1. General Themes

1.1 Are there any problems in the judicial practice with the autonomous interpretation of "civil and commercial matters" (Article 1 (1)) practised by the European Court of Justice (ECJ)?

1.2 Do public authorities use the Regulation to assert claims against private persons? The reported case law does not allow to answer that question positively.

1.3 How is the delineation of the scope of application of the Regulation and other instruments concerning the judicial cooperation in civil matters?

The literature has frequently emphasized that the material scope of application of other instruments concerning the judicial cooperation in civil and commercial matters may be broader than the scope of application of the Regulation, because the latter may not be applied in excluded matters.

In the courts’ practice, this difference does not seem to have raised major difficulty.

In particular:

1.3.1 the delineation to Regulation 2201/03/EC (concerning Article 1 (2) lit. a) Regulation 44/01/EC)? Are there any problems with the assertion of claims concerning maintenance/living costs?

Courts have apparently not frequently been faced with delineation problems between the Regulation and Regulation 2201/2003 in matters of maintenance/alimony.

See however, the decision of the Court of Appeal of Brussels, 30 October 2001, Div. Act. 2003/3 42 - in which the question arose whether Article 5(2) could be applied to the claim of an ex-spouse for an additional payment in order to supplement her old age pension, in order to compensate for the years during which she did not work and instead devoted her time to her family.

What has given rise to some difficulties, is the question whether Article 5(2) of the Regulation may be applied to a secondary claim which is made in the framework of a larger claim dealing with the status of the persons concerned (see Court of Cassation, 29 March 2001 Arr. Cass. 2001, 531).

Finally, courts in Belgium seem to apply routinely Article 5(2) of the Regulation to hear a claim for alimony when they are seized of divorce proceeding (see Court of Appeals of Ghent, 16 October 2003, RABG 2004/8, 483).

1.3.2 the delineation to Regulation 1348/2000/EC (concerning Article 1 (2) lit. b)), particularly: How does the judicial practice treat the delineation of collective and
single actions? Are there any problems with the delineation of actions concerning cases of insolvency and those that do not?¹

If the question is understood as pertaining to Regulation 1346/2000 (the so-called Insolvency Regulation), court practice so far has not shown difficulties in determining whether a given action falls under the Regulation or should be deemed to fall under the Insolvency Regulation.

Courts have routinely applied the Regulation notwithstanding the opening of insolvency proceedings against the defendant, when the action only relates to the payment of a contractual debt by the insolvent debtor. In that case, courts only refer to the Insolvency Regulation to determine what is the impact of the insolvency proceedings opened in another Member State on the dispute which is submitted to them (see e.g. Commercial Court of Furnes, 18 December 2002, RDC, 2003, 794).

On the other hand, courts have disregarded the Regulation and preferred the application of the Insolvency Regulation when the claim has a distinctive 'insolvency' flavor (e.g. Court of Appeal of Antwerpen, 23 June 2003, J.P.A. 2003/4, 368 - in this case, the claimant sought to have his ownership title of certain goods held by the insolvent debtor, be recognized by the court).

1.4 Is the application of Article 4 of Regulation 1438/71/EC practical for the determination of Article 1 (2) lit. c)?

In the literature, most authors recommend to follow the determination made by Regulation 1408/71/EC in order to construe the exclusion of social security. In practice, courts seem to follow this advice (see e.g. Labour Court of Liège, 6 May 1997, Chr. Dr. soc., 1998, 434)

1.5 Should the scope of application be extended, especially to incorporate arbitration and mediation proceedings?

In the reporter's humble opinion, it is submitted that the Regulation should avoid entering into the realms of arbitration and mediation proceedings, which are better left to their own, specific rules - including international conventions applicable in this field. It is also submitted that arbitration and mediation agreements should not be governed by the same rules as applicable to choice of court agreements. Preference should be given to the development of uniform substantive rules. The only exception may be in matters involving consumers, where there is a need to develop a European-wide standard dealing with arbitration and (but to a much lesser extent) mediation agreements.

1.6 How do the guarantees for the rights of defence provided by the Regulation work concerning jurisdiction on the one hand and recognition and enforcement on the other hand?

¹ In some legal systems the avoidance in insolvency proceedings has to be asserted before another court than the court of origin. Before Regulation 44/01/EC and Regulation 1346/2000/EC came into force, the proceeding was treated as one ruled by insolvency law, whose jurisdiction was ascertained by national law. Today it is said that the rules of Regulation 44/01/EC and Regulation 1346/2000/EC concerning the jurisdiction interlock. On the other hand Regulation 1346/2000/EC gives jurisdiction to a court only in the case of opening the insolvency proceedings, not in other cases concerning the law of insolvency. Does this lead to the conclusion that the avoidance of insolvency proceedings is ruled by Regulation 44/01/EC? The same problem arises with actions concerning the liability of a liquidator. Do such problems arise in your country?
Unfortunately, it sometimes happens that a court would ‘forget’ to verify, when the defendant does not enter an appearance, whether the defendant has received the document instituting the proceedings in due time - although this is imposed by Article 26. Fortunately, such mishaps rarely happen. When a party seeks the recognition or enforcement of a foreign default judgment, most courts will pay extra attention to the question whether the rights of the defendant have been respected before the court seized of the original proceedings.

1.7 Are the rules of Articles 32–58 of Regulation 44/01/EC compatible with national procedural rules? What is still left to be ruled by the Member States? Do special rules exist or do the general rules have to be used?

The Regulation leaves it to Member States to define the procedural framework for enforcement proceedings. No special rules have been adopted in this respect in Belgium. Hence the general rules of procedure apply. These rules require that a request for enforcement be filed by an attorney (art. 1026-5° Code of Civil Procedure). In practice, the application of these rules has not yet proved incompatible with the provisions of the Regulation or with its spirit.

1.8 Is the meaning of these conventions in relation between the Member States reduced by the application of Regulation 44/01/EC?

It is unclear to which convention reference is made in the question. If the question pertains to the bilateral conventions concluded by Belgium and still in force notwithstanding the adoption of the Regulation, it is submitted that these conventions still play a modest but important role in practice in matters excluded out of the scope of application of the Regulation. In the relations with France and the Netherlands, these conventions provide valuable service in determining the jurisdiction of courts, e.g. in matters of matrimonial property or succession.

2. Provisions of Regulation 44/01/EC dealing with Jurisdiction

2.1 General Issues

2.1.1 Does the Regulation guarantee, according to its overall objectives, predictability of judicial decisions and legal certainty?

It is most difficult to offer a general assessment of the success of the Regulation. As far as the rules on jurisdiction are concerned, one may note that some provisions still leave ample room for debate - this is particular the case with Article 5(1) and 5(3). Litigants may hence be forced to spend important resources to settle the issue of jurisdiction. This may undermine the objective of legal certainty. However, it is unlikely that any fine tuning of the Regulation could make such arguments on the precise scope and meaning of some of the Regulation’s provisions unnecessary.

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Example: In Germany there is an obligation for the parties of being represented by a solicitor when taking action at the *Landgericht*. An exception is made for the order of enforcement of a foreign judgment by a rule of the national implementation law (§ 4 (2)).
On the other hand, provisions such as Article 23 provide the legal certainty needed in contractual practice. No reservation needs to be made for example when reviewing a contract in which a choice is made for the courts of another Member State - even though in some exceptional cases, the combined effects of the Gasser and Turner case law may delay for some time the enforcement of a choice of court clause, as has been shown in the JP Morgan v. Primacom case.

One may finally note that the restrictions imposed today on the possibility for national courts to refer a preliminary question to the European Court of Justice (under Article 68 of the Treaty) could in the long run undermine the whole construction as the ECJ will irarely be called to shed some light on the precise meaning of a provision of the Regulation.

2.1.2 Do the provisions on jurisdiction deal satisfactorily with the relevant issues, in particular: Do the courts of the Member States comply with the obligation as laid down by the ECJ that exclusively deal with the issues identified by Article 5 constitute a ground of jurisdiction?

It is unclear to the reporter what the precise scope of the question is. If one assumes that the question relates to the solution adopted by the ECJ that a national court having jurisdiction under one of the headings of Article 5, may not by this means extend its jurisdiction to other issues or claims falling under another heading of Article 5, the answer is that courts seem to have understood the limitation of the 'case by case' approach adopted in Article 5.

2.1.3 Is the catalogue of fact-specific grounds of jurisdiction sufficient?

It is submitted that some cases may give rise to difficulties as they do not fall neatly either under Article 5(1) or Article 5(3). Query, however, whether there is in practice a real need to add an new ground of jurisdiction (such as a 'catch-all provision') to the existing list. Article 2 of the Regulation will in most cases provide a satisfactory answer.

2.1.4 Does Article 4 (2) cause a discrimination in fact of third State parties?

Although Article 4(2) has been decried in the literature, practice has not shown a frequent application of this provision against third State parties. This may be the result of the more frequent use of choice of court provisions in contracts concluded between litigants established in a Member State and litigants established outside the EU.

2.1.5 How are Articles 25 and 26 applied in practice? In particular: How does the examination “ex officio” work? Does such examination include grounds of jurisdiction not mentioned in Article 25? Do the courts examine ex officio if there is a valid choice-of-forum clause derogating the jurisdiction seized with the matter by reviewing the entire document of the agreement or do they demand a declaration of plaintiff that there is no derogation?

There is a widespread tendency among practitioners and magistrates alike (who are influenced by the status of the question under domestic law) to believe that jurisdiction is an 'ordre public' issue which must be checked ex officio by the court. This means in practice that some courts may go beyond the grounds of jurisdiction included in Article 25.
However, most courts will adopt a passive attitude at the hearing, looking up actively at the case only when all written pleadings have been filed and the parties have argued their case. Hence, if the defendant has declined the jurisdiction of the court, the court will be able to review the issue of jurisdiction without going beyond the limits of Article 25.

2.1.6 Is the examination of the issue of jurisdiction expensive and time-consuming? Are the same fees for the court and the attorneys to be paid as under the main proceedings? How long does it usually take to obtain a final decision on jurisdiction? Are there any complaints that courts do not decide the issue of jurisdiction separately, but only in connection with the main proceedings? In reverse, are there complaints that a separate decision on jurisdiction results in an unbearable delay of the decision in the main proceedings?

Examination of the issue of jurisdiction tend to be costly and time consuming. This results from the fact that in most cases, the court will not require that the partie deal first with the issue of jurisdiction before arguing the merits of the case. Hence, parties will end up arguing both the jurisdiction and the merits, without knowing whether the court will in the end accept that it has jurisdiction.

There is no formal mechanism under Belgian procedural law to force a plaintiff to accept that the dispute be 'split up' in two parts and to deal first with jurisdiction before going to the merits of the case. The defendant may suggest such a course of action but is powerless if the plaintiff does not agree. As a result, the defendant could be forced to finance litigation on the merits even though the court will at the end decline jurisdiction.

In terms of fees to be paid to the court, no distinction is made between the issue of jurisdiction and the merits of the case. In order to bring a case, the plaintiff should pay the required fee, whether the proceedings will be limited to the issue of jurisdiction or also include the merits of the case.

2.2 Questions regarding the various grounds of jurisdiction

2.2.1 How is the reference in Articles 2 and 59 applied? How is the term “domicile” defined? Are there any cases where the courts held that the Defendant had several domiciles?

Belgium has not adopted any special legislation to define the concept of 'domicile' for the purposes of the Brussels I Regulation. Most authors agree that this concept should be construed using the definition of the domicile provided for in the Code of Civil Procedure. Article 36 of the Code defines the domicile of physical persons as the place where one is registered with the municipal authorities. To the reporter's knowlegde, no court has yet held that a natural person has several domiciles in the sense of Article 36.

This situation is, however, not excluded and could arise if a person domiciled in Belgium leaves the country and takes residence in another Member State without giving notice of his departure to the Belgian authorities. During a limited period of time, this person could be said to have two domiciles in the sense of
Article 59. It is submitted that the Regulation's lis alibi pendens rule is sufficient to deal with such an exceptional case.

2.2.2 Does Article 60 with its alternative connecting factors appear feasible?

Although several authors have criticized the reference in Article 60 of the Regulation to alternative connecting factors, case law has not revealed problems with this definition. Rather, the thinking is that if a company separates its statutory seat from its principal place of business, it should bear the consequences and accept that it can be sued in two Member States.

2.2.3 How does Article 5 No. 1 work? In particular: Article 5 No. 1 lit. b) 1st indent leaves open the place of fulfilment if goods are handed over to a carrier under CIF or FOB. Is the place of delivery the place where the goods are handed over to the carrier or is the place of delivery to the addressee at the latter's place? In that respect, are there any difficulties known in court practice or contract drafting?

To the Reporter's knowledge, the determination of the place of delivery of the goods under Article 5(1)(b) has not yet been put to courts in case the agreement calls for delivery CIF or FOB.

On the other hand, several courts have referred to the 1980 Vienna Sales Convention in order to determine the place of delivery of goods in international sales transactions.

2.2.4 Do courts have difficulties to determine the place where a service was provided or should have been provided?

In most cases, courts would look at how the contract was performed in order to determine whether the service was or should have been provided.

So it is that in the case of a dispute relating to the termination by the Dutch principal of an agency agreement, the Court of Appeal of Anwerpen (28 April 2004, RDC 2005, 70) held that since the agent was representing the principal in Belgium, the services were provided in that country. Hence the court accepted it had jurisdiction to hear the agent's claim for compensation due to the unilateral termination of the agency agreement.

2.2.5 Under Article 5 No. 1 lit. a), how is the place of performance determined in light of the jurisprudence of the ECJ?

In most cases, courts stick to the classic Tessili case law and refer to the law applicable to the contract (which is determined in accordance with the provisions of the 1980 Rome Convention) to determine the place of performance of the relevant obligation. When the contract is governed by Belgian law, an obligation is required to be performed first at the place determined in the contract and, failing an agreement between parties on this issue, at the place where the debtor is established (Article 1247 Civil Code).

There appears to be some disagreement in court practice on the question when one should refer to the specific rule for sales and service contracts (art. 5(1)(b)) and when the court should stick to the traditional rule of Article 5(1)(a). Some courts consider that Article 5(1)(b) can only be applied when parties have
expressly determined the place of performance of the obligation (delivery of goods or provision of services). See e.g. Commercial Court of Hasselt, 8 June 2004, RDC, 2005, 96 - case concerning the production and sale of commercial leaflets by a Dutch company for the benefit of a company established in Belgium; the court only referred to the solution of Article 5(1)(a) without examining whether Article 5(1)(b) could apply.

Another issue that arises is when the court should accept that parties have agreed otherwise, i.e. when there is an agreement between parties which prevail over the direct determination of the place of performance under Article 5(1)(b). Some courts have accepted that it is sufficient to displace the application of Article 5(1)(b) that parties have agreed on the place of performance of the obligation that lies at the heart of the dispute, even though this obligation may not coincide with the obligation to deliver the goods or to perform the services (see Commercial Court of Hasselt, judgment of 15 May 2002, RCD 2002, 596 (the court finds that it has jurisdiction under Article 5(1) in a dispute relating to the sales of goods, because parties had agreed that the price should be paid at the plaintiff's domicile). Other courts deny that an agreement between parties on the place of payment could have such an effect (Court of Appeals of Ghent, 3 April 2006, T.G.R. - T.W.V.R. 2006/3, 170).

2.2.6 Under Article 5 No. 1 lit. b), how is the term „provision of services“ defined and how are services localised?

As stated in the answer to question 2.2.4, courts will in most cases look at the contract and how it was performed in order to determine whether the service was or should have been provided.

2.2.7 How is the scope of Article 5 No. 1 lit. c) determined?

See answer to question 2.2.5.

2.2.8 How is the line drawn between Article 5 No. 1 and Article 5 No. 3?

In the reporter's experience, courts will draw heavily on the characterization made under their domestic law to determine whether a claim falls under Article 5(1) or 5(3).

2.2.9 Does it provoke any problems that the ECJ does not accept annex grounds of jurisdiction? In particular: Do the courts of the Member States manage to draw a line between contractual and matters of offence in a way other than their own law?

2.2.10 What falls within the scope of the term „matters relating to tort“ under Article 5 No. 3?

Courts have applied Article 5(3) to a wide variety of cases, ranging from patent infringements disputes to claims for damages arising out of abuse of dominant position (by a professional sports organization) or an accident occurring in a train.
2.2.11 Taking into consideration the case law of the ECJ, how is the jurisdiction determined under Article 5 No. 3, in particular in the case of distance and multistate offences? Is the ratio of the decision of the ECJ in “Shevill” workable?

2.2.12 Functioning and practical relevance of Article 6 No. 1 and No. 2 Regulation 44/01/EC: Are there any doubts as to the compatibility of Article 6 No. 1 Regulation 44/01/EC with Article 6 European Convention on Human Rights?

To our knowledge, courts have not yet examined whether the application of Article 6(1) of the Regulation is consonant with the requirement of due process enshrined in Article 6 of the European Convention on Human Rights.

2.2.13 How broad is the scope of the grounds of jurisdiction for consumer issues?

Most commentators agree that the determination of the substantive scope of the rules of jurisdiction in consumer cases, should be simplified.

2.2.14 Determination of defendant’s quality, of a consumer in the sense of Article 15 (1) (in light of the case law of the ECJ).

Some courts have held that when a party has made a sufficient preliminary showing that he/she should be considered to be a consumer for the application of the Regulation, it is up to the other party to show otherwise (e.g. Commercial Court of Hasselt, 27 June 2001, RW, 2003-04, 630).

2.2.15 How is the concept of an activity “directed to one or several Member States” under Article 15 (1) lit. c) applied in practice? How is the provision construed in case of internet business?

To the reporter’s knowledge, the concept of directing activity to a jurisdiction has not yet been applied in practice, even though it has given rise to plethora of scholarly comments, in particular in relationship with internet commerce.

2.2.16 Taking into consideration the case law of the ECJ, how is the term of „establishment“ in the sense of Article 15 (2) interpreted?

To our knowledge, courts have not yet been faced with the interpretation of the concept of ‘establishment’ found in Article 15(2) of the Regulation.

2.2.17 How do the provisions on individual contracts of employment (Articles 18–21) apply and how do they interrelate with the respective choice of law rules (in particular Article 6 Rome Convention)?

Labour courts frequently refer to the provisions on individual contracts of employment. In most cases, courts will ignore a choice of law in the employment contract and give precedence to the mandatory rules of Belgian law under Article 6 of the Rome Convention.

2.2.18 How is the term „rights in rem” in the sense of Article 22 construed?
The precise meaning of the phrase ‘rights in rem’ does not appear to have given rise to significant court practice.

2.2.19 Determination of the national practice in respect to the exclusive grounds of jurisdiction under Article 22 No. 2, in particular: In which types of cases is the provision most frequently applied in practice?

It does not appear that Article 22(2) has been frequently applied by courts.

Article 22 has been applied most frequently in patent infringement cases, where one of the parties argue that the patent, enforcement of which is sought, is not valid.

In a limited number of cases, Article 22 has also been applied to determine the jurisdiction of Belgian courts in disputes relating to corporations (see e.g. Commercial Court of Hasselt, 22 April 1998, R.D.C. 1998, 404).

2.2.20 Are there any positive or negative conflicts of competence?

In order to determine whether positive conflicts of competence have arisen, one should take into account the case law of other Member States.

In the reporter’s opinion, the greatest source of potential positive conflicts lies in the multi-factor definition of the domicile of a corporation in Article 60 of the Regulation.

2.2.21 To what extent does the provision comply with the ECJ’s decisions on the freedom of establishment (Centros/Überseering)?

It is submitted that since Article 22(2) only pertains to the jurisdiction of the courts of Member States, without passing a judgment on the law applicable to companies and disputes relating to companies, the ECJ’s well known decisions on freedom of establishment should have no direct impact on this provision.

2.2.22 How do you draw the line between Article 5 No. 3 and Article 22 No. 4 in respect to litigation on patents? How do the national courts deal in infringement proceedings with the argument of patent invalidity?

2.2.23 Are any of the exclusive grounds of jurisdiction in the catalogue of Article 22 too broad or too narrow?

In the reporter’s humble opinion, the reference in Article 22(1) of the Regulation to tenancies of immovable property may not be satisfactory. This is in particular the case for commercial rental agreements, which may concern large office buildings. It may be worthwhile examining whether the tenants could be afforded jurisdictional protection by broadening the scope of application of Article 15 of the Regulation. This may make it possible to restrict Article 22(1) to disputes relating to rights in rem.
2.2.24 What is the relation between the respective national remedies against enforcement and the freedom of judgments (Articles 22 No. 5, 32)? In particular: What remedy does the obligor rely on if he argues that the claim has changed since the judgment or the title to enforce rendered outside courts does not base on a respective payment on the claim?

2.2.25 Questions relating to the applicability of Article 23

In particular:

2.2.25.1 Implementation in practice of the decisions of the ECJ by the courts of the Member States?

2.2.25.2 Except for the issue of formal requirements, are conclusion and validity of choice-of-forum agreements determined according to the lex causae or the lex fori?

To the reporter's knowledge, courts have not entered into a discussion of the validity requirements of choice of court clause outside the formal requirements which are specifically outlined in Article 23.

The literature is divided on this issue, with some authors arguing that Article 23 is a self contained code, which does not leave any room for the application of national law (be it the lex fori or the lex causae) in order to determine the validity of the choice of court agreement.

According to another line of reasoning, the application of national law to determine the validity of a choice of court agreement, is not excluded in well limited circumstances (such as, without any limitation, the fact that the agreement is void due to mistake, duress or other 'vices de consentement' / 'wilsgebrek'.

In practice, it is submitted that the difference between the two lines of thought is at best marginal.

In addition, there is no agreement in the literature on which national law should apply to determine the validity of a choice of court agreement for other questions than those covered by Article 23.

2.2.25.3 Are choice-of-forum clauses in standard form contracts subjected to judicial control?

Yes. Courts will scrutinize in particular whether the general terms and conditions of the party relying on a choice of court clause, have been duly communicated to the other party.

A recurrent problem in that respect is the fact that Dutch companies attempt to rely on the choice of court clause appearing in their general
terms and conditions, relying therefore on the fact that these terms and conditions are available in the local Chamber of Commerce (as is customary in Dutch business practice). Courts hold that this is not sufficient to establish that the other party knew or should have known about the general trade conditions (see e.g. Commercial Court of Hasselt, 8 June 2004, RDC, 2005, 96).

2.2.25.4 National practice in determining „usages“ of international trade or commerce in the sense of Article 23 (1) lit. c)?

In the literature it has been argued that Article 23 should in some circumstances receive application in relations with third states. However, to our knowledge, this issue has not yet arisen in case law. It is unlikely to arise in the near future as the recently adopted Belgian Code of Private International Law provides a precise framework for choice of court clauses and requires Belgian court in principle to decline jurisdiction when parties have chosen to submit their disputes to the court of such a third state.

See in particular, A. Nuyts, «La théorie de l’effet réflexe», Le droit processuel et judiciaire européen, G. de Leval (ed.), 2003, La Charte, at pp. 73-89.

2.2.25.5 Applicability of Article 23 vis-à-vis third states?

In the literature it has been argued that Article 23 should in some circumstances receive application in relations with third states. However, to our knowledge, this issue has not yet arisen in case law. It is unlikely to arise in the near future as the recently adopted Belgian Code of Private International Law provides a precise framework for choice of court clauses and requires Belgian court in principle to decline jurisdiction when parties have chosen to submit their disputes to the court of such a third state.

See in particular, A. Nuyts, «La théorie de l’effet réflexe», Le droit processuel et judiciaire européen, G. de Leval (ed.), 2003, La Charte, at pp. 73-89.

2.2.26 How does Article 26 function, in particular in comparison with Article 19 of Regulation 1348/2000/EC?

In the reporter’s experience, courts are not always paying attention to the duty imposed by Article 26 to scrutinize ex officio their jurisdiction when the defendant does not enter an appearance.

Likewise, some courts may forget to verify whether the document instituting proceedings has been served to the defendant in due time when the latter does not appear.

This is, however, not to say that courts are in general not aware of the obligation to stay their proceedings when the defendant does not enter an appearance and the plaintiff has not sufficiently demonstrated that the defendant has been served in due time with the document instituting proceedings. In fact, in most cases of default, the courts will dutifully apply Article 26 of the Regulation together with Article 19 of Regulation 1348/2000 (see e.g. Commercial court of Hasselt, 15 May 2002, RDC 2002, 597; Comm.

3 The problematic point lies with written confirmations of orders that are issued by the provider of the non-cash contribution with reference to general conditions that encompass a clause-stipulating jurisdiction. According to the opinion of the ECJ (“Segoura”) this was not possible without written confirmation by the client. This was the reason for the implementation of today’s Article 23 (1) c) in the adapting negotiations with Denmark, Ireland and the United Kingdom. According to the leading decision of the ECJ (“Mainschiffahrtsgenossenschaft”), the meaning of “commercial customs” used by Article 23 (1) c) is a matter of fact that has to be finally decided upon by national courts. Did the courts of your State express their opinion regarding this point – in particular with regard to confirmations of orders to which general conditions are attached? Are there any complaints from representatives of the economy who claim that there are no workable and reliable possibilities anymore to achieve choice of forum agreement for certain kinds of business?
In that respect, courts tend to adopt a flexible approach and may accept that the defendant has received the document instituting the proceedings in due time even though the plaintiff does not submit the certificate of completion of service provided for by Article 10 of the 1438/2000 Regulation, if it appears from the various steps undertaken by the plaintiff that the defendant has in fact received the document.

2.2.27 Effect and functioning of Article 31

In particular:

2.2.27.1 Term of „provisional measures“. According to the practice of the courts of your Member State, do measures resulting in the provisional fulfilment of the claim fall within the ambit of “provisional measures”?\(^4\)

2.2.27.2 Territorial connection with the State where the measure was rendered\(^5\)

Only a handful of judgment have been published in which courts have expressly dealt with the requirement of a territorial connection as laid down in Van Uden. It is worth noting that most of these rulings were issue in patent infringement cases or other cases dealing with intellectual property rights.

2.2.27.3 Problems in applying autonomous provisions on jurisdiction in cross-border transactions

2.2.27.4 Relation between interim protective measures and main proceedings

2.2.27.5 Enforcement of provisional measures under national law\(^6\)

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\(^4\) According to the rulings of the ECJ (“van Uden”, “Mietz”) a provisional measure according to Article 31 can only be assumed when the repayment of the granted amount is guaranteed to the claimant for the case of the claimant being defeated in the proceedings of the main action. Are there any opinions of the judicial practice or legal writers concerning the meaning of “guaranteed”? Does it only mean the existence of a substantive claim for a payment or does it mean the obligation of the claimant to grant sufficient securities?

\(^5\) In the judgments quoted above, the ECJ has set up the requirement that a provisional measure issued by a court that has no jurisdiction on the proceedings of the main action must have a territorial connection to the State of the forum. The question is, whether this criterion is also capable in cases, where the provisional measure shall impose or interdict an action to the opponent, e.g. not to distribute goods, which have been produced by infringements of the legal protection of industrial property. Are there any experiences concerning such cases in your State?
To our knowledge, Belgian courts have not yet (unlike French courts) been asked to enforce a Mareva injunction or other provisional measures unknown under Belgian law. This may be because lawyers will discourage parties from seeking enforcement of such measures. Courts have, however, already been faced with such issues.

2.2.28 Is there any case law relying on Article 24 Brussels I Convention (jurisdiction by appearance)?

The Supreme Court (Court of Cassation) has issued an interesting ruling (issued on 28 April 2006 in the case of Pro-Pak International B.V. v. Liecopotatoes), the Court held that the defendant who at the introductory hearing agreed to the appointment of an expert requested by the plaintiff, without challenging first the jurisdiction of the court, was deemed to have accepted this jurisdiction and hence could not at a later hearing decline the jurisdiction of the court.

3. **Lis Pendens and Similar Proceedings**

3.1 How does Article 27 work concerning the principle of *lis pendens*, particularly in the light of the case law of the ECJ and the courts of the Member States?

Although there is no tradition under Belgian private international law of coordination with parallel proceedings pending in a foreign court, Belgian courts appear to have understood the purpose and meaning of Article 27 and to apply this provision without manifest reluctance. In particular, courts have not shown any resistance to the ECJ’s wide interpretation of the concept of identity between proceedings.

3.2 Does the principle of *lis pendens* (“first seized”) cause an incentive to “race to the court room” in the judicial practice?

Most practicing attorneys have understood the value of acting early in order to safeguard their clients’ preferred choice of court.

Save in patent infringement disputes, where for a certain period, Belgian courts were said to provide a safe haven for litigants hoping to delay the outcome of litigation, the understanding that a litigant must not unduly delay the start of judicial proceedings has, however, not led to a noticeable increase in the number of proceedings brought preemptively. This may be in part explained by the fact that Belgian courts do not, in general, offer specific features that could appeal to prospective litigants.

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6 The provisional measures provided by the national legal systems are very different. The rules regarding the enforcement in the Member States are not applicable regarding provisional measures unknown to the national law. The problem has become a practical one in connection with the freezing order (Mareva Injunction) of the English law. This instrument prohibits the opponent from disposing over his assets. Infringements cause penalties because of contempt of court – even for third persons (e.g. banks running the account) that take part in these infringements. British courts add a clause to the world wide freezing order that persons who are not subject to the court’s jurisdiction are only covered, when this special order is declared enforceable abroad. What are the results of such a declaration of enforceability? Is there a possibility of enforcement in your State, when an English freezing order has been declared enforceable? To the national reporter of the UK: Do English courts demand to impose “contempt of court”-penalties on foreign banks because of account dispositions in the State of question after the declaration of enforcement of the freezing order?
3.3 Are there any frictions between Civil Law- and Common Law-systems caused by the different procedural cultures?

The fact that the other court seized may belong to a common law system, does not seem to have raised problems so far.

3.4 How does Article 28 work with actions that have close connections to each other? Would a positive differentiation by hard criteria be useful?

Analysis of the case law reveals that courts are rather timid in applying Article 28. In fact, in most cases where the defendant sought to have the court stay its proceedings, courts have refused to do so.

3.5 Within the Articles 27 to 30, how is it determined whether pending actions concern the same claim between the parties, particularly taking into consideration the case law of the ECJ?

3.6 Do practical problems arise regarding the application of Articles 27 to 30 with actions of several parties? If yes, please indicate which problems arise in your State.

3.7 Is there a loss of efficiency because of the tactics of taking negative actions for a declaratory judgment at courts without jurisdiction (“torpedos”)? Please give a short description of these tactics.

For a limited period of time, Belgium was known as a place where litigants could attempt to delay the outcome of a dispute by seising courts and.

Courts have reacted and attempted to curtail such attempts. This has led to an

3.8 Or could the client with an action taken quickly for a declaratory judgment turn away an oppressive action of a claimant in a foreign country (for example in a country with extremely high costs)?

Belgian courts appear to show some reluctance towards declaratory relief.

3.9 Are there any cases of actions concerning the infringement of a patent that were delayed by the objection of nullity of the patent?

In Germany the judgment of an action concerning the nullity of a patent does not ascertain the nullity of the patent, but furthermore abolishes it. In such cases only the special court for patents has jurisdiction. The objection of the nullity of the patent cannot be raised in an action concerning the infringement of the patent. So the action of infringement must be suspended until a decision is made in the action concerning the nullity of the patent, when such an objection is raised. How far is the court that is concerned with the action of infringement of the patent able to decide whether the announced action concerning the nullity of the patent in the foreign country is serious?
3.10 In the case of a European patent: Can a consistent action of infringement be asserted in your country when the objection is raised that several elements of this European patent are infringed by a consistent strategy of marketing?

4. The Recognition and Enforcement of Judgments, Authentic Instruments and Court Settlements According to Regulation 44/01/EC

4.1 Questions regarding the free movement of judgments

4.1.1 How does the procedure regarding the recognition and enforcement of judgments, authentic instruments and court settlements work?

Belgium has not adopted specific rules for the procedure leading to the recognition and enforcement of foreign judgments under the Brussels I Regulation.

Litigants must hence use the 'classic' ex parte procedure which is defined in the Articles 1025 ff of the Judicial Code. In one isolated decision, the Court of Appeals of Brussels has, however, decided that the Regulation did not allow the judgment creditor to request a declaration of enforceability by means of a unilateral request (Court of Appeals of Brussels, 8 June 2004, Revue@dipr.be, 2005/3, 33). It is submitted that this decision is only a most unfortunate 'accident' which should not be taken into account.

Under the Articles 1025 ff., the plaintiff must file a written request with the court of first instance. The request ('requête' / 'verzoekschrift') must be dated, indicate the identity of the applicant and explain the purpose of the application. The request must be filed by an attorney ('avocat' / 'advocaat').

4.1.2 Are the establishment of additional standard forms, e.g. for applications for a declaration of enforceability, desirable?

It is submitted that it will be difficult to introduce an additional standard form for the application to obtain a declaration of enforceability, as the procedures for such application may differ significantly in the various Member States.

On the other hand, it would be useful to provide courts of Member States with a Practice Guide (such as the one already available for Regulation 2201/2003). Such a guide could usefully complement the Regulation and offer courts of Member States the guidance they require.

4.1.3 Did the term “judgment” in Article 32 lead to difficulties in your State?

Courts in Belgium have apparently not experienced major difficulties in determining what is a judgment under Article 32. Courts have e.g. accepted that a Vollstreckungsbescheid issued by a German court constitutes a judgment (Court of Appeals of Antwerp, 12 May 1997, RW 1998-99, 860) and that a judgment issued by a foreign criminal court could also qualify under Article 32 (Court of Appeal of Mons, 15 January 1998). The only difficulties appear to concern judgments issued in non-contentious
matters, where it is not always easy to determine whether the Regulation applies.

4.1.4 Please describe the status of the accessibility of courts by electronic means.

At this stage, courts cannot yet be contacted by electronic means. There are plans to introduce ‘e-filing’ of judicial documents and a complete electronic treatment of cases. An Act of 10 July 2006 has adapted the rules of civil procedure to allow for electronic filing and the like. The new rules were scheduled to enter into force at the latest on 1 January 2009.

However, it is unsure at the moment whether the infrastructure and software will be ready by that time, as the Phenix project, as it is called, as recently suffered from a setback. It may therefore take more time (a couple more years) before such plans become reality.

4.1.5 Are the reasons for objection that are laid down in Articles 34 and 35 appropriate? Is there a possibility to decrease the number of reasons for objection or is it – on the contrary – necessary to increase this number?

In the reporter’s humble opinion, the grounds for refusal of recognition or enforcement of foreign judgments appear to strike an appropriate balance between on the one hand the needs of interstate commerce and on the other hand the various concerns that could arise when enforcement of such judgment is sought. In particular, the public policy exception appears to play a welcome role, if only psychologically, and should therefore not be deleted.

It may be useful, to include, in Article 35 of the Regulation, a reference to section 5 of Chapter II so that the court addressed may also refuse recognition or enforcement when the rules of jurisdiction in labour matters have not been applied correctly by the court of origin. If need be, this could be qualified by stating that this ground of refusal may only be applied when recognition of enforcement is sought against an employee.

4.1.6 What is the criteria regarding the requirement of clarity and definiteness of foreign titles have to comply with according to Article 38?

It does not appear that courts have had difficulty in determining whether a foreign decision is “enforceable” in the State of origin.

In the past, the question has arisen whether a foreign decision could be said to be enforceable in the State of origin when it was merely provisionally enforceable.

4.1.7 How often is the reservation of public policy (Article 34 No. 1) referred to and with which result?

Experience with the Brussels Convention learns that judgment debtors will often argue that the enforcement of a foreign judgment breaches public policy, as this constitutes one of the only grounds available to resist enforcement, but that courts will resist such appeal, confining the cases.

To take but one example, courts have in the past refused to accept that a
foreign judgment should be refused recognition or enforcement on the ground that the court of origin has refused to apply a specific Belgian statute which is deemed to be, under Belgian law, mandatory in the sense of Article 7(2) of the 1980 Rome Convention.

In another case, the Court of First Instance of Brussels (13 October 2004, RGDC 2005/2, 125) refused to accept that the fact that the judgment creditor had modified its claim during the course of the English proceedings that led to the judgment whose enforcement was sought, constituted as such a violation of public policy, even though under Belgian rules of civil procedure, such a modification would not have been accepted.

4.1.8 Did the non-recognition of judgments given in your State (in particular due to incompatibility with the public policy in the respective Member State) lead to amendments of laws?

To our knowledge, no such amendment was ever adopted, or even suggested, on account of a case of non-recognition by another member state of a judgment issued by a Belgian court.

4.1.9 What kind of interrelation exists between the rule of public policy and the general objection of abuse of the process of the court?

To our knowledge, the link between the public policy defence and the abuse of process has not yet been made in the case law.

4.1.10 How does Article 49 work with regard to the enforcement of foreign decisions, which are aimed at the payment of an administrative fine to the creditor and what is the practical significance of this provision?

Courts in Belgium have accepted that they have jurisdiction in order to determine the amount of the penalty ordered by a court in order to make the penalty enforceable in other Member States (see e.g. President of the CFI Liege, 17 September 2003, JLMB 2003/36, 1595 - in that case the judgment creditor sought to have the amount of the penalty determined before seeking to enforce it in England).

4.1.11 Is there any practical experience or is there a theoretical discussion among legal writers regarding the enforcement of titles which are aimed at the specific performance of an obligation or which are framed as a prohibitory injunction by means of penalties for contempt of court?

There is not much court practice in Belgium with foreign court rulings ordering a party to do something or to refrain from doing something. In most cases, the foreign order will go hand in hand with an order by the foreign court to pay a daily penalty fine in case of breach of the order. In that case, the issue of the enforcement of the foreign order will not arise, as the judgment creditor will first seek enforcement of the daily fine.

Since Belgian courts ordering a defendant to do something or to refrain from doing something abroad will in most cases add to the order an order for the
payment of a daily penalty fine in case of violation of the primary order (see e.g. President Commercial Court of Kortrijk, 10 December 2003 and President of the Commercial Court of Brussels, 31 December 2002; see also President of the Court of First Instance of Brussels, 1 March 2001, JT 2001, 25 - a case concerning the famous Formula 1 pilot Michael Schumacher), it is submitted that Belgian courts will see no difficulty of principle in granting effect to a reverse foreign order (ordering a party to do or to refrain from doing something and adding a daily penalty fine to the main order).

The only limitation could arise if the court considers that the main order issued by the foreign court, goes beyond the limitations of what a court should be allowed to do (e.g. if a foreign court has issued an in personam injunction ordering a litigant to disclose information that would be covered under a legal privilege of non-disclosure under Belgian law).


4.1.12 Does the inadmissibility of “anti-suit injunctions” which has been stated by the ECJ have any consequences for the efficiency of legal protection?

The antisuit injunction was unknown in Belgian court practice (save for one isolated occurrence in the late 1980’s). Hence, the prohibition of this mechanism by the ECJ in the relationships between Member States has not altered the existing situation.

In the literature, it is overwhelmingly argued that such injunctions should not be tolerated within the European judicial area.

4.1.13 How does the practical implementation of appeals work in your State (costs, duration, mandatory representation by lawyers)?

An appeal against a decision granting enforcement must be filed by a lawyer.

In terms of costs, the party appealing a judgment is required to pay a fixed fee amounting to 186,00 EUR.

Duration of appeal proceedings vary according to the jurisdiction. While in Liège or Antwerp, the appeal process can be terminated within one year, the Court of Appeals in Brussels suffers from a notorious backlog. It could take up to two years for an appeal to be heard by that court. It is, however, always possible under Article 1066 of the Code of Civil Procedure to request that the case be heard, if not at the introductory hearing, within 3 months after that hearing. In practice, it may not always be possible for the court to hear the case within this period of time.

4.2 Provisional Measures according to Article 47

4.2.1 How does Article 47 work?

In practice, Article 47 conforms to the long standing practice of Belgian courts. These courts have indeed accepted that a foreign judgment entitled to the de plano automatic recognition, constitutes a valid title for the judgment creditor to
seek such provisional measures as a third party attachment.

Hence, even without the specific authorization of Article 47, the judgment creditor would already be able to avail himself of a number of protective measures available under Belgian law.

4.2.2 Do law enforcement authorities consider – within the scope of Article 47 – the reasons to refuse recognition that are laid down in Articles 34 and 35?

To the reporter’s knowledge, the law enforcement authorities involved in provisional measures, i.e. the bailiffs (‘huissiers de justice’ / gerechtsdeurwaarders’) will not consider the grounds of refusal of recognition under Articles 34 and 35 of the Regulation.

This is because the applicant in any case bears the risk for any damage that could arise out of the provisional measures.

Further, as already indicated, a foreign judgment entitled to de plano recognition, is considered as such, and without the need for a declaration of enforceability, sufficient title to proceed to a third party attachment. The only requirement that must be verified in that case is whether the situation of the debtor justifies proceeding to provisional measures (in other words, there must a sense of urgency about the patrimonial situation of the debtor).

4.2.3 If yes, on the basis of which factual criteria?

Not applicable, given the answer to question 4.2.2.

4.2.4 Does the judge who is competent for declarations of enforceability have competence for provisional measures (Article 47) as well?

No. The most important protective measures (i.e. attachment) will usually only be ordered following a prior authorization by the attachment court (‘juge des saisies’ / ‘beslagrechter’), which is a functionally independent section of the Court of First Instance.

The judge competent for declarations of enforceability, has not jurisdiction to order such provisional measures.

Likewise, the president of the Court of First Instance, who is competent to grant the declaration of enforceability, does not have jurisdiction to determine the amount of the penalty fine which was ordered by the court, in order to make such penalty enforceable in other Member States (see e.g. President of the CFI Liège, 17 September 2003, JLMB 2003/36, 1595 - in that case the President held that the judgment creditor should seek the determination of the amount of the fine from the attachment court, before enforcing it in England).

4.3 Cross-border Enforcement of Court Settlements and Notarial Deeds

4.3.1 How do Articles 57 and 58 work?

Since Article 57 and 58 mainly relate to notarial deeds, the practice relating to these provisions does not lead in general to court opinions. Hence, it is difficult to offer an assessment of the working of Articles 57 and 58.
In the literature, it has been observed that, contrary to the provisions of Regulation 2201/2003, the Brussels I Regulation only refers to the enforcement of court settlements and notarial deeds, without making any reference to the recognition of such acts.

It has been suggested that it could be useful to add a provision in the Regulation to the effect that such settlements and deeds enjoy de plano recognition in other Member States (see G. de Leval, « Reconnaissance et exécution de l'acte notarié dans l'espace judiciaire européen » Liber amicorum Paul Delnoy, Larcier, 2005, 663 ff.).

The practical effect of such a revision would be limited. It could, however, constitute a welcome improvement to the Regulation's application.

In particular:

4.3.1.1 Is there any experience regarding the interpretation of the term “authentic instrument” in Article 57?

4.3.1.2 Is there any experience regarding the interpretation of the term “settlement approved by a court” in Article 58? Did the wrong English version (“court approved” instead of “conclus devant le juge”) lead to difficulties?

4.3.1.3 Are the standardised forms sufficient?

4.3.1.4 To which extent are Articles 34 and 35 applied?

Due to lack of published case law in this respect, it is not possible to determine whether courts and law enforcement authorities pay attention to the grounds of refusal laid down in Articles 34 and 35 of the Regulation when considering the enforcement of a foreign notarial deed or a court settlement.

4.3.2 Please describe the practical significance of Article 57 and Article 58

Articles 57 and 58 provide valuable services to litigants, in particular in order to obtain the enforcement of family-related notarial deeds. This would be the case, for instance, of an agreement between spouses to the effect that after their divorce, one of the spouses would pay be required to pay alimony (either for the benefit of the other spouse or of the children). In so far as that agreement has been recorded in a notarial deed, its enforcement under Article 57 and 58 is guaranteed.

Likewise, these provisions play a significant in reassuring a litigant that a settlement he is about to conclude, will be enforced in other Member States.
4.3.2.1 Did the situation occur that declarations of enforceability against the debtor have been applied for in several States at the same time?

To the reporter’s (limited) knowledge, this situation has not yet arisen.

4.3.2.2 For creditors’ lawyers: Was it possible to achieve a higher efficiency of legal protection by means of this?

Not applicable following the answer given to question 4.3.2.1.

4.3.2.3 For debtors’ lawyers: Did oppressive situations arise out of this? Did this lead in particular to the result that excessive enforcement measures have been carried out?

Not applicable following the answer given to question 4.3.2.1.

4.3.3 Specific problems regarding court settlements, enforceable instruments and provisionally enforceable judgments

4.3.3.1 Are there any known cases, where a court of a higher instance has reversed a foreign judgment after enforcement measures had been carried out? How can enforcement measures be set-aside in such a situation?

4.3.3.2 Are there – from the debtor’s point of view – any problems with documents that are not valued?

5. Proposals for Improvements

Do you see, based on your experience with Regulation 44/01/EC, any necessity to improve the regulation, in particular regarding the rules on jurisdiction, lis pendens, provisional measures and recognition and enforcement? If yes, please make proposals.

One of the most pressing issues that could improve the practical functioning of the Regulation, is the possibility for national courts, at the first instance level or appeal level, to make a reference to the ECJ when doubts arise as to the precise interpretation of one of the Regulation's provision. The specific regime existing for preliminary references is also a source of confusion, as some (lower) courts may not be aware that

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8 In some States, as for instance in Germany, notarial deeds are only enforceable if the debtor has submitted to enforcement explicitly. The submission is abstract. The debtor can submit to enforcement for a sum that he does not owe at all or does not owe to the stated amount. If the creditor pursues the enforcement nevertheless, the debtor is entitled to claim restitution of the unjust enrichment – if necessary in a separate legal proceeding. Therefore, there is a risk that the enforcement is carried out first for a much higher amount than the debtor has to pay (especially regarding interests). In Germany there exists – regarding cases without a foreign element – a very differentiated system of provisions of security and provisional stay of execution or limitations in its contents (only seizure of assets), which ensures a balance between the interests of both sides – the creditor as well as the debtor. Does the problem of titles that are not valued exist also in other States? Are cases known, where an excessive enforcement has taken place and the debtor was unable to obtain judicial remedy in time?
the competence to refer such questions has been limited. In one case where the Labour Court of Charleroi was seized of an employment dispute, the court referred a question on the correct interpretation of Article 20 to the ECJ, only to be answered by the ECJ that the question was inadmissible (Labour CFI Charleroi, 15 December 2003, RGDC 2004, 269).

Another suggestion for improvement would be to impose a maximum time period for the court to declare a foreign judgment enforceable under Article 41 or to deal with an appeal under Article 45. In the reporter's opinion, a period of one month should in the first case provide sufficient room for the court (or the court's clerk) to issue the declaration of enforceability.

Among the possibilities for improvement, one should also consider the deletion of specific regimes adopted to meet the concerns of some Member States, such as the special rule laid down in Article 63 for persons domiciled in the Grand Duchy of Luxemburg.

Finally, one should in the long run work towards the publication of relevant case law of all Member States. The efforts made in the framework of the Lugano Convention are very much welcome. They are, however, insufficient to allow the necessary cross-fertilization between Member States.