Convention. Referring to the decisions in *Kalfelis -v- Schroder* (Case C-189/87) Chief Justice Finlay noted:-

"I am satisfied that certain conclusions of principle arise. They are:

- (1) The onus is on the plaintiff who seeks to have his claim tried in the jurisdiction of a Contracting State other than the Contracting State in which the defendant is domiciled to establish that such a claim comes equivocally within the relevant exception.
- (2) In a case of a claim for breach of contract, therefore, what he must prove is that the obligation in question is, by virtue of the terms of the contract or by some generally applicable principle of Irish law, an obligation which must be performed in Ireland.
- (3) It would follow from this that where the evidence adduced by a plaintiff seeking to have a claim for contract tried within the jurisdiction of a Contracting State, other than the state of domicile of the defendant, amounts to no greater standard of proof than establishing that the obligation which it is claimed was breached could have been performed in such State, he would have failed to establish his entitlement to sue pursuant to Article 5.1, the necessary proof being that the obligation which it is claimed has been broken by the defendant according to the contract or according to some general principle of law must be performed in the State concerned".

On the facts the Court concluded that the obligation in question was the placing of orders for the computers and that there was no general proposition in Irish law that the placing of such orders under contract must occur in Ireland.

In the recent case of *General Monitors Ireland Ltd -v- Ses-Asa Protection SPA* the Court reiterated that place of performance was determined by the Court's decision as to what is the "obligation in question". The Court relied on the jurisprudence of the European Court of Justice on the Brussels Convention in the cases of *Ets. A. Bloos, S.P.R.L. -v- Société en Commandite par actions Bouyer* (Case 14/76) , *Leathertex Divisione Sintetici SpA -v- Bodetex B.V.B.A.* (Case C-420/97) and *Hassan Shenavai -v- Klaus Kreischer* (Case 266/85) to the effect that where various obligations are in issue it will be the principal obligation which will determine jurisdiction.

The Court in *General Monitors* further noted that determination of the place of performance of the obligation in question under Article 5(1) of the Brussels Convention is in accordance with the law governing the contract according to the national rules of private international law of the court seised: *Industrie Tessili Italiana Como -v- Dunlop AG* (Case 12/76) [1976] E.C.R. 1473.

In *General Monitors* the court noted the dilemma posed by *Shenavai* and *Leathertex* as to how to determine where there are multiple obligations of equal rank where the place of performance is. The Irish court noted that difficulties still arise under the amended version of Article 5 where there are multiple obligations which do not relate to transactions for the sale

of goods. In that case as the "obligations in question" formed part of contracts for the sale of goods, under which delivery took place in Ireland, the court held that the Irish courts had jurisdiction to determine the proceedings.

In the earlier case of *Carl Stuart -v- Biotrace Limited* [1993] ILRM 633 the court considered how to determine the place of performance of a 'negative' obligation i.e. not to supply another distributor within the Irish State. The court held that following *De Bloos* the court ought not take into account the place of the breach but should instead look to the right from which the obligation not to breach arose and upon which the proceedings are based. The Court identified the principal right as continuing as exclusive distributor and found it to be performable in Ireland. In an earlier decision of the Irish High Court in *Olympia Productions Ltd. -v- Cameron Mackintosh and Ors* [1992] ILRM 204 the Court however found that the place of performance of an exclusive right to perform the play 'Les Miserables' was not Ireland but was England. The Court reasoned that as the legal document under which the exclusive performing rights were granted was executed there, jurisdiction must lie with the UK Courts.

Peter Byrne in his article "The Application of the Brussels Judgments Convention by the Irish Courts, 1988-1993" IJEL 1994 Vol 3(1) notes that the conflicting ratios of *Stuart* and *Olympia Productions* could have been resolved by the application of the principle of necessity as in *Handbridge*. Byrne notes that had there been consideration of whether the agreements or obligations in question needed to be performed within a particular jurisdiction the same outcome would have been achieved judgments but the judgments would have been cohesive.

The Court's decision in *Olympia Productions* was perhaps influenced by the fact that the action related to an unperformed obligation. The amended version of Article 5 with the inclusion of Article 5 No. 1 (b) solves this confusion stating that jurisdiction will lie "in the case of the provision of services, [in] the place in a member state where, under the contract, the services were provided or should have been provided."

2.2.6 There has not been any useful Irish judicial consideration of this matter.

2.2.7 There has not been any useful Irish judicial consideration of this aspect of the Regulation.

2.2.8 As outlined in the response to question 2.1.1 above, the court in *Burke -v- Uvex Sports GmbH* [2005] IEHC 68 considered the relationship between Article 5(1) and Article 5(3). In that case an Irish citizen, who had purchased a motorcycle helmet from a German retailer sought to claim that he was badly injured in motorcycle accident in Ireland from a defect in the helmet. The High Court noted that prior to the trial the plaintiff had amended his plenary summons to delete the reference to Article 5(1) and now intended to attempt to proceed solely in tort against the German retailer who disputed jurisdiction on the basis that the relationship was arose by contract. The Irish court found that the Regulation must be interpreted strictly so as to ensure its uniform application among the Member States and that as Germany was the place of delivery of the helmet and the place where the retailer company resided, the plaintiff ought to have brought his action in Germany.

The court based its decision on the ECJ case of *Kalfelis -v- Schroder* [1988] (Case C-51/97). In *Kalfelis* the ECJ held that the provisions of Articles 5 and 6 constitute "derogations from

the principle that jurisdiction is vested in the courts of the state where the defendant is domiciled and as such must be interpreted restrictively".

The court approved the following passage from *Kalfelis*:-

"In order to ensure uniformity in all the member states it must be recognised that the concept of 'matters relating to tort, delict and quasi delict' covers all actions which seek to establish the liability of the defendant and which are not 'related to a contract' in the meaning of Article 5(1)."

The Irish Court found that the phrases "matters relating to contract" (Article 5(1)) and "matters relating to tort, delict or quasi delict" (Article 5(3)) had to be given what it described as "an autonomous or independent European Community meaning". The phrases could not be interpreted solely by reference to the national law of the domicile member states of the parties for the purposes of establishing jurisdiction under the regulation.

Whilst the national law of Ireland had established that the existence of a contractual relationship between the parties did not preclude a claim based in tort, in EU member states the principle of 'mutual exclusivity' applies and no action in tort is possible between two parties to a contract. It followed that the Irish court found it could not overlook the existence of the retail contract by allowing a claim grounded solely in tort. The court found that as Germany was the place of delivery of the helmet and the place where the retailer company resided, the Plaintiff ought to have brought his action in Germany for the purposes of Article 5(1) and no claim grounded in tort could be upheld here.

Burke echoes the findings of the Irish Courts in the earlier case of *Rye Valley -v- Fisher Frozen Foods*, unreported High Court, 10 May 2000 where O' Sullivan J expressly approved the dictum of the Advocate General in *Kalfelis* that "where there are overlapping grounds... only Article 5 (1) will determine the jurisdiction of the court since the matters relating to contract will 'channel' all the aspects of the dispute".

However in the later Supreme Court judgement of May 2005 in the case of *Leo Laboratories Limited -v- Crompton BV* [2005] IESC 31 the issue appears obfuscated again. In *Leo Laboratories* the Court noted the need for the ECJ to conclusively determine the scope of Article 5(3) (this is discussed in more detail at the response to 2.2.9 below). Although the court in *Leo Laboratories* noted the restrictive interpretation of Article 5(3) per *Kalfelis* the Irish Court nonetheless felt that it had jurisdiction to entertain the respondent's tort claim "on its merits" even though it acknowledged "it is plain... that in reality the dispute arises from a contract and the respondent frankly acknowledged that this occurs because of the claimed "procedural advantage" secured by the appellant by instituting proceedings in the Netherlands."

The later passage appears to be a *volte face* from the earlier dictum of the Irish Courts in *Burke -v- UVEX Sports GmbH* where the Irish Court declined jurisdiction noting that there was nothing in Regulation 44 which allowed it to determine jurisdiction by reference to a possible detriment to the plaintiff by being out of time.

2.2.9 Yes it provokes confusion that the ECJ does not accept annex grounds of jurisdiction. As outlined in the response to question 2.2.8 there has been some consideration of the delineation between contractual matters and other matters of offence in the Irish Courts. Notably in the recent case of *Leo Laboratories Limited -v- Crompton BV* [2005] IESC 31 the Supreme Court noted the confusion arising from the existence of a number divergent judgments by the ECJ on the scope of Article 5(3). The court referred to *Kronhofer -v- Maier* (Case C-168/02) wherein the ECJ noted that "special jurisdictional rules such as those laid

down in Article 5(3) of the Convention... must be restrictively interpreted and cannot give rise to an interpretation going beyond the cases expressly envisaged by the Convention [including *Kalfelis*]."

The Irish Court also referred to the conflicting broader interpretation of Article 5(3) in *Verein für Konsumenteninformation v. Karl Heinz Henkel*, (Case C-167/00) a case concerning an Austrian consumers association which brought proceedings against a German businessman who organized 'commercial day-trips' thereby using contracts that contained clauses unfair to consumers. In *Henkel* the defendant claimed that Article 5(3) did not apply as no damage had occurred in Austria. The Court rejected the defence of a contractual nexus noting that the representative consumer association and the defendant had not entered directly into a contract although the defendant had concluded some contracts with the consumers. The ECJ further noted that under special legislation the association was granted the right to sue in the name of the consumers. In *Henkel* the ECJ concluded that the scope of Article 5(3) not only covers actions where damages for individual damage is sought, but also extends to collective actions where a 'collective' damage is complained of.

In *Leo Laboratories* Mr. Justice Fennelly (himself a former Advocate General) commented on the conflict between the two ECJ judgments as to the scope of Article 5(3) and noted that it "would certainly constitute material for a reference for preliminary ruling". However on the facts the case was decided on other issues.

2.2.10 Thus far three significant cases have arisen on this provision in Irish law.

In *Murray -v- Times Newspapers Limited* [1997] 3 IR 97 "matters relating to tort" was deemed to enable the Irish domiciled plaintiffs to sue a newspaper published from another state where it was alleged that defamatory material was communicated through the defendants' newspaper in circulation in this jurisdiction. However the Irish High Court (and subsequently the Supreme Court) held that Article 5(3) did not entitle the plaintiff to seek special damages for harm caused to its reputation in the Irish Courts.

In *Constance Short and others -v- Ireland, The Attorney General and British Nuclear Fuels Plc* and other [2004] IEHC 64, the High Court held that Article 5(3) of the Convention did not extend to claims against a state or emanation of a state for failing to properly implement a directive as arose in the case of *Francovich and others -v- Italian Republic* (Joined Cases C-6/90 and 9/90). The court noted that even though such claims against a state have been classified as a tort under Irish law, in *Tate -v- Minister for Social Welfare; Robinson and Others -v- Minister for Social Welfare* [1995] 1 IR 418, it does not follow that such claims are torts for the purposes of Article 5(3) of Regulation 44. The court concluded that in cases such as *Francovich* the defendant must be sued in its own courts.

Peart J noted that "there is nothing in the wording of Article 5(3) of the Convention, or in the judgment in *Bier*, which suggests that it was contemplated that a challenge to the validity of an administrative act, or a 'euro-tort' dependent upon such a challenge, could be mounted other than in the jurisdiction in which the administrative decision was made. In other words, the question of jurisdiction would come within the terms of Article 2, the general provision, and not under any of the special cases referred to in Article 5 of the Convention. Article 2 provides a general rule, subject to Article 5, that the courts of the state in which the defendant is domiciled shall have jurisdiction."

In *Burke -v- Uvex Sports GmbH* and another [2005] IEHC 68 the High Court struck out proceedings against a German retailer as it found that by virtue of Article 5 (3) of the Regulation and the ECJ judgement in *Kalfelis -v- Schroder* (Case C-51/97), it had no

jurisdiction. The Irish Court found that the phrase "matters relating to tort, delict or quasi delict" (Article 5(3)) had to be given what it described as "an autonomous or independent European Community meaning". The phrase could not be interpreted solely by reference to the national law of the parties for the purposes of establishing jurisdiction under the regulation. Accordingly the Irish Court upheld the principle of 'mutual exclusivity' as found in a number of EU member states and held that no action in tort for the purposes of Article 5(3) of the Regulation is possible between two parties to a contract.

2.2.11 In *Murray -v- Times Newspapers Limited* [1997] 3 IR 97 a libel action, the court noted that the correct interpretation of "the courts for the place where the harmful event occurred for the purposes of Article 5(3) [of the Brussels Convention]" had given rise to difficulty but that this problem had been removed by the decision of the ECJ in *Shevill -v- Presse Alliance S.A.* [1995] ECR I-415.

In *Ewins and Ors -v- Carlton* [1997] 2 ILRM 223, *Shevill* was more practically considered in the context of an allegedly defamatory statement broadcast on television. The plaintiff's claimed damages in Ireland in respect of a television programme produced by Carlton a UK based company, and broadcast by Ulster Television, a company based in Northern Ireland. The defendant sought to have the Irish proceedings stayed on the basis that the harmful event required by Article 5(3) to found jurisdiction had occurred in the UK. On the facts, the court found that approximately 111,000 viewers in Ireland had seen the programme as it was distributed by cable and deflector companies and in certain parts of Ireland could be received by television viewers whose sets received signals from Northern Ireland and England. Applying *Shevill*, the Court held that the plaintiffs had a choice of jurisdiction under Article 5(3) and were free to choose Ireland as harm had been done in Ireland. The court clarified that the onus was on the plaintiffs to establish that the circumstances of the case brought them within the Article 5(3) exception to the fundamental rule of the Convention that the defendant shall be sued in the courts of his or her domicile.

In *Hunter -v- Duckworth* [2000] 1 IR 510 the defendant contested an allegation of defamation in Ireland arising from the publication in the UK of a booklet. The defendant contested the jurisdiction on the basis that he had not authorised the publication of the booklet in Ireland and that for a person to be sued in a particular jurisdiction he must have responsibility for the allegedly harmful event occurring in that jurisdiction. The Court rejected this argument, noting that as the author's contract with the publisher authorised the publisher to publish the booklet worldwide the natural and probable consequence of publication of the book was republication in Ireland. The court took guidance from *Shevill* and noted that given the proximity of the two countries and the high level of interest in the booklet's subject in Ireland it was almost inevitable it would be republished here.

In the recent Supreme Court judgment of *Leo Laboratories Limited -v- Crompton BV* [2005] IESC 31 the Court appeared to accept as settled law the jurisprudence of the ECJ in *Bier -v- Mines de Potasse d'Alsace* (Case C-21/76) with reference to multiple jurisdictions in situations where the origin of the damage is situated in a state other than the one in which the place where the damage occurred is. However the court also referenced the later case of *Marinari -v- Lloyds Bank plc* (Case C-364/1993) which limited the scope of *Bier* stating that the place where the harmful event occurred "cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere".

2.2.12 Bourke comments "This has been interpreted on several occasions by the Irish Courts who have made it clear in the process that co-defendants from other contracting member states can only be sued in Irish proceedings where there is a real case against the Irish defendant to justify the including the foreign defendant."

Gannon -v- B&I Irish Steam Packet Company Limited and Others [1993] 2IR 359 demonstrates the Irish judiciary's unwillingness to entertain a contrived action against an Irish defendant in order to join other defendants under Article 6(2). The plaintiff had been injured in a road traffic accident in England. She was on a package holiday organised by the first defendant, injured in the second defendant's bus that had collided with the third defendant's lorry. She argued that the first defendant had a contractual liability to her in relation to its selection, choice and instruction of the coach and driver and that the courts should hear her claim against the other defendant's under Article 6(1). The Supreme Court held however that there were no grounds for suggesting that the selection, choice and instruction of the coach and driver had any causative link with the accident. The Court concluded that the sole reason for bringing an action against B&I was so that the other defendants could be joined in under Article 6(1) and the jurisdiction of the English Courts ousted. The Court refused to allow this.

A recent Irish case which considered Article 6(1) of Regulation 44/01 was *Daly -v- Irish Group Travel Limited Trading as "Crystal Holidays"*, unreported High Court 16 May 2003. In that case the court affirmed the stance taken in the ECJ case of *Reunion Europeene SA -v- Spliethoff's Bevrachtungskantoor BV* (Case C-51/97) that a lower burden of proof namely proof of a similarity of claims would be insufficient to impede joining a party as a defendant in another member state. The Irish Court reaffirmed the ECJ decision in *Kalfelis* that there must be a risk of conflicting findings. The Irish Court found on the facts that it could not hear the action as there would be a considerable overlap of issues as between the claims and it was expedient to determine the claims arising in the various jurisdictions together so as to avoid the risk of irreconcilable judgements.

In the earlier case of *O'Keefe -v- Top Car Limited*, unreported High Court July 2, 1997 the court held that it is for the national courts to determine whether such a connection exists and it is not necessary to refer the issue to the European Court of Justice under an Article 177 [now 234] reference.

The only Irish case in which Article 6(2) has been in issue is *Clare Taverns -v- Gill* (discussed below) in which the UK supplier of computer hardware was joined as a third party to a claim by the ultimate purchaser against the Irish supplier who had installed the hardware and configured relevant software. The UK supplier was struck out of the proceedings on the basis that its contract with the Irish supplier contained a choice of forum clause conferring exclusive jurisdiction on the UK courts.

2.2.13 There has not been any reported Irish case law on this matter. T.P. Kennedy in his article "Judgment Calls" Law Society Gazette June 2002 comments that the Regulation has extended the consumer contract provision to offer consumers better protection. Kennedy notes that the new residual provision at Article 15 (1) c) is broader as the original Article was confined to contracts for the sale of goods or the supply of services, but there is no limitation on the new provision. Furthermore whereas the original provision under the Convention required that an invitation to purchase be addressed to the consumer and that the consumer take the necessary steps to conclude the contract in his state the new provision under the Regulation is designed to take account of new consumer trends and covers contracts

concluded through interactive websites which are merely accessible in the consumer's domicile state and not addressed specifically to the purchaser.

2.2.14 We are not aware of any Irish case which has considered the characteristics of a "consumer" for the purposes of Article 15. However, there is an established understanding of the meaning of a "consumer" having regard to relevant ECJ case law on the issue (e.g. *Gruber Case C-464/01*; *Benincasa Case C-269/95*), and EU and domestic legislation having an emphasis on consumer protection.

2.2.15 Again there has not been any litigation on this matter in the Irish Courts. In 'Judgment Calls', Kennedy notes that this provision is ambiguous as it is unclear what "directing" activities to member states will mean in practice. He questioned the reference in earlier drafts of the recital that a company should be considered as directing its activities to any member state in which its website was accessible as there is no guidance as to its meaning and expressed the view that an ECJ decision is required for clarification. Kennedy notes the furore in the UK by companies involved in electronic commerce and by UNICE (the European Union Employers Federation) who argue that they will be exposed to potential litigation in each member state. These bodies argue that the only alternative for them is to partition the markets by specifying that their products or services are not intended for consumers domiciled in certain member states, which runs contrary to what is intended to be encouraged by other EU legislation on electronic commerce. Kennedy notes that the provision may have a disastrous effect on start up electronic commerce businesses that would be unaware of the risks to which they are exposing themselves.

2.2.16 There is no reported case law in Ireland on this point, but we expect that Irish courts would follow the guidance of the ECJ, such as in *Brenner and Noller- v- Dean Witter Reynolds International* (Case C-318/93).

2.2.17 Thus far there has been limited judicial consideration of these provisions in the Irish Courts. However the issue has arisen in the decisions of two of the statutory bodies set up to deal with employment claims, the Labour Court and its appellate body the Equality Tribunal. An appeal lies to the Irish Courts System from the latter statutory body.

The only legal analysis of the 'Brussels I Regulation' in relation to individual employment contracts relates to Article 19 which provides that an employer domiciled in a member state may be sued in another member state if it is the place where the employee habitually carries out its work. In the labour court decision of *A Retail Company -And - A Worker* EED014 and its resultant appeal to the Equality Tribunal (*A Complainant -v- A Company* EE/2000/103) the statutory bodies cited approvingly the European Court of Justice cases *Mulox IBC -v- Geels* C-125/92 and *Rutten -v- Cross Medical* C-383/95. The Equality Tribunal adopted the following statement in *Rutten* in relation to the place where an employee habitually carries out his work: -

"[This] must be understood to refer to the place where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties vis á vis his employer. That is the place where it is least expensive for the employee to commence proceedings against his employer or to defend himself in such proceedings... When identifying that place..., which is a matter for the national court in the light of the facts before it, the fact that the employee carried out almost all two-thirds of his work in one contractin state - the remainder of his work being performed in several other

states - and that he has an office in that contracting state where he organised his work for his employer and to which he returned after each trip abroad... is relevant".

The Equality Tribunal recognised that working time is not the only factor to be taken into account and as in *Rutten* gave to consideration to the location of the claimant's home and office to which he returned after every trip to this jurisdiction. The Equality Tribunal also considered the ECJ's mention of costs in *Rutten* noting that in the instant case it would have been less expensive for the complainant to institute proceedings in Northern Ireland which was the jurisdiction where he had his home. The Equality Tribunal went on to consider an additional factor which was where the claimant made his tax and social insurance payments.

In the later Equality Tribunal decision of *Mr. Gerard Fahey -v- McKinsey & Co. Inc.* EE/2001/146 the Tribunal noted that the provision antecedent to Article 19 (in the Brussels Convention) in relation to where employees can make their claims would extend to cases where the claimant was not an employee but rather an unsuccessful applicant. This situation may arise in Irish law as the Irish Employment Equality Act 1998 prohibits discrimination in recruitment processes as well as in the course of employment.

In *A Complainant -v- A Company* EE/2000/103 the Equality Tribunal considered that the issue of applicable law under the Rome Convention is irrelevant until the question of jurisdiction is finalised by reference to Regulation 44.

2.2.18 There are no decided cases in Ireland on this particular point. We believe that the jurisprudence of the ECJ would be followed.

2.2.19 We believe that most of the Irish cases deal with Article 22.1 (constitutional issues in corporate legal persons). Article 22.2 (then Article 16.2) seems to have been first considered by the Irish courts in *Papamicolaou v Thielen and anor* [1998] 2 IR 42. There, the plaintiff was the director of a group of Irish companies, 95% of whose shares were owned by the second defendant, a company registered in Luxembourg. The first defendant had been appointed provisional administrator of the second defendant by the Courts of Luxembourg and, in pursuance of his duties, purported to convene general meetings of the Irish companies to remove the plaintiff as a director of them. The plaintiff sought an injunction restraining the first defendant from calling the meetings. It was submitted on behalf of the defendants and accepted by Keane J that because the dispute related to the lawfulness or otherwise of the decisions of the first defendant (an appointee of the Luxembourg Courts) as an organ (and possibly the only organ) of the second defendant, that Luxembourg was the sole and exclusive forum for the determination of the issue by virtue of Article 22.2. Whether the first defendant was acting within or outside his mandate was therefore a question exclusively for the Courts of Luxembourg.

It is uncertain whether the Irish Courts would tend to follow the approach adopted by the English Courts in cases involving challenges to transactions or courses of action by directors prejudicial to shareholders' interests, which appears to be to the effect that where what is complained of is that the board has acted without authority, the action falls within Article 22.2 but where what is complained of is that the directors have committed a fraud in breach of their fiduciary duties, it does not. (See *Newtherapeutics Limited -v- Katz* [1991] Ch 226 and *Grupo Torras SA -v- Sheikh Fahad Mohammed Al-Sabah* [1996] 1 Lloyd's Rep 7, discussed in Collins (ed.) "Dicey and Morris on the Conflict of Laws", 13th ed., Sweet & Maxwell, 2000, # 11R-330 et seq.)

The most recent case which has considered the interpretation of Article 22 (2) is *Hasset (a minor) -v- South Eastern Health Board and Ors* [2006] IEHC 105. This arose out of a medical negligence action, in which the Medical Defence Union (MDU), an insurer, was joined as an additional third party by a surgeon, and a subsequent action in which the surgeon sought an indemnity from the MDU. The MDU sought an order setting aside service of the third party notice on the grounds that the court did not have jurisdiction to hear the claim having regard to Article 22(2) as the proceedings had as their object the validity of the decisions of the MDU and its organs. The MDU argued that the courts of England and Wales had exclusive jurisdiction as the MDU was incorporated and had its seat in that jurisdiction. The surgeon argued however that the principal subject matter of the claim was based on contract, estoppel and legitimate expectation.

The Court refused to grant the order setting aside service even though it recognised that the seat of the MDU for the purposes of Article 22 was England and Wales. The Court commented that Article 22 must be interpreted purposively and narrowly as it is an exception to the basic jurisdictional rules. The Court agreed with the Jenard Report on Article 16(2) of the Convention that Article 16(2) [now 22(2)] is concerned with the internal regulation and management of a company in accordance with its public documents. The Court found that the subject of the exclusive jurisdiction under Article 22(2) is that of a challenge to decisions of organs of companies as being in breach of prescribed corporate procedures or of duties owed by the organ in question or of failure of the organ to act when it was obliged to do so. Accordingly the Court found that Article 22(2) is not concerned with litigation on 'simple' contracts which the company has entered into and the service was upheld.

2.2.20 We are not aware of any cases where significant issues as to conflicts of competence have arisen.

2.2.21 We are not aware of any case law or commentary dealing with the question of consistency between Article 22 or decisions relying on it and decisions on freedom of establishment.

2.2.22 We are not aware of any Irish cases which assist in dealing with where this distinction is drawn.

2.2.23 We consider that the exclusive grounds in Article 22 are reasonably well-balanced.

2.2.24 There are very limited circumstances in which enforcement of a foreign judgment outside Regulation 44 can arise in Ireland. In ordinary practice, the applicant is required to "sue on the judgment" i.e. to issue new proceedings in Ireland based on the judgment. In general principle, a foreign judgment will not be recognised and enforced in Ireland unless it is issued by a competent court in the foreign state which had jurisdiction over the matter according to Irish conflicts of law rules, is final and unappealable, is for a certain amount of money, was not obtained by fraud and enforcement of it would not breach Irish rules of natural and constitutional justice or be contrary to public policy in Ireland. (This final point would have a much broader meaning than in the context of Article 34 of Regulation 44, as it would be determined according to Irish conflicts of law). (See Binchy, "Irish Conflicts of Law", Butterworths, 1988, pp. 588-611).

2.2.25 See answers below.

2.2.25.1 In *Holfield Plastics Limited -v- ISAP OMV Group SpA*, Unreported High Court 19 March 1995, the Irish court gave precedence to the decisions of the ECJ over the existing body of Irish law on the incorporation of exclusive jurisdiction clauses. In that case the contract was not comprised of one single document with one particular jurisdiction clause but consisted of a number of documents and orally agreed terms. In the High Court Geoghegan J noted "if it were simply a matter of interpreting the contract in accordance with Irish law, I would have no hesitation in holding in favour of the defendant. These were two commercial companies dealing at arm's length and a company such as the plaintiff should expect supplier companies such as the defendant to annex to all its sales its own terms and conditions. Both quotations made it expressly clear that those conditions were to apply and on any reasonably careful reading of them the plaintiff would have been on notice of the exclusive jurisdiction clause."

The court went on to comment that it was "satisfied that it is not correct to determine this matter by reference to the Irish law of contract" and referred to the EC cases of *Salotti* (Case C-24/76) and *Segoura -v- Bonakdarian* (Case C-25/76). The court followed the ratio in *Segoura* that :- "Article 17 imposes ... the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated." The Irish Court went on to refer to *Salotti* where the ECJ had sought tangible written evidence. In *Salotti* the ECJ held that the mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not of itself satisfy the requirements of Article 17. The ECJ went on to hold that if the clause is on the back of a contract the requirement of Article 17 is fulfilled only if the contract signed by both parties contains an express reference to those general conditions. On the facts of the case the court found that there was a consensus between the parties as to the jurisdiction clause and that the agreement was evidenced in writing.

2.2.25.2 The conclusion of such agreements is determined according to the *lex fori*. In *Bio-Medical Research Limited t/a Slendertone -v- Delatex* [2001] 2 ILRM 51 the Supreme Court noted that the place of performance of the obligation was a matter for the Irish courts to decide. The Court referred to the ECJ case of *Leathertex Divisione Sintetici SpA -v- Bodetex BVBA* (Case C-420/97) which stated that "the place of performance of the obligation in question is to be determined by the law governing that obligation according to the conflict rules of the court seized". *Leathertex* was reaffirmed in the Supreme Court case of *Leo Laboratories* [2005] IESC 31.

2.2.25.3 Yes, although there has not yet been consideration of Article 23 of Regulation 44/2001 however there have been a number of cases which have considered Article 17 of the Brussels Convention. In *Bio-Medical Research Limited t/a Slendertone -v- Delatex* [2001] 2 ILRM 51 the Supreme Court affirmed the dictum of the ECJ in *Salotti* to the effect that the national courts must carefully scrutinise the effects of the terms of an exclusive jurisdiction clause "in view of the consequences that such an option [to oust jurisdiction under the other provisions of the convention] may have on the position of the parties to the action." The court noted that the validity of such exclusive jurisdiction clauses is dependent on the existence of an agreement between the parties which must be "clearly and precisely demonstrated".

The Court also referred to the ECJ decision of *Transporti Castelletti Spedizione Internationali SpA -v- Hugo Trumpy SpA* (Case C-159/97) where the EC Court gave its view that for there to be an agreement to confer jurisdiction there must be 'clear consent'.

The Court went on to note as per *Castelletti* that both the application of Article 17 itself and the jurisdiction clause be "strictly construed". On the facts in *Bio-Medical Research* the court found that the printed terms on the invoices which conferred exclusive jurisdiction on the Irish courts related only to the sale of those goods and not to the whole distribution agreement as the conditions on the invoices made no reference to distribution, exclusive or otherwise.

2.2.25.4 There has not yet been consideration of Article 23(1)c) of Regulation 44/2001 in Ireland, though there have been a number of cases which have considered its precursor, Article 17 of the Convention. In *Clare Tavern's t/a Durty Nelly's -v- Gill* [2001] 1 IR 286 the court concluded that there could be no convincing argument or serious suggestion that the practice of printing the general conditions of sale on the reverse side of invoices and similar documents with a reference on the face of the document to the conditions was not a common commercial practice in that type of international trade (sale of hardware). Indeed the court went on to note that every ordinary consumer much less those engaged in trade would be familiar with that type of document.

In the earlier case of *Hanley -v- Someport-Walon* [1995] 2 I.R. the amendment to Article 17 of the Convention to deal with practices in international trade and commerce was considered. The court referred to the Schlosser Report on the Accession Convention, 1978. The court noted Professor Schlosser's comments at paragraph 179 on the rationale behind the relaxation in international trade and commerce of the requirement for written confirmation before jurisdiction clauses are effective. The court noted Schlosser's comment that it is "only a relaxation of the formal requirements. It must be proved that a consensus existed on the inclusion in the contract of the general conditions of trade and the particular provisions." However on the facts of the case the court found that there was no consensus as the defendant had not received a copy of the general terms and conditions until some time after the contract had been agreed.

2.2.25.5 Bourke comments that "It has sometimes been argued that a jurisdiction clause must confer exclusive jurisdiction on one jurisdiction only. The received view is that provided the parties state their chosen intention clearly, they are free to choose more than one jurisdiction. I believe that Article 23 of the new Regulation 44/2001 is intended to have this effect."

2.2.26 The Irish rules of court create a special procedure for cases where there is no appearance by a person who has been served with Irish proceedings under Regulation 44. Ordinarily, where an Irish defendant does not enter an appearance, the plaintiff can proceed to mark judgment in the office - this means that the plaintiff can obtain a judgment by lodging the appropriate papers but without having to appear again in open court, provided that the claim is for a specific amount. (Where a specific amount is not claimed, the plaintiff can mark judgment and leave the question of damages to be assessed.) However, where the defendant is served by reason of a jurisdiction arising under Regulation 44, the plaintiff is required under Order 13A, RSC, to bring a further application before the court, grounded upon a sworn affidavit, before judgment can be obtained. This procedure enables the court to undertake the assessment of jurisdiction required by Article 26.

2.2.27.1 Measures resulting in provisional fulfillment of the claim in terms of provisional payment to the plaintiff are alien to Irish practice. The kinds of provisional measures which are available in Ireland include the interlocutory injunction, which requires the opposing

party to maintain a certain state of affairs pending the trial of the main proceedings. Interlocutory injunctions can in Ireland include the Mareva injunction, whereby assets of the defendant are frozen pending the trial of the main proceedings. However, there is no procedure in Ireland, either in domestic or in cross-border cases, in which there is a provisional payment to the plaintiff. Accordingly, the issue identified here does not arise.

2.2.27.2 The jurisdiction of the Irish courts to give provisional measures is not exclusively territorial, but there must be a sufficient connection with the jurisdiction of the Irish court. The court can order a particular action to be taken within Irish territory, because such an order can ordinarily be enforced in Ireland. However, the Irish courts also exercise personal jurisdiction over Irish subjects, and therefore can in principle order an Irish subject to take a particular action, even if that subject (or his or her asset) is at present physically outside the Irish jurisdiction. The test in this regard is not one of territoriality, but rather one of the extent to which the Irish courts can properly exercise jurisdiction over the person addressed by the order, and can enforce the order made against that person. See *H -v- H* Unreported, High Court, 7 April 1982 and *Deutsche Bank -v- Murtagh* [1995] 2 IR 122.

2.2.27.3 We are not aware of any useful case law or reported experience on this issue in Ireland.

2.2.27.4 The ordinary practice in Ireland is that protective measures in domestic proceedings continue up until the beginning of the trial of the main proceedings. In practice, in relation to foreign proceedings, what should happen is that the protective measures would continue up until the determination of the foreign proceedings and there should then be a further application to the Irish court to discharge the protective measures and for any further or other measures as were then appropriate.

2.2.27.5 As with the UK, where a person to whom any interlocutory injunction is addressed breaches the court's order in Ireland, the person is liable to measures in the nature of contempt. However, we feel that worldwide Mareva injunctions are generally not given by the Irish courts, having regard to issues identified above, and the issue of contempt really only arises in circumstances where there is a person within Irish territory who may be answerable to a charge that he or she breached the court's order. In Mareva cases, we think it relatively unlikely that a person would be penalised unless there was evidence that the breach was more serious than merely inadvertent.

2.2.28 Yes. The recent case of *Popely -v- Popely and Ors* [2006] IEHC 134 considers the relationship between Article 24 and Article 27 of Regulation 44/2001. The High Court determined in *Popely* that "Article 24 is directed to the circumstances in which jurisdiction may be conferred on the courts of a member state whilst Article 27 is concerned with the entitlement of courts of a member state to continue to hear and determine proceedings which when viewed in isolation from any other proceedings they have jurisdiction to entertain." Accordingly the Court held that notwithstanding the fact that the Irish Courts had jurisdiction for the purposes of Article 24 due to the fact that an unconditional appearance had been entered the court needed to go on to consider whether in accordance with Article 27 it was obliged to stay the proceedings in favour of the courts of another jurisdiction. Accordingly the Irish courts appeared to find that Article 24 is subservient to Article 27.

In *Campbell International Trading House Ltd -v- Van Aart* [1992] IR 663 the Supreme Court considered the identical provision in Article 18 [now 24] of the Brussels Convention. The court held that an appearance which does not contest jurisdiction on its face will be taken as a submission under Article 18.

In the later case of *Murray -v- Times Newspaper Limited* [1997] 3 IR 97 the Irish court qualified Campbell. The court found that a party who enters an unqualified appearance may be held only to accept the jurisdiction of the court to entertain the case which has been formulated against him by the plaintiff in his plenary summons or statement of claim and is not a submission to a wider jurisdiction. On the facts the plaintiff had expressed his claim to be solely under Article 5(3) and the court held that the unqualified appearance of the defendant could only be not be held to be an acceptance of the jurisdiction of the court to entertain claims other than under Article 5(3). The court further opined that if a defendant were mistakenly to submit to a wider jurisdiction he may seek to strike out the wider claim but he must do so without excessive delay. In determining what is excessive delay, the court felt that a delay on the part of a plaintiff would be a relevant factor.

3.1 There has not been any recent Irish case in which Article 27 of the Regulation has been discussed. Article 21 of the Brussels Convention regarding *lis pendens* was considered in depth in *International Commercial Bank plc -v- Insurance Corporation of Ireland plc and Meadows Indemnity Company* [1989] ILRM 788.

There, the plaintiff ICB lent 11.5 million Swiss francs to a company called Amaxa A.G. and at the same time entered into an insurance agreement with the defendant by which the defendant agreed to insure the risk of default by Amaxa. The defendant further entered into a contract of reinsurance in respect of its potential liability to the plaintiff with the third party ('Meadows'), which was incorporated in Guernsey. The three contracts were made in London on 9 February 1984. When Amaxa defaulted, the defendant refused to pay the sum insured to the plaintiff on the grounds inter alia of misrepresentation and non-disclosure by the plaintiff in relation to the security for the risk undertaken. The plaintiff issued a summons on 1 September 1987, against the defendant, who then claimed a full indemnity as against Meadows. The defendant was given liberty by the High Court to issue a third party notice and serve it out of the jurisdiction.

Meadows brought a motion seeking to discharge the order, inter alia on the ground that the court should decline jurisdiction pursuant to Article 21 of the Convention, as proceedings had been instituted in England in relation to the same cause of action by Meadows. Meadows sought to rely on Article 21 which provides that: "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court."

The Supreme Court upheld the finding of Costello J in the High Court that the institution of proceedings is to be defined by the law of the forum seised. The Court noted that "it is the successful application for liberty to issue and serve a third party notice which commences third party proceedings for the purpose of the interpretation of [Article 21]".

Peter Byrne in his Article 'The Application of the Brussels Judgments Convention by the Irish Courts, 1988-1993' comments that the decision appears consistent with the ECJ case of *Zelger -v- Salinitri* (Case C-129/83).

3.2 We think that there is a potential for this. In Ireland, Article 30.1 applies, so that it is possible to institute proceedings very quickly by lodging the initiating document with the court, as service follows issue in Ireland.

3.3 Yes. As indicated above, service follows issue in Ireland and Irish proceedings are in being as soon as the initiating document has been accepted by the court office. Confusingly in the case of *International Commercial Bank plc -v- Insurance Corporation of Ireland plc and Meadows Indemnity Company* [1989] ILRM 788 it was held that obtaining liberty from the High Court under Order 16, RSC to serve a third party notice commences proceedings for the purpose of Article 21 of the Convention [now Article 27]. The court found that as of the moment the court decides it is an appropriate case in which to give liberty to issue and serve a third party notice it has assumed jurisdiction for that portion of the action.

3.4 There has not yet been any substantial Irish judicial consideration of Article 28 of Regulation 44/2001. However there has been consideration of the precursor provision, Article 22 of the Brussels Convention. In *Gonzales -v- Mayer and Others* [2003] IEHC 43, an application to set aside a petition to wind up a transnational company, the Court accepted the "common sense" approach of the English House of Lords in *Sarrio SA -v- Kuwait Investment Authority* [1999] 1 AC 32 as to the determination of what are "related actions". The Court approved the following dictum in *Sarrio*:-

"there should be a broad common sense approach to the question of whether the actions in question are related bearing in mind the objective of the article, applying the simple wide test set out in Article 22 and refraining from an over sophisticated analysis of the matter."

On the facts the Court found that the substance of the petition before the Irish Courts was the alleged failure to carry out obligations imposed under a unionisation agreement and deed of conversion. The unionisation agreement and the deed of conversion were governed by Spanish law and the outcome of Spanish litigation would determine the validity of the agreement. It followed that the Court concluded in *Gonzales* that the risk of an irreconcilable judgement was patent as the Spanish Courts were properly seised of the dispute long before the presentation of the Irish petition.

In *Popely -v- Popely* [2006] IEHC 134 the court was satisfied that as there was no risk of an 'irreconcilable judgment' arising from the Irish proceedings for the purposes of Article 27 there could be no argument under Article 28 that the Irish and English proceedings were so 'related' that they were required to be determined together.

3.5 In *Popely -v- Popely* [2006] IEHC 134 the Irish court relied on the ECJ case of *Gubish Maschinenfabrik KG -v- Palumbo* (Case C-144/86) in finding that the phrase "the same cause of action" in Article 27 must be construed in accordance with all of the language versions of the Regulation in order to find its autonomous meaning. Accordingly the Irish court had to consider whether the two actions had the same "cause" and "object" as the French and Italian versions of the Regulation require. The Irish court referred to the dictum of the ECJ in *The Tatry* (Case C-406/92) that "the 'object of the action' for the purposes of Article [27] means the end that the action has in view." The Irish court further was guided by the ECJ case of *Gantner Electronic GmbH -v- Basch Expolitatie Maatschappij BV* (Case C-111/01), noting that in considering whether the two sets of proceedings have the same cause, the national court should consider only the claims made by the applicant in each of the relevant proceedings to the exclusion of any defence made by the parties.

3.6 In *Popely*, the Court found that the fact there were additional parties in the Irish proceedings to those in the English proceedings was no bar to the application of Article 27. The Court noted however that Article 27 would only apply to so much of the claim in the proceedings before the courts secondly seised as is between the courts firstly seised. Article 27 does not prevent the proceedings continuing between the other parties. The Irish Court relied on the decision of the ECJ in *The Tatry* (Case C-406/92)

3.7 The Irish courts are generally poorly-disposed to applications for negative declarations. Order 19, rule 29, RSC provides that “No action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not.” This was explained in *O’Donnell –v- Dun Laoghaire Corporation* [1991] ILRM 301 as: “A declaratory judgment is one which declares the rights of parties...”. Accordingly, there may be doubt as to whether an Irish court should give an entirely negative declaration as “negative rights” do not as such exist. Though the practice of seeking negative declarations in certain EU jurisdictions was recognised in *Leo Laboratories*, the Supreme Court in that case expressed considerable sympathy with a party who objected to his opponent’s application in the Netherlands for negative declarations. There is no recorded case in Ireland of a simple negative declaration being given in a Regulation 44 case.

3.8 Again, while this is in principle possible, actions involving negative declaratory judgments are generally not taken in Ireland, so in practice this does not happen.

3.9 The procedure in Ireland in relation to a claim that a patent is null being raised in defence to an action for infringement may be distinguished from that in Germany. In Irish procedure, the allegation of nullity may be made as a counterclaim in the proceedings for infringement, and both issues may be resolved by the High Court in the same proceedings. In practice therefore, while a case which included a counterclaim as described might take longer to conclude, this would be by virtue of the fact that an additional issue was raised, and would not involve delay as such to the determination of the claim for infringement.

3.10 Ireland is a contracting party to the European Patent Convention. However, we are not aware of any Irish case law in which this kind of issue has been considered.

4.1.1 The procedure for seeking a declaration of enforceability is as set out in Order 42A, RSC, copy attached. This procedure has been described in the answers to Questionnaire 2.

4.1.2 We do not believe it necessary to establish standard forms in relation to applications for declarations of enforceability. The content of the documents to be presented to the Irish courts is clear from the Irish rules of court and it is not difficult to prepare the necessary documents. It might also be argued that as the application for a declaration of enforceability is made according to local law, its form should be a matter for local rules of procedure, subject of course to the requirements of the Regulation being met.

4.1.3 We are not aware of any case before the Irish courts in which the definition of the term “judgment” has caused a difficulty.

4.1.4 While most Irish court offices are equipped with electronic mail, the rules of procedure do not as yet in Ireland (with certain minor exceptions) permit the filing or

delivery of documents by electronic means. Court documents must therefore still be lodged in paper form.

4.1.5 We believe that the reasons for objection to or refusal of enforcement should be as few as possible and as clear as possible. To the greatest extent possible, the court of the state in which enforcement is sought should not be asked or required to look to the substance of the issue between the parties and its role in this regard should be confined to being satisfied that there is no inconsistent judgment, the proper procedures have been followed and giving the declaration of enforceability would not offend public policy.

As outlined above in the response to question 1.7 following the case of *Rhatigan -v- Textiles y Confeciones Europeas S.A.* [1990] IR 3 it appears that the Irish Courts may in any case entertain objections outside the scope of Articles 34 and 35. In that case the Irish Courts entertained an action wherein the plaintiff asserted that the enforcement order on foot of the judgment which had been made by the Master of the Irish High Court was invalid and a nullity as the enforcement order itself did not contain an address for service of process and that the order did not disclose on its face that the judgments in question were those of a contracting state which was party to the convention. The Supreme Court in *Rhatigan* refused the order sought on the basis that no substantial prejudice had occurred to the plaintiff.

4.1.6 There is no reported case in Ireland in which an issue about the clarity or definiteness of the foreign judgment or title has arisen. We believe that if doubt arose, the applicant for a declaration of enforceability would be asked to produce some further document or evidence as to the proper meaning of the judgment or title.

4.1.7 We believe the public policy ground is very rarely at issue in Ireland. The only case law in relation to the reservation of public policy is the case of *Westpac Banking Corporation -v- Dempsey*, High Court, 19 November 1992, Morris J.. In that case the Master of the High Court made an order enforcing an English judgment for payment against Dempsey. Dempsey appealed claiming that the order was a criminal offence in breach of the Exchange Control Act 1954, section 5 of which prohibited without the permission of the Minister, the making of or a commitment to making any payment to a person resident outside the scheduled territories (which then excluded the UK) and accordingly null and void the Court should not enforce it. In dismissing the appeal Morris J heard evidence from an official of the Central Bank that the restrictions on exchange control were being removed in anticipation of the coming into effect of the Single European Act and that such payments could now be made. Morris J concluded in view of the evidence of the central bank official he did not see any conflict with public policy such as would prevent the recognition of the judgment under Article 27 as the public policy of the State was at that time to dismantle all obstacles to the free movement of capital. Morris J noted that he did not wish to "injure the innocent, benefit the guilty and put a premium on deceit".

4.1.8 We are not aware of any legislative amendments arising from a finding of incompatibility of a judgment with Irish public policy and we believe none arise.

4.1.9 There has not been any consideration of such interrelation in Irish case law, though we believe the Irish jurisprudence on what amounts to abuse of process would be relevant in a consideration of the question of whether giving a declaration of enforceability on the facts of a particular case would be regarded as contrary to Irish public policy.

4.1.10 We are not aware of any case in which this issue has arisen in Ireland. It is possible in Irish practice to obtain an "instalment order" for the payment of a judgment debt in instalments. However, we are not certain as to whether what is characterised as an "administrative fine" would necessarily be regarded by the Irish courts as falling within the scope of Regulation 44; to the extent that it might be regarded as being in the nature of a tax or penalty, there might be doubt as to whether it was properly within the scope of the Regulation.

4.1.11 Again, we are not aware of any case in which this issue has arisen in Ireland; nor have we found any academic discussion in relation to the issue described.

4.1.12 Anti-suit injunctions do not generally arise in Ireland and we are not aware of any Irish cases in which this issue has been considered.

4.1.13 Appeals from declarations of enforceability by the Master are so rare in Ireland (see statistical responses in questionnaires 1 and 2) that nothing particularly useful can be said about this. However, the application would be re-heard by the High Court at a relatively early stage and we do not imagine that the costs involved would be particularly significant. As indicated above, it is not strictly speaking mandatory according to court rules to be represented by lawyers in an appeal, but in practical terms, it is almost essential.

4.2.1 Thus far there have only been two cases which have considered the operation of the equivalent provision of the Brussels Convention - Article 39.

In *Elwyn (Cottons) Ltd. -v- Pearle Designs Ltd.* [1989] IR 9 the High Court held that the Master was not entitled to refuse the protective measure sought which was in the form of a *mareva* injunction. The Court held that once the Master had made an enforcement order and he was satisfied under section 11(3) of the 1988 Act that it was within the power of the High Court to grant such a protective measure in proceedings within its jurisdiction, then the provisions of Article 39 (now 47) of the Brussels Convention applied and effectively there was no need to seek separate judicial authorisation to proceed with the protective measures. The relevant parts of section 11 (3) of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 Act provide:-

"Subject to Article 39 [replaced by Article 47 of Regulation 44/01], an application to the Master of the High Court for the enforcement of a judgment... may include an application for the granting of such protective measures as the High Court has power to grant in proceedings that, apart from this Act, are within its jurisdiction and, where an enforcement order is made in relation to a judgment... the order shall include a provision granting any such protective measures as aforesaid are applied for as aforesaid".

The Court was guided in *Elwyn* by the ECJ case of *Cappelloni and Aquilini -v- Pelkmans* (Case C-119/84) and stated that as there was no provision for an appeal against a refusal to grant protective measures, the appropriate procedure in the instant case was to apply for judicial review for *mandamus* and to apply for interim relief by way of *mareva* injunction under the Rules of the Superior Courts.

In the ensuing case of *Elwyn (Cottons) Ltd -v- Master of the High Court* [1989] IR 14 *Elwyn* sought leave to seek by way of judicial review an order of *mandamus* to direct the Master of the High Court to grant protective measures under section 11(3) of the 1988 Act. Justice O' Hanlon consented to grant leave to apply for judicial review noting that an order of

mandamus could be granted against the Master of the High Court because in making such an order the High Court was making an order against an officer attached to the High Court and not the High Court itself. The Court queried however whether the judicial review procedure was a comprehensive and appropriate code of procedure for the enforcement of judgments under the 1988 Act or whether the usual appeal procedure under the Order 63 rule 9 of the rules of the Superior Court was more appropriate.

4.2.2 There are really no significant protective measures which may be availed of by the applicant in Ireland prior to the declaration of enforceability being given. The possible exception to this may be registering the application as a *lis pendens* against real property in the title of the judgment debtor. In such a case, the effect of registering a *lis pendens* is simply to give an indication of pending proceedings and we do not believe that the Court office concerned would give any consideration to issues arising under Article 34 or 35. .

4.2.3 Does not arise.

4.2.4 Yes see answer above to question 4.2.1

4.3.1.1 As indicated above, “authentic instruments” and “court settlements” do not arise in domestic Irish practice. We are not aware of any Irish case in which issues relating to either of them have been considered.

4.3.1.2 As indicated above, “authentic instruments” and “court settlements” do not arise in domestic Irish practice. We are not aware of any Irish case in which issues relating to either of them have been considered.

4.3.1.3 Does not arise.

4.3.1.4 Does not arise.

4.3.2 As indicated above, Articles 57 and 58 are of little if any practical significance in Ireland.

4.3.2.1 None of which we are aware.

4.3.2.2 No information available.

4.3.2.3 No information available.

4.3.2.1 No such case is known in Ireland.

4.3.2.2. for the reasons indicated, there has not been any relevant case law or practical experience in Ireland on this issue.

4.3.25. Twinkle Egan in her article "The Case for an EU Convention Causebook and Judgment Registry Database" in *The Bar Review* October 1996 notes that "the effective workings of the European Single Market and European Monetary Union requires that individuals, investors and companies have access to comprehensive, accurate and up-to-date information on other players in the single market" and that a centralised European database is

required to provide this service. Egan notes that the effective operation of the Brussels Convention/Regulation is hampered by the fact that when proceedings are instituted in one country such proceedings are a matter of record only within that jurisdiction and there is no mechanism whereby the existence or significance of such proceedings can be ascertained by interested parties. Egan suggests that such a register would record whether proceedings are ongoing or have concluded and if concluded what the relevant outcome is.