

RESEARCH

The Court of Justice of the European Union and the impact of its case law in the area of civil justice on national judicial and administrative authorities

(Latvia, Hungary, Germany, Sweden and the United Kingdom)

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PREFACE

European Union law in the civil justice area has become a very dynamic, broad and complex field of law and the Court of Justice of the European Union has an important role in interpreting European Union law and giving guidance to the national courts and legal practitioners. Moreover, the case law of the Court of Justice of the European Union in the area of civil justice stands apart, due to its novelty and the dynamic development during the last decade. As the number of the Court of Justice of the European Union judgments in this area keeps increasing, national courts, state institutions and legal practitioners encounter the challenges of being constantly updated on any given matter and face a complex multitude of issues.

In addition, the judges of Member State courts have to be able to determine when and how the preliminary question shall be referred to the Court of Justice of the European Union. Therefore, the aim of this Research is to analyse and examine application of case law of the Court of Justice of the European Union in practice of national courts and in national laws in order to facilitate its more effective use.

This Research covers 17 instruments of European Union law in the area of civil justice, focusing on five different Member States: Latvia, Hungary, Germany, Sweden and the United Kingdom. The Research simultaneously covers legal systems of both Civil Law and Common Law. It also studies court judgments delivered in these five countries, comparing them mutually and analysing them in the light of the relevant judgments of the Court of Justice of the European Union. Such an approach ensures the necessary degree of broadness and gives solid ground for comparison, making present Research unique amongst other contributions in the field. The Researchers expect that this Research might be of use for practitioners in their everyday work. It is also sincere hope of the Researchers that this Research will be only the first, followed by many other, much more extensive studies aimed at defining and helping to build stronger feedback relations between the Court of Justice of the European Union and the domestic courts of the Member States.

Even though there are five authors who jointly share the responsibility for this Research, they have, however, received valuable advice from others, in particular, the Ministry of Justice of the Republic of Latvia and partner organizations in Hungary and the United Kingdom. Furthermore, the authors thank all individuals who supported this project by filling out questionnaires, giving interviews, and providing information and their opinions. The Researchers highly appreciate this contribution. The Research has been conducted with the financial support of the European Union program "Civil Law."

Researchers: Inga Kačevska, Baiba Rudevskā, Arnis Buka, Mārtiņš Dambergs and Aleksandrs Fillers.

CONTENTS

PREFACE	3
OVERVIEW AND SCOPE OF RESEARCH.....	9
SUMMARY OF THE RESEARCH	13
Application of CJEU Case Law in Area of Civil Justice in General	13
Brussels Ibis (Brussels I) Regulation	14
Conflict of Laws	15
Taking of Evidence and Service of Documents	16
Insolvency	17
Family Matters	18
European Procedures.....	19
Other Instruments.....	20
Practice of National Administrative Authorities in Application of CJEU case Law in Area of Civil Law... ..	20
INTRODUCTORY PART:	
PRACTICE OF NATIONAL COURTS IN APPLICATION OF CJEU CASE LAW: GENERAL ISSUES	22
1. CJEU Case Law and Preliminary Rulings Procedure: Legal Basis.....	22
2. Preliminary Rulings Procedure and CJEU Case Law in Respective Member State in General	24
2.1. Specifics of the Preliminary Rulings Procedure in the Area of Civil Justice	24
2.2. Latvia	27
2.3. Sweden	29
2.4. Germany	31
2.5. Hungary	31
2.6. The U.K.	32
2.7. Conclusions and Suggestions	34
3. CJEU and National Case Law on <i>Ex Officio</i> Application of EU Law in Area of Civil Justice	35
4. Autonomous Interpretation of Legal Concepts and its Impact on National Courts.....	37
5. Possible Sanctions against National Judiciary in Case of Misapplication of CJEU Case Law and Preliminary Procedure	42

PART I:

PRACTICE OF RESPECTIVE NATIONAL COURTS IN APPLYING CJEU CASE LAW: SPECIAL ISSUES 45

1. International Jurisdiction under Brussels Ibis (Brussels I) Regulation 45
 - 1.1. Short Introduction to Brussels Ibis Regulation 45
 - 1.2. Jurisdiction in General and Interaction of Brussels Ibis Regulation with Other Instruments 46
 - 1.3. Scope of Regulation: “*Civil and Commercial Matters*” 47
 - 1.4. Arbitration Exception under Brussels Ibis Regulation 48
 - 1.5. Prorogation of Jurisdiction (Multi-Choice Clauses) 53
 - 1.6. Jurisdiction in Contracts (Article 7(1)(b) of Brussels Ibis Regulation) 55
 - 1.7. Jurisdiction in Non-Contractual Obligations (Article 7(2) of Brussels Ibis Regulation) 58
 - 1.8. Conclusions and Suggestions 60
2. Service of Documents 62
 - 2.1. Service of Documents in General 62
 - 2.2. Special Issues 64
 - 2.3. Conclusions and Suggestions 66
3. Taking of Evidence 66
 - 3.1. Taking of Evidence in General 66
 - 3.2. Special Issues 68
 - 3.3. Conclusions and Suggestions 70
4. Conflicts of Law 70
 - 4.1. Conflicts of Law in General 70
 - 4.2. Rome I Regulation 72
 - 4.3. Rome II Regulation 74
 - 4.4. Rome III Regulation 75
 - 4.5. Conclusions and Suggestions 75
5. Insolvency 76
 - 5.1. Insolvency in General 76
 - 5.2. Temporal applicability of Insolvency Regulation 77
 - 5.3. Determining COMI of Natural and Legal Persons 78
 - 5.4. Application of *Seagon* Judgment 82
 - 5.5. Application of Insolvency Regulation in Relation to Third States (and Denmark) in Relation to Recovery Actions 83
 - 5.6. Conclusions and Suggestions 84
6. Family Matters 85
 - 6.1. Family Matters in General 85

6.2. Special issues under the Brussels IIbis Regulation	86
6.3. Maintenance Regulation	92
6.4. Conclusions and Suggestions	93
7. European Procedures	95
7.1. European Procedures in General	95
7.2. European Procedures as an Alternative to National Procedures of the Same Kind	96
7.3. Other Specific Issues	97
7.4. Conclusions and Suggestions	98
8. Recognition and Enforcement of Judgments under the Brussels Ibis (Brussels I) Regulation	98
8.1. Recognition and Enforcement in General	98
8.2. Special Issues of Recognition and Enforcement	99
8.3. Conclusions and Suggestions	103
9. Other Instruments	104
9.1. In General	104
9.2. Mediation	105
9.3. Legal Aid	106
9.4. Succession Regulation	109
9.5. Protection Measures Regulation	110
9.6. Conclusions and Suggestions	110

PART II:

PRACTICE OF NATIONAL ADMINISTRATIVE AUTHORITIES IN APPLICATION OF CJEU CASE LAW
IN AREA OF CIVIL JUSTICE

1. Competent Administrative Authorities of Member States in Application of CJEU Case Law	111
1.1. Central Authorities	111
1.2. Transmitting and Receiving Agencies	114
1.3. Administrative Authorities Equivalent to Courts	115
1.4. Conclusions and Suggestions	116
2. Amendments to National Laws Arising from CJEU Case Law in Area of Civil Justice	117
2.1. Duty to Comply with EU Legal Requirements In General	117
2.2. Necessity for Amendments in National Law Arising from CJEU Case Law in Area of Civil Justice	117
2.3. Activities of National Administrative Authorities in Response to CJEU Case Law in Area of Civil Justice	120
2.4. Amendments to National Law Arising from CJEU Case Law: Practice in Area of Civil Justice	121
2.5. Conclusions and Suggestions	123

LIST OF ABBREVIATIONS125

ANNEX:

CJEU CASE-LAW ON CROSS-BORDER CIVIL COOPERATION 128

1. Brussels I Regulation. 128
2. European Enforcement Order Regulation 139
3. European Order for Payment Regulation 139
4. Taking of Evidence Regulation 140
5. Service of Documents Regulation 140
6. Brussels IIbis Regulation141
7. Insolvency Regulation142
8. Rome I143
9. Rome II 144
10. Legal Aid Directive 144
11. Mediation Directive 144
12. Maintenance Regulation..... 144

OVERVIEW AND SCOPE OF RESEARCH

- [1] The main **purpose** of the Research "***The Court of Justice of the European Union and the impact of its case law on the area of civil justice on national judicial and administrative authorities***" is to analyse the influence and practical application of the case law of the Court of Justice of the European Union (hereafter: *CJEU*) in decisions and judgments of national courts and in national legal acts. The Researchers have asserted the problems in applying the case law of the CJEU, in particular European Union (hereafter: *EU*) Member States – **Germany, Hungary, Latvia, Sweden, and the United Kingdom** (hereafter: *the U.K.*) and offered solutions and proposals for more effective and frequent application of the case law of the CJEU in national courts and authorities.
- [2] The **Authors** of this Research are:
- ✓ *Dr. iur* **Inga Kačevska**, Attorney at Law, Assistant Professor at the University of Latvia in the field of international arbitration, international civil procedure, European consumer law;
 - ✓ *Dr. iur* **Baiba Rudevskā**, Independent Researcher in the field of private international law (conflict of laws), international civil procedure, Latvian private law, comparative private law and inter-temporal law;
 - ✓ *Dr. iur* **Arnis Buka**, Assistant Professor at the University of Latvia in the field of European law and European institutional law;
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 - ✓ *LL.M* **Aleksandrs Fillers**, PhD student, Independent Researcher in the field of international arbitration, private international law (conflict of laws) and Latvian private law.
- [3] In the **scope** of Research, the following EU Regulations and Directives are analysed:
- ✓ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (hereafter: ***European Enforcement Order Regulation***);¹
 - ✓ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedures (hereafter: ***European Order for Payment Regulation***);²

1 Regulation (EC) No 805/2004 of the European Parliament and of the Council (21 April 2004) creating a European Enforcement Order for uncontested claims. L 143, Official Journal of the European Union, 30.04.2004, p. 15-62.

2 Regulation (EC) No 1896/2006 of the European Parliament and of the Council (12 December 2006) creating a European order for payment procedures. L 399, Official Journal of the European Union, 30.12.2006, p. 1-32.

- ✓ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (hereafter: **European Small Claims Regulation**);³
- ✓ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (hereafter: **Insolvency Regulation**);⁴
- ✓ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereafter: **Brussels IIbis Regulation**);⁵
- ✓ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (hereafter: **Maintenance Regulation**);⁶
- ✓ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (hereafter: **Service of Documents Regulation**);⁷
- ✓ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation among the courts of Member States in the taking of evidence in civil or commercial matters (hereafter: **Taking of Evidence Regulation**);⁸
- ✓ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereafter: **Rome I Regulation**);⁹
- ✓ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereafter: **Rome II Regulation**);¹⁰
- ✓ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter: **Brussels Ibis Regulation**);¹¹

3 Regulation (EC) No 861/2007 of the European Parliament and of the Council (11 July 2007) establishing a European Small Claims Procedure. L 199, Official Journal of the European Union, 31.07.2007, p. 1-22.

4 Council Regulation (EC) No 1346/2000 (29 May 2000) on insolvency proceedings. L 160, Official Journal of the European Union, 30.06.2000, p. 1-18.

5 Council Regulation (EC) No 2201/2003 (27 November 2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000. L 338, Official Journal of the European Union, 23.12.2003, p. 1-29.

6 Council Regulation (EC) No 4/2009 (18 December 2008) on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. L 7, Official Journal of the European Union, 10.01.2009, p. 1-79.

7 Regulation (EC) No 1393/2007 of the European Parliament and of the Council (13 November 2007) on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000. L 324, Official Journal of the European Union, 10.12.2007, p. 79-86.

8 Council Regulation (EC) No 1206/2001 (28 May 2001) on cooperation among the courts of the Member States in the taking of evidence in civil or commercial matters. L 174, Official Journal of the European Union, 27.06.2001, p. 1-24.

9 Council Regulation (EC) No 4/2009 (18 December 2008) on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. L 7, Official Journal of the European Union, 10.01.2009, p.1-79.

10 European Parliament and Council Regulation (EC) No 864/2007 (11 July 2007) on the law applicable to non-contractual obligations (Rome II). L 199, Official Journal of the European Union, 04.07.2008, p. 40-49.

11 Regulation (EU) No 1215/2012 of the European Parliament and of the Council (12 December 2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. L 351 Official Journal, 20.12.2012, p.1-32.

- ✓ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter: **Brussels I Regulation**);¹²
- ✓ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereafter: **Succession Regulation**);¹³
- ✓ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereafter: **Rome III Regulation**);¹⁴
- ✓ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (hereafter: **Protection Measures Regulation**);¹⁵
- ✓ Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (hereafter: **Legal Aid Directive**);¹⁶
- ✓ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (hereafter: **Mediation Directive**).¹⁷

- [4]** It shall be noted that some of legal instruments mentioned above are recent, for example, the Succession Regulation, thus there is no CJEU case law yet.
- [5]** The temporal scope of the Research is to examine application of the respective EU legal acts by the CJEU and national courts within **past five years**. However, previous practice has also been taken into account as a foundation of further case law.
- [6]** As the Research was carried out in a very constrain time frame, the scope of the Research is limited to the most common and relevant issues of application of CJEU case law in the area of civil justice. Similarly, the selection of national practices is based on considerations of relevance, widespreadness, accessibility and limited length of this Research.
- [7]** This Research attempts to examine the use of CJEU case law in the adjudications of national courts and legal acts and to propose solutions for more frequent and effective application of CJEU case law. To achieve this aim, the Researchers have used the following **methodology**.¹⁸

12 Council Regulation (EC) No 44/2001 (22 December 2000) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. L 12, Official Journal of the European Union, 16.01.2001, p. 1-23. In the Research the terms “Brussels I Regulation” and “Brussels Ibis Regulation” are used interchangeably, unless the context clearly indicates to the contrary.

13 Regulation (EU) No 650/2012 of the European Parliament and of the Council (4 July 2012) on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. L 201, Official Journal of the European Union, 27.07.2012, p. 107-134.

14 Council Regulation (EU) No 1259/2010 (20 December 2010) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. L 343, Official Journal of the European Union, 29.12.2010, p. 10-16.

15 Regulation (EU) No 606/2013 of the European Parliament and of the Council (12 June 2013) on mutual recognition of protection measures in civil matters. L 181, Official Journal of the European Union, 29.06.2013, p. 4-12.

16 Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. L 26, Official Journal of the European Union, 31.01.2003, p. 41-47.

17 Directive 2008/52/EC of the European Parliament and of the Council (21 May 2008) on certain aspects of mediation in civil and commercial matters. L 136/6, Official Journal of the European Union, 24.05.2008, p. 3-8.

18 Detailed methodology was developed and submitted prior to commencement of the Research but due to the limited length of this Research here the methodology is described in short.

- [8]** The Research is based on personal interviews with judges, private-practice lawyers, notaries, court bailiffs and state officials from **Germany, Hungary, Latvia, Sweden, and the U.K.**¹⁹ However, the Researchers did not conduct the interviews with judges of the CJEU since it was not covered by the scope of the Research.
- [9]** The Researchers used available databases of national²⁰ and CJEU case law²¹ and analysed national court practice as well as distributed questionnaires.²² The Researchers have referred to the European Judicial Atlas in Civil Matters.²³ However, it must be noted that the Atlas does not always reflect recent information from Member States. In addition, legal literature was also used in this Research.
- [10]** The Research was conducted as from 14 August 2014 to 31 December 2014.
- [11]** The Research is **structured** as follows. This overview and scope of the Research is followed by the summary of the Research providing the main conclusions and propositions.
- [12]** In the introductory part the Researchers assess general questions regarding the preliminary rulings of the CJEU and general application of CJEU case law. Moreover, it also briefly deals with issues of *ex officio* application of EU law, autonomous interpretation of legal concepts in EU law and a possible control mechanism in cases where national judges did not apply CJEU case law correctly.
- [13]** The first part consists of scientifically analysed national court practice by five respective Member States. This part is divided into sub-sections of the specific areas of law, for example, jurisdiction, insolvency, family law, etc. There the Researchers elaborate how often and to what extent the national courts take into consideration CJEU case law in cross-border litigation.
- [14]** The second part includes a study regarding how and when the state institutions of Member States take into consideration the practice of the CJEU, especially concentrating on whether the national laws are amended due to the CJEU case law. This part of the Research is less extensive, because CJEU case law in the area of civil justice is rarely applied by the administrative authorities, and there have been very few amendments to national law due to CJEU case law in the respective Member States.
- [15]** Each section of the relevant part of the Research includes conclusions on the main problems and suggestions for improvements.
- [16]** Finally, the Researchers have made a table of CJEU case law in the area of civil justice and have attached it to the Research in **Annex**. Although not exhaustive, the table indicates more than 260 cases of applying the EU instruments mentioned in ¶ [3] in this Research. From those the express references are made to 88 cases of the CJEU.

19 In this Research, references are made to the interviews, discussions and other communication in general (without identification of the particular source) in order to protect the privacy of persons, the personal opinion of the person, and maintain ethical standards and the integrity of the Research.

20 Researchers used the Court Information System (TIS) database in **Latvia**, Westlaw International, Westlaw UK, Cambridge Journals Online, and Heinonline subscription databases, and the British and Irish Legal Information Institute free database to access judicial decisions and literature about the **U.K.** For **German** case law, the Researchers used the paid database www.juris.de and free database www.unalex.eu. In **Hungary**, some judgments in the Hungarian language can be found in the database of Hungarian courts portal - <http://www.birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara>. In Sweden, the Researchers used the public database of the Swedish Courts Administration, which contains most of the reported guiding decisions of Swedish courts: <http://www.rattsinfosok.dom.se/lagrummet/index.jsp>.

21 EU case law <http://europa.eu/eu-law/case-law/>; Curia http://curia.europa.eu/jcms/jcms/Jo1_6308/; SEMDOC <http://www.statewatch.org/sem-doc/728/>. The Researchers are aware of new method of citing the case law of CJEU (http://curia.europa.eu/jcms/jcms/P_125997/); however, they have deliberately chosen to make simplified references.

22 The questionnaires were available at: <http://webanketa.com/forms/70vk4d9g5xgkcdv471h6csg/> (in Latvian), <http://webanketa.com/forms/70vk2cs-g5ww38rsp61h3jdg/> (in English) and <http://webanketa.com/forms/70wkce9g5xgkcd36cgw64s0/> (in Hungarian). The questionnaires were also published via Conflict of Law Net <http://conflictoflaws.net/2014/research-projects-on-eu-law-and-ecj-case-law-in-civil-matters/>.

23 European Judicial Atlas in Civil Matters http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm; European e-Justice Portal: https://e-justice.europa.eu/content_croatia_cooperation_in_civil_matters-276-en.do.

SUMMARY OF THE RESEARCH

- [17]** Although the EU area of civil justice served as a primary focus of the Research, it is inseparably interlinked with the functioning of other elements within the EU system of law. Therefore, most of the reasons for shortcomings in the application of CJEU case law by national courts and administrative authorities are of a general nature and can be connected to most areas of EU law.
- [18]** At the same time, the area of civil justice and CJEU case law in this area stands apart, due to its novelty and dynamic development during the last decade. As the number of EU legal acts in the area of civil justice is increasing, CJEU case law grows as well. Therefore, the national courts as well as legal practitioners and academics are faced with the challenge of being constantly updated on the matter.
- [19]** Adequate response to such challenge would be an increase of awareness amongst national judges and practitioners regarding CJEU case law. This can be achieved through more elaborate training systems as well as through well-organized internal EU law networks for national judges. With the increase in the level of awareness national judges and legal practitioners might more willingly see CJEU case law as their trusted ally, which simplifies the application of complex EU law issues in the area of civil justice.

Application of CJEU Case Law in Area of Civil Justice in General

- [20]** Even though CJEU case law in the area of civil justice is rapidly developing, CJEU case law still does not provide national courts with guidance on interpretation in many situations. Thus it comes as no surprise that the Research identified several examples when the same issues on the application of EU law or CJEU case law in the area of civil justice were faced by several courts in different Member States, sometimes even almost simultaneously.
- [21]** Mostly the number of requests for preliminary rulings from each Member State in the area of civil justice corresponds to the overall activity of courts from those Member States in other fields of EU law (e.g., in **Germany** courts are active overall in referring to the CJEU and, similarly, they have also referred a great number of questions to the CJEU in the area of civil justice).
- [22]** In most Member States covered by the Research the courts of last instance are the ones that refer to the CJEU most often. However, the reasons given for this differ from one Member State to another. The only certain reason in common is that the courts other than the courts of last instance were precluded from making references to the CJEU in the area of civil justice until the Treaty of Lisbon.²⁴

²⁴ Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community, C 306, Official Journal of the European Union, 17.12.2007, p. 1–229.

- [23]** National judges sometimes avoid application of CJEU case law because of the complexity of private international law and because finding the correct rule of EU law would be very time consuming.
- [24]** The length of the proceedings in the CJEU was mentioned as one of the main reasons why national courts often decide not to request preliminary rulings from the CJEU (for instance, in **Sweden**, the **U.K.** and **Latvia**). It was even expressed that in some cases parties tend to request the national courts to refer to the CJEU to delay the final judgment in their case. Thus, if the proceedings in the CJEU would not be so time consuming, the national courts might be more active in requiring its opinion.
- [25]** The Research identified a substantial number of cases in the area of civil justice where national courts delivered extensive argumentation regarding regulations, yet did not make any reference to CJEU case law. It was noticed that judges while applying regulations in the area of civil justice very rarely motivate their decision not to apply the relevant CJEU case law.
- [26]** Application of EU law *ex officio* in general as well as specifically in the area of civil justice so far remains a very complicated issue. It not only makes many national judges feel a certain degree of insecurity, but also shows a lack of clarity and consistence, even in CJEU case law itself. Hopefully, in the nearest future CJEU case law in the area of civil justice will add more detailed guidelines for national judges.
- [27]** The Research revealed that there are problems in applying autonomous legal concepts in EU law in the area of civil justice in practice. It is important that the autonomous interpretation carried out by the CJEU is not one of the methods of interpretation, but a way of defining legal terms (*lege commune*), aside from the *lege fori* and *lege causae* criteria. The Research shows that courts of Member States repeatedly request further clarifications from the CJEU on practical application of these autonomous concepts.

Brussels Ibis (Brussels I) Regulation

- [28]** EU regulations function side-by-side with international conventions and national jurisdictional rules. The CJEU has addressed interrelations between these instruments on several occasions. Nevertheless, national case law demonstrates that Member State courts are often uncertain as to which legal instrument applies. No doubt, the CJEU will have to address these questions in future. However, as evident from evaluated practice, it is likewise required that both legal practitioners and judges carefully consider the material, geographical and temporal scope of each EU regulation in the light of CJEU case law before its application.
- [29]** Brussels Ibis Regulation shall be applied to proceedings initiated as from 10 January 2015. In principle, CJEU case law interpreting the Brussels Convention and the Brussels I Regulation will remain pertinent. Nevertheless, in certain cases, the wording of the Brussels Ibis Regulation deliberately deviates from that of older instruments. In these cases the national courts must perform a two-sided task – analyse the effects of the new legislation on the one hand and the legal basis of the CJEU judgments on other hand, in order to determine their relevance.
- [30]** The Research also demonstrates that notwithstanding the regular case law from the CJEU, operation of special heads of jurisdiction under the Brussels Ibis Regulation continues to raise questions. For instance, it remains unclear how a court should locate a place of performance of a contractual obligation if the applicable law permits performance in multiple locations. Neither the text of the Brussels Ibis Regulation, nor CJEU case law directly addresses this matter. Thus, it might be up to future CJEU case law to clarify the issue.

- [31]** CJEU case law on the arbitration exception of the Brussels I Regulation is both controversial and ambiguous. The Brussels Ibis Regulation contains a new Recital 12, adopted to annul certain effects of the previous case law. Remarkably, the Advocate General had already used Recital 12 to interpret the Brussels I Regulation as he considered this novelty as retroactive interpretation of the law.²⁵ However, until there is a ruling by the CJEU on the meaning of the said recital, national courts will have to reconcile that CJEU case law on the arbitration exception is complicated issue.
- [32]** Similarly, Article 25 of the Brussels Ibis Regulation contains new provisions dealing with prorogation of jurisdiction. *Inter alia*, the new provision expressly establishes that the jurisdiction clause is separate from the main contract, thus codifying the approach developed by the CJEU in regards to the Brussels I Regulation. This is a positive development for national courts, as they will most likely benefit from more comprehensive EU legislation.
- [33]** Interaction between the Brussels I Regulation and common law instruments (such as anti-suit injunction, default judgments, freezing orders, receivership orders, etc.) has been very topical in civil-law Member States, as can be seen from preliminary references to the CJEU. Historically, the CJEU has favoured the civil law approaches, thus the practical relevance of certain common law instruments (e.g., anti-suit injunctions) has diminished drastically. Nevertheless, recent practice of the CJEU has been more favourable to other common law instruments.²⁶ Therefore, it is now a challenge for civil law Member States to accustom themselves to these unfamiliar instruments.
- [34]** As regards the recognition and enforcement of foreign judgments, the Researchers observed that there are two main problems for the national courts. First problem concerns the interpretation and understanding of the public policy (*ordre public*) concept.²⁷ The national courts (especially in **Latvia**) cannot always determine the framework of this concept in the particular case.
- [35]** Second difficulty arises from the interpretation and application of Article 34(2) of the Brussels I Regulation (Article 45(1)(b) of the Brussels Ibis Regulation) regarding default judgments. In practice, defendants very often make reference to this Article. Articles 45(1)(a)²⁸ and 45(1)(b)²⁹ of the Brussels Ibis Regulation must be strictly separated. If the question deals with a default judgment and the debtor refers to the fact that the document or default judgment had not been served to him, Article 45(1)(b) must be applied as the *lex specialis* in respect to Article 45(1)(a) of the Brussels Ibis Regulation. The Researchers have observed that there were many cases where a foreign default judgment had to be enforced. It means that already during the service of documents abroad there could be some procedural or technical problems.

Conflict of Laws

- [36]** Case law analyzed by the Researchers shows that conflict of laws instruments are rarely applied by national courts. In some cases, courts have failed to refer to these instruments even when parties have referred to them in their submissions. Such approach violates an obligation of Member States to apply EU law. It is necessary for national courts to apply conflict of laws instruments, provided the requirements for their application is satisfied and likewise offer reasoning supporting the choice of the particular law.

25 4 December 2014 Opinion of Advocate General Wathelet in the case: No C-536/13 Gazprom OAO.

26 See: *Ibid.*

27 Article 34(1) of the Brussels I Regulation and Article 45(1)(a) of the Brussels Ibis Regulation.

28 Article 34(1) of the Brussels I Regulation.

29 Article 34(2) of the Brussels I Regulation.

- [37]** At the same time, conflict of laws suffers from scarcity of case law at EU level. Only the Rome II Regulation has a unique CJEU judgment. It also seems that national courts do not consider conflict-of-law issues sufficiently significant to request clarifications from the CJEU.
- [38]** Analysis of CJEU case law has also identified a particular methodological problem. In an ideal scenario, similar notions in the Rome Regulations and the Brussels I Regulation should have been interpreted similarly. For the purpose of conflict of laws, such methodology is particularly welcomed, due to scarcity of case law. In some cases the CJEU has emphasized the importance of this approach. Unfortunately, in others, the CJEU has taken the opposite stance, refusing to use the Rome II Regulation to interpret the Brussels I Regulation.
- [39]** Theoretically, the aforementioned CJEU practice is not problematic, since the Brussels I Regulation must be interpreted in conformity with the Rome Regulations, when it confirms with its own scheme and objectives. In practice, national courts may find it difficult identifying legal notions that are subject to uniform interpretation and those that are not.
- [40]** There is no single answer to avoid the problem of uncertainty. However, national courts should attempt interpreting the rationales behind CJEU judgments. Until now, the CJEU has emphasized that under the Brussels I Regulation, heads of jurisdiction depriving the defendant of his right to litigate at his domicile are interpreted narrowly. In these cases, the divergence between instruments is most likely to occur. Thus, national courts must establish whether a notion in the Brussels I Regulation was not given an overly narrow meaning by the CJEU before its extension to the Rome Regulations. Conversely, national courts must verify whether notions from the Rome Regulations are not so extensive that their transmission to the Brussels I Regulation would endanger the defendant's rights to litigate at his home forum.

Taking of Evidence and Service of Documents

- [41]** There are only three CJEU judgments interpreting the Taking of Evidence Regulation, but Member States examined in this Research submitted none of the requests for preliminary rulings. The existing CJEU case law and also the Opinion of the Advocate General have been used to reason the judgments by **German** and the **U.K.** courts.
- [42]** Moreover, the court of the **U.K.** has interpreted the Taking of Evidence Regulation considering existing CJEU case law, but distinguished the circumstances in the particular case and concluded that CJEU case law had no impact on the powers that the court had in relation to the parties to the dispute in its own jurisdiction. Hence, the U.K. court also considered the goal of the Regulation and interpreted it in a way that does not limit the efficiency of the national proceedings.
- [43]** The Researchers identify certain dangers regarding possible misinterpretation of EU instruments and the scope of the Taking of Evidence Regulation. In cases where similar arguments are used in other jurisdictions to prevent submission of evidence, national courts may rely both on the **U.K.** practice and likewise use extensive interpretation of the Taking of Evidence Regulation in the light of CJEU case law to decline such attempts.

- [44] There are only six CJEU judgments interpreting the Service of Documents Regulation. Two of them have been delivered according to the reference of a preliminary ruling made by German courts – in the *Weiss* case³⁰ and in the *Cornelius de Visser* case.³¹ The Researchers were not able to identify any case law from **Latvia**, **Hungary** or **Sweden** where the CJEU judgments on the Service of Documents Regulation were used.
- [45] The Researchers conclude that **German** courts can use the CJEU's case law very well in order to solve issues relating to translation and language problems. But the courts of the **U.K.** have interpreted the Service of Documents Regulation taking into consideration the main goal and the principles laid down by this Regulation. Therefore the **U.K.** courts are also very well prepared to apply this Regulation.³² It shows that there is no need to make a reference for a preliminary ruling each time. The national courts can also interpret the Service of Documents Regulation even if there is no CJEU case law regarding the particular problem.

Insolvency

- [46] Courts of all Member States considered in this Research have very uniformly applied the Insolvency Regulation. From the reviewed cases the Researchers conclude that the national courts still struggle with determination of the centre of a debtor's main interests (hereafter: *COMI*) of natural persons and distinguishing between matters of jurisdiction and applicable law.
- [47] The approach to the question of COMI shows an important difference in application of CJEU case law. For the **U.K.** courts that historically have used elaborated factual investigations, the open-ended nature of the CJEU practice in relation to COMI seems perfectly acceptable. The Researchers conclude that the U.K. courts have simply taken an important guideline of third party impression and used its their understanding in weighing different facts.
- [48] However, **Latvian** courts seem to have used a misleading interpretation of national law that indicated that COMI lies in the place of declaration (i.e. the registered address), thus substituting its own law for the Insolvency Regulation. Even though the court found that declaration is one of the circumstances to be taken into account for determination of COMI, then again, there was no legal basis neither in the Insolvency Regulation, nor in CJEU case law to turn declaration into presumption of COMI. The Researchers suggest that the approach of English courts should be encouraged for establishment of COMI of natural persons.
- [49] The practice of **Sweden** shows that the courts successfully apply the conclusions from the CJEU in the *Seagon* judgment³³ regarding jurisdiction to decide an action to set a transaction aside that is brought against a person whose registered office is in a third state. The Researchers find this approach correct by virtue of the Insolvency Regulation and justified by later CJEU judgment in the *Schmid* case.³⁴
- [50] The Researchers conclude that reference to judgments of the CJEU is mostly used to justify an exception from the general principle under Article 3(1) of the Insolvency Regulation when COMI is established in another Member State than the Member State where the registered office is located.

30 8 May 2008 CJEU judgment in the case No C-14/07 Weiss v. Industrie- und Handelskammer Berlin.

31 5 March 2012 CJEU judgment in case: No C-292/10 G v Cornelius de Visser.

32 25 April 2013 Queen's Bench Division (Commercial Court) judgment in case: Arbutnot Latham & Co Ltd v M3 Marine Ltd, [2013] EWHC 1019 (Comm); [2014] 1 W.L.R. 190

33 12 February 2009 CJEU judgement in case: No C-339/07 Christopher Seagon v Deko Marty Belgium NV.

34 16 January 2014 CJEU judgment in case: No C-328/12 Ralph Schmid v Lilly Hertel

Family Matters

- [51]** Cases analyzed by the Researchers show that, in principle, courts of Member States frequently apply the Brussels IIbis Regulation. On many occasions, national courts make extensive references to CJEU practice. However, this approach is not universally observed, creating the risk of misapplication. As CJEU case law is growing, references to the case law must be the starting point for interpretation of the Brussels IIbis Regulation by national courts.
- [52]** In the practice of national courts, the concept of a child's habitual residence is of paramount importance. Usually, habitual residence serves as a connecting factor for jurisdiction. This concept is not defined in the regulation and must be interpreted autonomously. Here, the *Mercredi*³⁵ judgment appears to be an invaluable aid for national adjudicators seeking to establish an autonomous meaning of this concept. This judgment is extensively cited in national case law. The Researchers propose that national courts should analyse this and other CJEU judgments dealing with the same issue when determining a child's habitual residence.
- [53]** Nevertheless, judgments like *Mercredi* provide only general guidelines. National case law shows that courts are dealing with very different factual patterns. Determination of habitual residence may be affected by the child's age, relations with other family members, division and extent of custody. The Research shows that so far many national courts have avoided the route of references for preliminary ruling. Using flexible criteria for habitual residence established by the CJEU, courts consider themselves capable of adapting the approach to different factual patterns. Theoretically, this could be explained by the confidence of national adjudicators. Nevertheless, once the facts of the case strongly differ from those decided by the CJEU, it may be necessary for the court to consider referring to the CJEU. Otherwise, such open-ended concepts as habitual residence may end up being applied non-uniformly.
- [54]** The Brussels IIbis Regulation strongly diverges from the Brussels I Regulation. Even at the level of structure, the Brussels I Regulation seems to have more in common with the Rome Regulations than the Brussels IIbis Regulation. Consequently, the potential for uniform interpretation is limited. However, the precise boundaries of uniform interpretation may be less than apparent.
- [55]** In some cases, these boundaries are drawn by the very text of the Brussels IIbis Regulation. For example, Article 1 of the Brussels IIbis Regulation defines its scope by use of the term "*civil matters*". While the same term "*civil matters*" is used in Article 1 of the Brussels I Regulation, it cannot be directly transferred into the Brussels IIbis Regulation, because Article 1 of the Brussels IIbis Regulation enlists different matters by default falling within its scope. These matters are covered by the Regulation, even when they are characterized as public law under national law. Therefore, a court of a Member State should not attempt mechanical extension of CJEU case law under the Brussels I Regulation to establish the scope of the Brussels IIbis Regulation.
- [56]** There are also other cases where similar provisions in the Brussels IIbis Regulation and the Brussels I Regulation have substantial textual differences. For example, Article 20 of the Brussels IIbis Regulation permits a court of a Member State in urgent cases to take provisional measures, even if that court otherwise lacks jurisdiction under the Brussels IIbis Regulation. A similar provision of the Brussels I Regulation (Article 31) does not contain the urgency requirement, thus courts interpreting any of these provisions must take into account substantial differences.
- [57]** In other cases, the divergence between instruments is far from apparent. Such is already mentioned concept of a child's habitual residence under the Brussels IIbis Regulation. The CJEU has rejected reliance on interpretation of habitual residence under other community instruments. In

35 22 December 2010 CJEU judgment in case: No C-497/10 PPU *Mercredi*.

cases like this, when the text of the Brussels IIbis Regulation does not hint of possibility of uniform interpretation, it is advisable that courts clarify uncertainties of interpretation by lodging a preliminary reference, rather than through an extension of case law under the Brussels I Regulation.

- [58]** In the long run, the applicability of CJEU case law made with respect to the Brussels I Regulation to the Brussels IIbis Regulation may become by its own means a source of uncertainty. For example, in a recent case, the Supreme Court of the **U.K.** avoided answering whether rulings of the CJEU on prohibition of the *forum non conveniens* doctrine under the Brussels I Regulation are extendable to the Brussels IIbis Regulation.³⁶ As more cases are decided on the Brussels IIbis Regulation, these questions will have to be addressed by the CJEU.
- [59]** The Research shows that up to this moment, national courts do not make unnecessary references to CJEU case law on the Brussels I Regulation, in order to interpret the Brussels IIbis Regulation. On the contrary, it seems that both regulations are perceived as isolated legal regimes.
- [60]** Overall, in comparison with the Brussels I Regulation, the Brussels IIbis Regulation has been to a lesser degree the subject of academic studies. Consequently, there are more gaps in its interpretation. Likewise, CJEU case law on the Brussels IIbis Regulation has been subject to lesser scrutiny. Nevertheless, national courts have to use the tools that they have at their disposal. So far, their main tools are CJEU judgments that should be cited and discussed in national decisions and making new preliminary references when necessary.
- [61]** The situation is different in regards to the Maintenance Regulation. Here, CJEU case law is just starting to develop. The scarce national practice shows courts filling that gap by referring to their own national practice. In principle, here too it may be more beneficial for all Member States that particularly complicated issues are solved not within the case law of one particular Member State, but amount to common knowledge through references to the CJEU.

European Procedures

- [62]** In practice European procedures are not applied very often in respective Member States. Also there are only a few cases interpreting the European Enforcement Order Regulation and the European Order for Payment Regulation, but there is no case law by the CJEU on the European Small Claims Regulation.
- [63]** The interviews and the questionnaires showed that lawyers and judges overall do not truly understand the interaction of national law and European procedures even though the CJEU reminded in ***Banco Español***³⁷ that European procedures neither replace, nor harmonize the existing similar mechanisms under national law, thus creating new alternative cross-border procedure in Europe. However, the practice, for example, of court of **Latvia**, shows that this CJEU judgment already has been reflected in national case law and even has changed the present case law concerning autonomous application of European procedures.³⁸

36 9 September 2013 Supreme Court of the United Kingdom judgment in case: A v A (Children) (Habitual Residence) [2013] UKSC 60, para. 70.

37 14 June 2012 CJEU judgment in case: No C-618/10 Banco Español de Crédito SA v Joaquín Calderón Camino, para. 79.

38 29 April 2014 Decision of the Supreme Court of Republic of Latvia in the case No SKC-2113/2014. Available at: <http://at.gov.lv/files/uploads/files/archive/department1/2014/SKC-2113-2014.docx> (in Latvian).

[64] Abolishment of exequatur and full implementation of free movement of judgments in the EU required introduction of minimal procedural standards. The question on minimal procedural standards has been very topical in the national case law, because those standards are not always very clear in relation to the national law and the Service of Documents Regulation. Presumably those issues will be addressed by the CJEU in the nearest future.

Other Instruments

[65] The Succession Regulation, Protection Measures Regulation, Mediation Directive and Legal Aid Directive are all comparatively recent developments in the area of civil justice. They all deal with a narrow segment of cross-border dispute resolution. This shows that EU law is rapidly expanding its reach within the area of civil justice. Simultaneously, EU legal instruments become all the more specialized.

[66] There are only a handful of CJEU judgments on these instruments. Researchers have identified very few references to these judgments in the practice of the Member States studied in the Research. Nor have the Researchers identified a large body of case law in these Member States offering ground-breaking insights into application of these instruments. Thus, it is difficult to make comprehensive conclusions about application of CJEU case law in regards to the foregoing instruments and even application of these instruments as such.

[67] It is, however, necessary to reiterate that these instruments are a legitimate and important part of EU legislation. Provided the preconditions of their application are satisfied, judges must apply them with the same meticulousness as the Brussels I Regulation or the Brussels IIbis Regulation. Up until now, fulfilment of this task has been complicated by a lack of substantial guidance from the CJEU and sporadic academic literature. Further studies of these instruments are necessary in order to clarify their application.

Practice of National Administrative Authorities in Application of CJEU case Law in Area of Civil Law

[68] CJEU case law in the area of civil justice is applied by administrative authorities very rarely. The main reason for this is that EU law instruments in this area mostly contain provisions in relation to national courts. Additionally, CJEU case law itself has interpreted duties of administrative authorities only in a very few cases. Therefore, tasks of administrative authorities in relation to CJEU case law mostly consist of coordination duties and preparation of amendments to national laws.

[69] There are only a few examples of amendments in national laws of Member States due to the CJEU case law in the area of civil justice. Such very limited legislative response to the CJEU case law in the area of civil justice can be explained by several reasons. The most important of those reasons is the directly binding nature of EU regulations that in general do not require any additional national legislative measures.

[70] At the same time the Research reveals that national judges mostly support inclusion of references to directly applicable instruments of EU law within texts of national procedural codes, even if the reference is more of an informational nature by pointing out which EU law instruments are relevant for particular national law context. Thus the reflection of the developments in the CJEU case law in national legislation might be considerate useful, even if not obligatory.

[71]

Research confirms that adequate digital solutions play an essential role in Member States' ability to acknowledge CJEU judgments and prepare a necessary response within national laws. The information system on transposition and implementation of EU law in **Latvia** (ESTAPIKS) can be mentioned as a good example in this field, as this system not only ensures that the Ministry of Justice is automatically informed on any developments in the CJEU practice, but also automatically designates the responsible governmental body in relation to the particular CJEU case law.

INTRODUCTORY PART: PRACTICE OF NATIONAL COURTS IN APPLICATION OF CJEU CASE LAW: GENERAL ISSUES

[72] Although this Research focuses on application of the CJEU case law on very particular instruments of EU law, some general observations regarding the nature and scope of the CJEU case law in the area of civil justice and its application in courts of Member States should be made. Therefore, the following part of the Research addresses these general issues and thus sets the background for more detailed analyses of particular problems in further parts of the Research.

1. CJEU Case Law and Preliminary Rulings Procedure: Legal Basis

[73] At the outset of the Research, aimed at analysing application of CJEU case law at the national level, an understanding of the concept of the CJEU case law, its legal foundations and specifics in the area of civil justice should be briefly outlined.

[74] The competences of the CJEU are set out in the provisions of the founding treaties of the EU, most importantly in Articles 251–281 of the Treaty on the Functioning of the European Union (hereafter: *TFEU*).³⁹ In accordance with these provisions, the CJEU is empowered to adjudicate on a wide range of issues – from reviewing the legality of the acts of the institutions of the EU and ensuring that Member States comply with EU legal obligations, to interpreting EU law at the request of national courts and tribunals. CJEU judgments in all these proceedings contribute to the creation of a unified case law system at EU level.

[75] However, CJEU case law in the area of civil justice consists almost exclusively of the CJEU judgments delivered as preliminary rulings, only exception being opinions of the CJEU on compatibility of international agreements with the TFEU.⁴⁰

[76] The main legal provision regarding preliminary rulings is Article 267 of TFEU:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

39 Treaty on the Functioning of the European Union C 326, Official Journal of the European Union, 26.10.2012, p. 47–390.

40 Pursuant to Article 218(11) TFEU, for example, 14 October 2014 CJEU opinion in case: No 1/13; 7 February 2006 CJEU opinion in case: No 1/03.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with a minimum of delay.

- [77] Thus Article 267 of TFEU serves as a legal basis for application of the preliminary rulings procedure in the courts of Member States, and there is no formal duty for Member States to adopt any additional national legal provisions on the matter. Yet at the same time most Member States have chosen to amend their procedural laws by adding at least a few articles of a general nature concerning the preliminary rulings procedure, as well as adding a reference to the preliminary ruling for possible grounds for stopping the adjudication of the case.
- [78] For example, in **Latvia** Article 51 of Civil Procedure Law (*Civilprocesa likums*) states that a court in accordance with EU law shall assign matters to the CJEU regarding the interpretation or validity of legal norms for the rendering of a preliminary ruling.⁴¹ Additionally, in Article 214 of Civil Procedure Law making reference to the CJEU is listed as one of the grounds for staying the proceedings.
- [79] Similarly, in **Hungary** Civil Procedure Code ("*1952. évi III. törvény a polgári perrendtartásról*") in Section 155/A contains provisions of same nature. Only Hungarian Code adds some details on making the reference: "*The court shall define the matter for which the preliminary opinion of the European Court of Justice is required, and shall outline the facts - to the extent required - and the pertinent passages of the Hungarian legal system.*"⁴² Also, the same provision in the Hungarian Civil Procedure Code states the duty of the court to send a copy of its decision to make reference to the CJEU also to the Ministry of Justice.
- [80] In **Sweden** the national regulation on preliminary rulings is even more extensive, as there exists a separate Act on Reference for a Preliminary Ruling.⁴³
- [81] By contrast, in **Germany** there are no separate additional national law provisions on preliminary rulings. Situation in the **U.K.** is slightly more complicated. Although the U.K. also does not have any additional legislative measures on preliminary rulings, common-law system plays some role here and there are several legal precedents regarding how and when to make requests for preliminary rulings to the CJEU.⁴⁴
- [82] Judges from **Latvia** and **Hungary** also expressed the view that the existence of additional national legal provisions on preliminary rulings is beneficial for judges. As they are used to working almost exclusively with national law, additional national procedural provisions allow seeing clearly the context of national procedural law within which the preliminary rulings procedure should be applied.⁴⁵

41 Civil Procedure Law of the Republic of Latvia, adopted 14 October 1998, in force as from 01 March 1999, published in *Latvijas Vēstnesis* [Herald of Latvia] No 326/330, 03 November 1998.

42 1952. évi III. törvény a polgári perrendtartásról, adopted 6 June 1952.

43 Grousot X., Wong C., Inghammar A., Bruzelius A. Empowering National Courts in EU Law. Stockholm: Svenska institutet för europapolitiska studier, No 2010:2, 2010, p. 36. Available at: <http://www.sieps.se/sites/default/files/541-2009-3-rapport.pdf>.

44 See, e.g., Lenz C.O., Grill G. The Preliminary Ruling Procedure and United Kingdom. In: *Fordham International Law Journal*, Vol.19(3), 1995, p.844-865.

45 13 October 2014 interview with representatives of Latvian judges; 20 November 2014 interview with representatives of Hungarian judges.

2. Preliminary Rulings Procedure and CJEU Case Law in Respective Member State in General

- [83]** *“It is settled case law that a judgment in which the Court gives a preliminary ruling is binding on the national court.”*⁴⁶ Thus not only the referring court, but also any appeals court which decides on the case in the main proceedings is bound by a preliminary ruling on the case in question.⁴⁷ As the preliminary ruling procedure is aimed at ensuring uniform interpretation of EU law,⁴⁸ the parties and judges in other proceedings should refer to the CJEU case law. In that regard the **U.K.** as a *Common Law* country stands slightly apart, since there national courts instead of direct reference to the CJEU case law might refer to previous judgments of the U.K. courts where CJEU case law has been mentioned before.
- [84]** Indeed, 84% of lawyers interviewed by the Researchers have applied CJEU case law in their practice. During the interviews, lawyers stated that they refer to the CJEU case law in their submissions to the court. Also, many of them use this case law for academic purposes. In turn, the judges apply CJEU case law as a source of law and in order to support a particular argument in the specific case. However, many of the lawyers completing the questionnaires admitted that the judgments of the CJEU in the area of civil justice do not create a united and consistent system of case law.
- [85]** The following sections of the Research provide a general overview on the specifics of the preliminary rulings in the area of civil justice as well as on the experience of each respective Member State regarding the activity of asking for preliminary rulings and applying CJEU case law by the national courts.

2.1. Specifics of the Preliminary Rulings Procedure in the Area of Civil Justice

- [86]** The statistical data regarding CJEU case law in the area of civil justice reflects quite similar tendencies as in other areas of the CJEU case law. Firstly, relative importance of cases can be estimated from the fact whether the case in the CJEU is adjudicated in the Chambers or in the Grand Chamber. In the area of civil justice as well as in other area statistics are similar – the great majority of cases are dealt with by Chambers and only less than one tenth of the cases are adjudicated by a Grand Chamber.⁴⁹
- [87]** Secondly, the same as in other fields, the number of questions for preliminary rulings referred to the CJEU in the area of civil justice is increasing. The relevant statistical data show that the number of cases decided by the CJEU is increasing.⁵⁰ Examining the questions referred by Member States covered by this Research in the area of civil justice, the tendency is approximately the same.
- [88]** However, 2009 was of special importance in the context of civil justice, since that was when the Treaty of Lisbon came into force.⁵¹ If up to 2009 only courts of last instance were entitled to make references in the area of civil justice to special preliminary rulings mechanisms provided in Article

46 5 October 2010 CJEU judgment in case: No C-173/09 Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa, paras. 29-30.

47 Broberg M., Fenger N. *Preliminary References to the European Court of Justice*. Oxford University Press, 2014, p.442.

48 *Ibid.*, p. 451.

49 Proportion of cases adjudicated in Plenary or in Chambers specifically in the area of civil justice was counted by Researchers using CJEU search engine. Regarding general tendencies, see: Court of Justice of the European Union Annual Report, 2013, p. 10. Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf>.

50 *Ibid.*, p.9.

51 Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community, C 306, Official Journal of the European Union, 17.12.2007, p. 1–229.

68 of the Treaty establishing the European Community (hereafter: *EC Treaty*), then during the last five years after the coming into force of the Treaty of Lisbon, every national court can make references to it in the area of civil justice. For example, **German** courts of lower instance took advantage of this possibility and actively started using the preliminary ruling procedure. To illustrate it: since 2009 in the area of civil justice approximately 15 references for a preliminary ruling were made by German lower courts and 12 references by the Federal Court of Justice of Germany (*Bundesgerichtshof*).

- [89]** Also during last five years there has been a leap in the overall numbers of references for preliminary rulings in the area of civil justice in Member States. Some sources mostly explain it in relation to the above-mentioned right of every court in a Member State to make references to the CJEU in the area of civil justice. The total number of references rose gradually from 2004, with five references, to 11 references in 2009. After coming into force of the Treaty of Lisbon, there were 23 references in 2010, 18 in 2011 and 23 in 2012.⁵²
- [90]** For the particular Member States that were the subject of this Research this tendency is not that evident, although some rise in activity can be seen in relation to the **U.K.**, since U.K. courts start to make references in the area of civil justice only in 2009 with 2 references and keep a similar level of references during the next years.⁵³
- [91]** In the same context a comparison of the activity of courts of last instance and other national courts in asking for preliminary rulings in the area of civil justice confirms the increasing role of lower national courts. If up until December 2009 Article 68 of the EC Treaty precluded the courts other than the courts of last instance of Member States to refer to the CJEU for preliminary rulings, then after this limitation was removed, the numbers of references made by the courts of last instance and other national courts have a tendency to level off, at least in the Member States subject to this Research.⁵⁴
- [92]** At the same time courts of last instance still retain a dominant role in making references for preliminary rulings in the area of civil justice. Of course, partly this can be explained as a legacy of the pre-2009 situation. Yet at the same time the contrast seems quite striking between the overall dominance in numbers of lower courts regarding references to preliminary rulings in other EU law areas and activity of last instance courts in the area of civil justice, at least in some Member States (for example, in **Hungary**).
- [93]** One possible explanation for such situation might be that the issues arising in the area of civil justice are more complicated than those on average in EU law and, therefore, lower courts try to avoid preliminary rulings. Some other explanations can be considered as specific to national law and are addressed in the next sections of the Research regarding particular states.
- [94]** Additionally, the EU enlargement process has played a certain role in the pattern of references from Member States – in the area of civil justice there have been in total 18 references from 2004 and 2007 Member States (namely, from Czech Republic, Poland, Bulgaria, Latvia, Lithuania, Slovenia and Hungary), therefore from the particular Member States that were the subject of this Research, the experience of **Latvia** and **Hungary** confirms that this activity is on the rise.

52 Arcarazo D.A., Murphy C.C. (ed.) *EU Security and Justice Law after Lisbon and Stockholm*. Hart Publishing, 2014, p.65.

53 See: Annex 1 of this Research.

54 See: Annex 1 of this Research.

- [95]** The area of civil justice also plays a special role in comparison with other CJEU case law areas, due to high numbers of the urgent preliminary ruling procedure. From 2009 – 2013⁵⁵ the urgent preliminary ruling procedure was used in 15 cases, all of which were in the area of freedom security and justice.⁵⁶ Four of these cases were initiated by Member States covered by the Research – three by **Germany**⁵⁷ and one by the **U.K.**⁵⁸ All four cases concerned the Brussels IIbis Regulation.
- [96]** The courts of Member States covered by this Research usually refer one to three questions in a single request for preliminary ruling to the CJEU. However, in some cases the courts have referred up to eight questions to the CJEU.⁵⁹ In the **Cornelius de Visser** case⁶⁰ the court of first instance in **Germany** even initially submitted 11 questions. Yet the Registry of the CJEU sent the national court a copy of the judgment in the **eDate Advertising and Others** case⁶¹ requesting it to state whether, in light of that judgment, it wished to maintain all the questions in its reference for a preliminary ruling.⁶² Afterwards, the national court withdrew five of the questions and reformulated one of them.⁶³
- [97]** Basically in all the judgments in the area of civil justice, the CJEU reformulated the questions referred by the national courts, using phrases like “*By its first question, the referring court asks essentially,*”⁶⁴ “*By this question, the referring court is asking the Court, in essence...*”⁶⁵, “*The court seeks in essence.*”⁶⁶ These phrases then are followed by an interpretation of the question or questions⁶⁷ drawn up by the referring court.
- [98]** The **OTP Bank** case⁶⁸ is of special notice in regard of reformulation of questions by the CJEU. In this case the CJEU went beyond the question referred for the preliminary ruling by the Supreme Court of **Hungary**, which asked for interpretation of Article 5(1) of Brussels I Regulation, and additionally referred also to Article 5(3) of the same regulation.
- [99]** Such approach by the CJEU when almost all referred questions are reformulated was criticized by some national judges. They pointed out that they know exactly what they want to ask and mentioned this as one of the reasons the preliminary rulings procedure is not working as smoothly as it could have.⁶⁹

55 The statistical data on 2014 are not available yet.

56 Court of Justice of the European Union Annual Report, 2013, p. 101. Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf>.

57 5 July 2010 CJEU judgment in case: No C-256/09 PPU Bianca Purrucker v Guillermo Vallés Pérez; 22 Décembre 2010 CJEU judgment in case: No C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz.

58 22 December 2010 CJEU judgment in case: No C-497/10 PPU Barbara Mercredi v Richard Chaffe.

59 See also: 3 April 2014 CJEU judgment in case: No C-438/12 Irmengard Weber v Mechthilde Weber the court of Germany referred to the CJEU 8 questions with several subsections.

60 5 March 2012 CJEU judgment in case: No C-292/10 G v Cornelius de Visser.

61 25 October 2011 the CJEU judgment in joined cases: No C-509/09 eDate Advertising GmbH v X and C-161/10 Olivier Martinez and Robert Martinez v MGN Limited.

62 15 March 2012 CJEU judgment in case: No C-292/10 G v Cornelius de Visser para. 34.

63 Ibid., para. 35.

64 See: 28 April 2009 CJEU judgment in case: No C-420/07 Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams.

65 See: 25 February 2010 CJEU judgment in case: No C-381/08 Car Trim GmbH v KeySafety Systems Srl.

66 See: 22 December 2010 CJEU judgment in case: No C-497/10 PPU Barbara Mercredi v Richard Chaffe.

67 In some cases several questions are answered together; see: 15 November 2012 CJEU judgment in case: No C-456/11 Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH.

68 17 October 2013 CJEU judgment in case: No C-519/12 OTP Bank.

69 20 November 2014 interview with representatives of Hungarian judges.

- [100]** However, the issue of questions referred for preliminary rulings is double-edged. Despite the fact that the CJEU has developed quite detailed guidance on how to make references⁷⁰ and the Research confirms that courts in **Germany** are using it in practice,⁷¹ sometimes questions national courts refer for preliminary rulings can be subject to criticism, too.
- [101]** In this context a very interesting experience can be seen when courts from two different Member States – **Germany** and France – made reference to the CJEU for a preliminary ruling on almost identical issues regarding Brussels I Regulation, and the CJEU joined both proceedings in one case.⁷² Although the substance of the questions referred was the same, in the opinion of the Researchers, the style and structure used by the German courts was better organized and easier for the CJEU to navigate, and therefore required less reformulation on the part of the CJEU.
- [102]** Thus, the conclusion in regard to the quality of questions referred for preliminary rulings is that the overall success of the preliminary rulings procedure in this aspect heavily relies on the cooperation nature of the procedure and on mutual respect from both courts. Although sometimes questions referred by national courts might lack a certain degree of precision, the overly active approach of reformulation of the questions by the CJEU might lead to situation when national court is not receiving guidance on the exact issue it was seeking assistance. Even more, in a long run overly active reformulation of questions might lead to general discouragement for some national courts to make references for preliminary rulings.

2.2. Latvia

- [103]** In general Latvian courts requested their first preliminary ruling almost four years after Latvia's accession to the EU, at the end of 2007.⁷³ However, after that Latvian courts have used the preliminary rulings procedure on a regular basis. In total till the end of year 2013 Latvian courts have put forth 30 requests for preliminary rulings: 2008 – three, 2009 – four, 2010 – three, 2011– 10, 2012– five and 2013– five.
- [104]** In Latvia the majority of preliminary rulings were requested by administrative courts. In accordance with statistics at the end of the year 2012, out of a total 25 requests, 20 were done by the Administrative Division of the Supreme Court of Latvia and two more by other administrative courts.⁷⁴ Mostly the subject matter for the reference was taxation issues (15 references until the end of year 2012 were in cases against state tax authorities), which in general is in conformity with the tendencies in other new Member States.⁷⁵
- [105]** In the area of civil justice, so far there are only three preliminary rulings requested by Latvian courts. But there is normally a certain time gap before the full weight of a new Member State is reflected in the CJEU's case-load.⁷⁶

70 5 December 2009 CJEU Information note on references from national courts for a preliminary ruling. Official Journal of the European Union, 2009, C 297/01.

71 3 November 2014 interview with representatives of German judges.

72 6 September 2012 CJEU judgment in joined cases: No C-509/09 eDate Advertising GmbH v X and C-161/10 Olivier Martinez and Robert Martinez v MGN Limited.

73 As the case was registered in the CJEU in early January, 2008, for statistical purposes usually it is attributed to the year 2008. See: e.g., Nesterova I. Eiropas Savienības Tiesa: svarīgākie nolēmumi. Latvijai aktuālie prejudiciālie nolēmumi. Jurista Vārds, Nr. 47 (746), 20.11.2012.

74 Buka A. Requests for the preliminary rulings from Latvian courts: 10 years of the EU membership. In: „The Baltic States in the European Union: ten years as Member States”. Proceedings of the international conference, 25-26 April, 2014. Latvian Academy of Sciences, p. 24.

75 Bobek M. Learning to talk: preliminary rulings, the courts of the new member states and the Court of Justice. Common Market Law Review, 2008, Vol.45, pp. 1612-1614.

76 Broberg M., Fenger N. Preliminary References to the European Court of Justice. Oxford University Press, 2014, p.34.

- [106]** The first reference by Latvian court regarding the interpretation of an EU instrument in civil justice area was made only in 2012, eight years after accession to the EU. However, this case – **Trade Agency**⁷⁷ – has been a very important development in interpreting the Brussels I Regulation. This case is analysed in detail in ¶ [474] of this Research.
- [107]** Also, other two references for preliminary rulings were made in 2014, and they also concerned interpretation of the Brussels I Regulation. Still, in one case the CJEU considered that there is no need to give a ruling, because the national court was no longer dealing with the case which was pending before it, and the questions referred in the context of the present case have for that reason become hypothetical.⁷⁸ The argument of the national court that similar cases are pending before the referring court was found irrelevant by the CJEU.⁷⁹
- [108]** The **FlyLAL** case⁸⁰ also was remarkable in interpreting the scope of the Brussels I Regulation. Still, at the moment of the drafting of this Research, the Latvian court has not rendered a decision in the main proceedings.
- [109]** All mentioned preliminary references were made by the Supreme Court of Latvia. Partly this might be explained by the above fact mentioned in ¶ [88] of this Research that until the Treaty of Lisbon came into force in December 2009; only courts of last instance had the right to make reference to the CJEU. Even in the matters on the recognition and enforcement of the judgments, the proceedings are time consuming and the cases have gone through all three instances and the CJEU.
- [110]** For example, in the **Trade Agency** case the application for the recognition and enforcement was submitted on 28 October 2009,⁸¹ the judgment of the CJEU was rendered after almost three years, but the final decision by the Supreme Court was adopted approximately after 5 months. Thus the proceedings took place for three years, three months and 16 days. A similar period of time was spent also in the **Antonio Gramsci Shipping Corp.** case – three years, four months and 13 days.⁸²
- [111]** As indicated above, all three preliminary references were made regarding the Brussels I Regulation, and this can be explained due to the fact that this EU instrument in civil law area is the one applied most often in Latvia, and the lawyers are more familiar with this regulation than others.
- [112]** Article 5 of the Civil Procedure Law of Republic of Latvia provides the list of sources applicable by the judges in adjudicating the case. This list includes both the legal norms of the EU as well as there is a reference that in applying legal norms, the court shall take into account case law.⁸³ At the same time, this Article does not explicitly provide what courts' case law should be taken into account. However, the commentaries on the Civil Procedure Law indicate that the interpretation by the CJEU of EU law is binding and final.⁸⁴
- [113]** The Supreme Court of Latvia from time to time relies on CJEU case law in cases concerning EU civil justice; moreover, the Research showed that in the lower-level courts' judgments the judges mention the rulings of the CJEU only because it is cited by a party, but there is no elaboration on those cases in the court's reasoning. Consequently, there are very few cases where courts of first and second instance have referred to the judgments of the CJEU in order to strengthen their

77 6 September 2012 CJEU judgment in the case: No 619/10 Trade Agency Ltd. v Seramico Investments Ltd.

78 5 June 2014 CJEU judgment in the case: No C-350/13 Antonio Gramsci Shipping Corp. et al v Aivars Lembergs, para. 11.

79 Ibid.

80 23 October 2014 CJEU judgment in case: No C-302/13 flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS.

81 13 February 2013 Supreme Court Senate of the Republic of Latvia decision in the case SKC-1/2013. Available at <http://at.gov.lv/files/uploads/files/archive/departament1/2013/1-sk-2013.doc> (in Latvian).

82 15 October 2014 Supreme Court of the Republic of Latvia decision in the case SKC-231/2014, unpublished.

83 Article 5(6). Civil Procedure Law of the Republic of Latvia, adopted 14 October 1998, in force as from 01 March 1999, published at *Latvijas Vēstnesis [Herald of Latvia]* No 326/330, 03 November 1998.

84 Torgāns K. (ed.). *Civilprocesa likuma komentāri. I.dāļa (1.-28.nodaļa)*, Tiesu namu aģentūra, 2011, p. 33.

argumentation, even though it is the obligation of the national courts, whether it sits as a court of last instance or not, to apply not only the operative part of a preliminary ruling, but also its *ratio* when interpreting EU law.⁸⁵

[114] During the interviews the judges admitted that the courts are overloaded with cases, thus there is not much time to make deeper research on each particular issue. Moreover, they are not always aware of new CJEU case law.⁸⁶ For example, the Research showed that CJEU judgments from last two years on the Brussels I Regulation have not been assessed in the judgements of Latvian courts even once. Nonetheless, according to the data of the Latvian Judicial Training Center, the interested judges are trained yearly regarding new CJEU case law.⁸⁷ The Center also stated that the judges have not received any training regarding the formulation of the preliminary questions to the CJEU.

[115] In conclusion, it is most likely that Latvian courts will request more preliminary references to the CJEU in the nearest future as the application of EU acts in the civil area increases, consequently increasing the need to interpret them. Thus judges must be reminded that the interpretation given by the CJEU constitutes an integral part of the EU law rule in question⁸⁸ and therefore it must be taken into account in deciding disputes in the area of civil justice. Moreover, CJEU case law can make the work of the courts easier, because the relevant judgment may contain the necessary argumentation.

2.3. Sweden

[116] Regarding interaction between Sweden and the CJEU, it must first of all be noted that Sweden has been criticized for being quite restrictive in requesting preliminary rulings from the CJEU. According to research by the Swedish Institute for European Policy Studies from 1995 to 2009, the CJEU had decided 67 preliminary rulings at the request of Swedish courts, i.e. less than five cases per year.⁸⁹ The numbers have not grown, as Swedish courts have made 6 requests in 2010, 4 requests in 2011, 8 requests in 2012 and 12 requests in 2013. Altogether Sweden has made 111 requests for preliminary rulings.⁹⁰ Courts of last instance make the majority of requests for preliminary rulings.⁹¹ Over the last five years Swedish courts have made the following two requests for preliminary rulings regarding interpretation of the Brussels I Regulation.

[117] In one case the Supreme Court of Sweden (*Högsta domstolen*) made a request to the CJEU for determination of the scope of the Brussels I Regulation regarding enforcement of a judgment in a Member State that invalidated registration of ownership of shares in a company having its registered office in another Member State.⁹² In a different case the reference to the CJEU was

85 Broberg M., Fenger N. *Preliminary References to the European Court of Justice*. Oxford University Press, 2014, p. 452.

86 13 October 2014 interview with representatives of Latvian judges.

87 13 October 2014 interview with representatives of the Latvian Judicial Training Center.

88 Broberg M., Fenger N. *Preliminary References to the European Court of Justice*. Oxford University Press, 2014, p. 451.

89 Bernitz U. *Förhandsavgöranden av EU-domstolen*. Svenska domstolars hållning och praxis. Stockholm: Svenska institutet för europapolitiska studier, No 2010:2, 2010, p. 7. Available at: <http://www.sieps.se/sv/publikationer/forhandsavgöranden-av-eu-domstolensvenska-domstolars-hallning-och-praxis-20102>.

90 Court of Justice of the European Union Annual Report, 2013, p. 102. Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf>.

91 Bernitz U. *Förhandsavgöranden av EU-domstolen*. Svenska domstolars hållning och praxis. Stockholm: Svenska institutet för europapolitiska studier, No 2010:2, 2010, p. 51. Available at: <http://www.sieps.se/sv/publikationer/forhandsavgöranden-av-eu-domstolensvenska-domstolars-hallning-och-praxis-20102>.

92 2 July 2009 CJEU judgment in case: No C-111/08 S.C.T. *Industri AB v Alpenblume*.

made by the Court of Appeals of Southern Northland (*Hovrätten för Nedre Norrland*)⁹³ regarding the concept of matters relating to tort, delict or quasi delict in a case where a creditor of a limited company sought to hold liable a member of the board of directors of that company and one of its shareholders for the debts of that company, because they allowed that company to continue to carry on business, even though it was undercapitalized and forced to go into liquidation.

[118] Interviews with representatives of the Swedish judiciary show that court clerks carry out very thorough research of EU-law-related matters before the case is presented to the judge.⁹⁴ That confirms that existing CJEU case law is taken into consideration, and the courts tend to rely on *acte clair* doctrine.

[119] Another reason mentioned in the interviews for the relatively small number of questions referred to the CJEU by Swedish courts for the preliminary rulings is the efficiency of court proceedings in Sweden. Sweden aims to ensure swift and efficient court proceedings, but addressing a preliminary question before the CJEU prolongs the proceedings for more than a year.⁹⁵ For these reasons Swedish courts might seem reluctant towards referral of preliminary questions to the CJEU. However, should both parties request a preliminary question, such request is made.

[120] Another reason for the relatively small number of references, especially from lower instance courts, could be the "*elevation of a question*" – the right of the district court or the court of appeals to address the Supreme Court with a particular question on the application of law (procedure similar to preliminary question before the CJEU). This procedure presumably allows for reducing the number of questions addressed to the CJEU.

[121] Even though Sweden's reluctance is well reasoned, this attitude in Swedish legal writing has sometimes been referred to as "*the principle of isolation*."⁹⁶ On the other hand, Sweden has been described as very interested in achieving legal certainty, stability and good functioning of international commerce and cross-border family relations, and this requires that foreign laws be applied in some situations.⁹⁷

[122] It can be concluded that the concerns of due process and efficiency of court proceedings play the most important role for Swedish judges before deciding on reference for a preliminary ruling to the CJEU. Moreover, it seems that Swedish judges make a reference for a preliminary ruling only if the matter is not clear from previous CJEU case law. Researchers consider that the requirement to provide a reason not to make a reference under Swedish Procedural Rules (adopted by the Swedish Parliament through the Act on Reference for a Preliminary Ruling by the CJEU)⁹⁸ is beneficial and ensures high quality of research of CJEU case law and facilitates application of *acte clair* doctrine.

93 18 July 2013 CJEU judgment in case: No C-147/12 ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV.

94 27 October 2014 interview with representatives of Swedish judges.

95 Court of Justice of the European Union Annual Report, 2013, p. 10. Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf>.

96 Bogdan M., Foreign public law and article 7(1) of the Rome Convention: some reflections from Sweden. In: *Vers de nouveaux équilibres entre ordres juridiques*. Mélanges en l'honneur de H.Gaudemet-Tallon. Dalloz, 2008, p. 674.

97 Ibid.

98 Groussot X., Wong C., Inghammar A., Bruzelius A. Empowering National Courts in EU Law. Stockholm: Svenska institutet för europapolitiska studier, No 2010:2, 2010, p. 36. Available at: <http://www.sieps.se/sites/default/files/541-2009-3-rapport.pdf>.

2.4. Germany

- [123]** Germany is one of the most active Member States in asking for preliminary rulings not only in general, but specifically in the area of civil justice, too. For example, since 1976 German courts have submitted references for preliminary rulings about the interpretation of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (hereafter: *Brussels Convention*)⁹⁹ and Brussels I Regulation in 70 cases (68 – judgments of the CJEU; one – opinion of Advocate General; one – pending preliminary ruling case).
- [124]** Concerning other EU Regulations in the civil law area, German courts have submitted requests for preliminary rulings in 14 cases. The most active period for the preliminary ruling procedure on the Brussels Convention and Brussels I Regulation in Germany was 2013 and 2014 – six requests for a preliminary ruling per year. Regarding other regulations, the most active time period was 2014 – three requests for a preliminary ruling from German courts (one – European Order for Payment Regulation; three – Service of Documents Regulation; two – Insolvency Regulation). German courts have never asked for preliminary rulings in the field of interpretation of the Taking of Evidence Regulation, Rome I Regulation and Rome II Regulation.
- [125]** In Germany, the methodology of formulation of the requests for preliminary rulings is very important. The lower courts take the Federal Court of Justice (*Bundesgerichtshof, BGH*) as an example for how to formulate requests for a preliminary ruling.
- [126]** There is no national domestic legal act which would address the procedural details of requesting a preliminary ruling in Germany. The only legal basis is Article 267 of the TFEU. Also the attorneys at law are very well trained in those issues, thus they often take the initiative to request the courts to start a preliminary ruling procedure. There is an observation that sometimes German first instance courts ask for preliminary ruling in order to change the German case law established by the Federal Court of Justice (*BGH*). Thus, there is some kind of criticism of the Federal Court of Justice (*BGH*) by lower courts.

2.5. Hungary

- [127]** Hungary has been the leading country from the post-2004 EU Member States in making references for preliminary rulings to the CJEU. At the moment Hungarian judges have sent 106 questions to the CJEU. Even more, there is a tendency for the yearly number of references to grow, as 2014 alone has witnessed 22 requests for preliminary rulings from Hungarian courts.
- [128]** The main areas in which the references to the CJEU by Hungarian courts have been made so far are tax law, consumer protection and agriculture. In the area of civil justice the number of references has been insubstantial – there have been only four references in the area of civil justice for preliminary rulings from Hungarian courts up to now. Even more, from those four references only two so far have been addressed by a judgment of the CJEU – one on the Insolvency Regulation, the other on Brussels I Regulation.¹⁰⁰ One reference has been made only very recently on the Brussels I Regulation and the European Order of Payment Regulation in 2014,¹⁰¹ and one more on the Brussels I Regulation was dismissed by the CJEU as inadmissible.¹⁰²

99 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version). Official Journal of the European Union C 27, 26.01.1998, p. 1-27.

100 5 July 2012 CJEU judgment in case: No. C-527/10 ERSTE Bank Hungary and 17 October 2013 CJEU judgment in case: No. C-519/12 OTP Bank.

101 27 February 2014 application to the CJEU in case: No. C-94/14 Flight Refund.

102 6 November 2014 CJEU order in case: No. C-366/14 Herrenknecht.

- [129]** The majority of references for preliminary rulings come from courts of lower instances, and at the end of 2013 the Supreme Court has made only 15 requests for preliminary rulings. Yet, at the same time, Hungarian academics expressed the view that the Supreme Court plays quite an important role in application of EU law in Hungarian judiciary, as the most important cases in substance come from the Supreme Court. Also, the Supreme Court by way of its practice is influencing the application of EU law by the courts of lower instances.¹⁰³ In the area of civil justice, from a total of four references, three were made by the Supreme Court.
- [130]** A major influence on the activity of the courts in requesting preliminary rulings was played by the parties of the case, and on many occasions the parties were the ones who submitted that the reference for the preliminary rulings should be made. Even more, the activity of the parties of the case in relation to the preliminary rulings procedure is confirmed by the fact that in some cases the parties were of the opinion that the reference is necessary, yet the adjudicating court decided against making the references. Despite the fact that there are no statistics on this issue, the judges identified that the frequency of such cases is quite substantial.
- [131]** The judges from lower court instances in this context also pointed out that sometimes parties seek the preliminary rulings as a way how to artificially lengthen the hearing of the case and delay the final judgment.¹⁰⁴
- [132]** Also, the judges were of the opinion that if they have to search the previous case law of the CJEU, it is easier to work with the cases that came from Hungary, as they understand the legal background better and they can relate to the factual circumstances of the case easier.¹⁰⁵
- [133]** Specific legal regulation in relation to requests for the preliminary rulings originating from Hungarian courts has been established by the practice of the Supreme Court of Hungary. If a Hungarian court has made a reference for a preliminary ruling to the CJEU, other Hungarian courts have the duty to stop the adjudication of similar cases and wait for the preliminary rulings from the CJEU.¹⁰⁶

2.6. The U.K.

- [134]** The U.K. exhibits moderate activity of referring for preliminary rulings. According to available statistics in the period between 2009 and 2013, the U.K. courts made on average 20 preliminary references per year.¹⁰⁷ This is a much smaller number than that of Germany – more than 60 references, Italy – more than 40 and the Netherlands – close to 40.¹⁰⁸
- [135]** Up until now, only a handful of the CJEU rulings in the area of civil justice have been rendered pursuant to a preliminary reference made by a U.K. court. **Firstly**, currently a unique CJEU ruling on the Rome II Regulation is based on a preliminary reference from the High Court of Justice,

103 Varju M. The judicial reception of EU law. In: Varju M., Varnay E. (ed). The Law of European Union in Hungary: Institutions, Processes and the Law. HVG-ORAC Publishing Ltd., 2014, p.221.

104 20 November 2014 interview with representatives of Hungarian judges.

105 Ibid.

106 Osztoivits A., Gombos K. Preliminary references and Hungarian courts: procedural context, trends and quality. In: Varju M., Varnay E. (ed). The Law of European Union in Hungary: Institutions, Processes and the Law. HVG-ORAC Publishing Ltd., 2014., p.240.

107 Broberg M., Fenger N. Preliminary References to the European Court of Justice. Oxford University Press, 2014, pp. 34-35.

108 Ibid.

Queen's Bench Division.¹⁰⁹ **Secondly**, two CJEU rulings on Brussels IIbis Regulation and Brussels I Regulation were made pursuant to requests by U.K. courts. In addition, ten CJEU rulings on the Brussels Convention were made pursuant to requests emanating from U.K. courts.

- [136]** Such moderate activity might be explained by several reasons. Formerly, Rule 68.2(2) of the Civil Procedure Rules prohibited lower instance courts from requesting preliminary rulings.¹¹⁰ From 2013, the same provisions allow for this.¹¹¹ Nevertheless, the same provision specifies that lower instance courts should not normally make references to the CJEU.¹¹² This rule is explained by legislators' concern that "*where legal or factual issues remain to be resolved it may be, but not necessarily need be, premature for the court to order a reference.*"¹¹³ It is likely that such formulation reduces the number of referrals at least in the early stages of litigation.
- [137]** Interviews with members of the U.K. judiciary indicate other potential reasons for the comparative inactivity of the U.K. courts. Respondents noted that judges in the U.K. consider the length of proceedings to be an essential element of justice.¹¹⁴ Therefore, in cases when EU law is not of utmost pertinence for the outcome of the dispute, courts will avoid referring to the CJEU. Lower instance courts may decide to avoid referring to the CJEU even when EU law is pertinent to the dispute, but appeal is available. Thus, for example, in the *Canyon* case,¹¹⁵ the Commercial Court denied invitation by one of the parties to lodge a preliminary reference, even though the judge himself recognized that he was not sure as to the interpretation of Article 5(1)(a) of the Brussels I Regulation.¹¹⁶ At the level of the Supreme Court, the speediness of the proceedings may be achieved by reliance on the *acte clair* doctrine, thus circumventing the obligation to lodge a preliminary reference to the CJEU.
- [138]** It is impossible to second-guess why courts on each and every occasion prefer referring to the CJEU or refraining from doing so. Nonetheless, it seems reasonable that for the sake of efficiency, lower instance courts keep referrals to the CJEU to a minimum. On average, a preliminary ruling procedure lasts more than a year.¹¹⁷ It will be often unreasonable to subject parties to such a delay, when the review of a higher instance court is available. The reviewing court may find the issue of EU law not pertinent for the case, deciding it on other grounds, or likewise find the question of EU law to fall within the scope of *acte clair*. It is also possible that parties will settle with the purpose of avoiding further litigation – an outcome that may be more favourable to parties' interests.
- [139]** The restrictive attitude to preliminary references has a paramount disadvantage. It deprives all Member States of legal certainty on points of EU law. However, the weight assigned to this consideration may depend upon the court's perception of its own role. Courts seeing themselves as creators of uniform practice may find it preferable to obtain a final answer to questions of EU law. Courts, as it is mostly in the **U.K.**, considering justice in the particular case as their highest priority can justify their preference for a rapid solution of the case in question over request for a preliminary reference, which might explain relatively restrictive approach to the preliminary rulings procedure by the U.K. courts.

109 17 November 2011 CJEU judgment in case: No 412/10, Deo Antoine Homawoo v GMF Assurances SA.

110 White Book 2014. Commentary to Rule 68.2(1). Available on Westlaw UK database.

111 Civil Procedure Rules of 1998 (Amendment No 7, Rule 2013). Available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part68>.

112 Ibid.

113 White Book 2014. Commentary to Rule 68.2(1). Available on Westlaw UK database.

114 27 November 2014 interviews with representatives of U.K. judges.

115 27 November 2014 High Court Of Justice Queen's Bench Division (Commercial Court) judgment in case: Canyon Offshore Ltd v GDF Suez E&P Nederland BV [2014] EWHC 3810 (Comm).

116 Ibid.

117 Court of Justice of the European Union Annual Report, 2013, p. 10. Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf>.

2.7. Conclusions and Suggestions

- [140]** Essentially preliminary rulings procedure presupposes two things: first, there must be a case before a Member State court that gives rise to EU law issues that may form the basis for a reference; second, the court in question must decide to actually make a reference.¹¹⁸ Therefore, in any area of EU law, the success of the preliminary rulings procedure depends on the cooperative nature of the procedure and on the willingness of the national judge to make the reference to the CJEU.
- [141]** However, the Research reveals several issues pointed out by judges from various Member States that indicate certain scepticism on the part of national judges regarding their respective role in the preliminary rulings procedure. It was pointed out that judges lack any procedural status during the adjudication of the case in the CJEU, although even parties of the main proceedings and national governments of every Member State are able to participate.
- [142]** Also formulation of questions referred to the CJEU can be seen as a certain cause of tension between the CJEU and national courts, since sometimes national judges might formulate the question not accurately enough, and sometimes the CJEU might be overly active in reformulation of questions. This is especially topical issue in the area of civil justice, where legal regulation is very complicated, and it is hard to determine the most precise formulation of the question.
- [143]** Mostly the number of requests for preliminary rulings from each Member State in the area of civil justice corresponds to overall activity of courts from those Member States in other areas of EU law (e.g., **Germany**, which is active overall in referring to the CJEU, has also referred the most questions to the CJEU in the area of civil justice).
- [144]** Research confirms that after the Treaty of Lisbon came into force in 2009, the total number of references to the CJEU in the area of civil justice is growing. It might be explained by the fact that only with the Treaty of Lisbon did courts of all instances gain the right to make reference for preliminary rulings in the area of civil justice.
- [145]** The most preliminary questions referred to the CJEU in the area of civil justice have concerned application of the Brussels I Regulation – in general as well as from Member States covered by the Research. Such popularity can be explained by a relatively long period of time since the regulation is in force and therefore judges have already become familiar with its application. Additionally, other legal instruments in the area of civil justice regulate quite specific issues, but Brussels I Regulation covers wide part of the whole area of civil justice – it sets general rules governing the jurisdiction of courts and the recognition and enforcement of judgments in all civil and commercial matters.
- [146]** From the Member States covered by the Research, only **German** and **Swedish** judges stated that they are well trained in application of EU law and CJEU case law. The judges of the **U.K.** did not express their attitude towards this subject matter, while some **Latvian** and **Hungarian** judges emphasized that the lack of knowledge on EU law precludes national judges from applying CJEU case law and making reference to the CJEU. The Researchers are of the opinion that this situation is connected with the general experience of Member States in EU law, as Latvia and Hungary joined the EU quite recently, while Germany has been there since the very foundation of the EU.
- [147]** Another reason why judges sometimes avoid application of CJEU case law is the fact that the finding of the correct provision of EU law would be very time consuming. Here the Researchers wish to emphasize the good practice of **Swedish** courts, where court clerks carry out very thorough research of EU-law-related matters before the case is presented to the judge. It can also be seen

118 Broberg M., Fenger N. Preliminary References to the European Court of Justice. Oxford University Press, 2014, p. 35-36.

from Swedish case law that references to CJEU case law are very comprehensive and thorough, as Swedish judges quite often make references to several cases of the CJEU instead of just one, as well as refer not only to cases in general, but to particular paragraphs.

[148] In the opinion of the Researchers, **Sweden** can be considered a good example also in that the national laws put an obligation on the national courts to motivate their decisions by which a request by one of the parties in proceedings to require a preliminary ruling from CJEU is not granted.

[149] The length of the proceedings in the CJEU was mentioned as one of the main reasons why national courts often decide not to request preliminary rulings from the CJEU (for instance in **Sweden**, the **U.K.** and **Latvia**). Thus, if the proceedings in the CJEU were not so time consuming, the national courts might be more active in seeking out its opinion. However, in **Germany** judges did not see the length of the preliminary ruling procedure as a major problem per se. Nonetheless it was expressed that sometimes parties are the ones concerned by the length of proceedings. Sometimes parties tend to request the national courts to refer to the CJEU to delay the final judgment in their case. On other occasions parties expressly try to persuade judges not to use the procedure, as they are not interested in prolongation of adjudication of the case.

3. CJEU and National Case Law on *Ex Officio* Application of EU Law in Area of Civil Justice

[150] Some regulations in the area of civil justice themselves directly preclude or oblige national courts from raising the issues of EU law on their own motion. For example, Article 19 of the Brussels IIbis Regulation implies the obligation of the second court seized regarding proceedings between the same parties to stay the proceedings on its own motion. Recital 17 of the Brussels Ibis Regulation contains the prohibition of national courts to raise of their own motion any of the grounds for non-enforcement of judgments.

[151] However, if there is no obligation or prohibition to apply EU law *ex officio* directly in the texts of regulations, the duties of national courts in relation to possible *ex officio* application are much harder to determine. Also the case law on both levels – CJEU and national – reveal a quite complicated picture on the matter.

[152] The starting point of analysis on the possibilities of national courts to apply EU law *ex officio* is a general one - once a particular state becomes a Member State of the EU, the law of the EU becomes a part of the national law of that state. However, not all of the procedural aspects of application of EU law have been determined by EU law itself. Thus the procedural autonomy has been left to Member States on many occasions to independently legislate on procedural issues, giving each Member State the freedom to use its own solutions in applying EU law in the absence of specific EU procedural rules pre-empting this discretion.¹¹⁹

[153] Nonetheless, national procedural rules must comply with two principles limiting the procedural autonomy of Member States.¹²⁰ **Firstly**, the principle of effectiveness determines that national law must not be framed in such a way as to make it virtually impossible or excessively difficult to exercise the rights derived from EU law. **Secondly**, according to the principle of equivalence, claims based on EU law must not be subject to national rules that are less favourable than those governing similar domestic actions.

119 Kowalik-Bańczyk K. Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings. Available at: http://www.yars.wz.uw.edu.pl/yars2012_5_6/s215.pdf.

120 Havelka L. Escaping the Trap: The Simplified Application of EU Law. Available at: <http://www.cyelp.com/index.php/cyelp/article/view/177/120>.

- [154]** From the principle of equivalence derives the obligation of the courts to apply the rules of EU law *ex officio* when the national court has by virtue of its domestic law the obligation to raise, or even only the power to raise, similar rules of domestic law.¹²¹ However, that is not the only case in which the national courts might be required to apply the rules of EU law on their own motion. Then CJEU has introduced the “*contextual effectiveness test*”, meaning that a national rule that potentially hinders the application of EU law must be examined by considering the role of the provision in question in the procedure, its progress and special features, taking also into account the basic principles of the domestic judicial system.¹²² According to this, for example, the CJEU has ruled that short time limits on arising questions of EU law make the exercise of EU rights excessively difficult.¹²³
- [155]** So far the CJEU has used this approach in two areas of law –competition law¹²⁴ and consumer law.¹²⁵ Even though it has not addressed the issue of *ex officio* application, particularly in the area of civil justice, yet, the previously mentioned general rules are most likely to be applicable also in this sphere.
- [156]** At the same time in civil proceedings the issue of *ex officio* application of law is a more sensitive one than in administrative proceedings. The principle of equality of parties and adversarial proceedings limit the possibility of the court to raise points of its own motion in general. The CJEU has addressed this issue by stating that national courts are not required to abandon their passive role, requiring them not to go beyond the ambit of the dispute defined by the parties themselves.¹²⁶
- [157]** However, CJEU case law on the matter is not entirely clear, as it came to the opposite conclusion in the previously quoted **Peterbroeck** case¹²⁷ in dealing with time limitations imposed on the raising of issues of EU law. This means that every case must be weighted separately to evaluate whether the circumstances of the particular case render the exercise of EU law “*excessively difficult*.”¹²⁸
- [158]** At the same time some academics have criticized the very idea of the duty of the national courts to apply EU law *ex officio*, by stating that such an expectation is based on the naive and unrealistic assumption that a judge knows the entire body of EU law.¹²⁹ The test used by the CJEU to determine whether the national courts have to apply EU law of their own motion has also been criticized mainly for a lack of predictability and impracticality.¹³⁰
- [159]** Research affirms that in practice national courts have no clear view over application of EU law *ex officio*. In a survey made in 2010 among approximately 300 **German** and Dutch judges, 45,2% of these judges stated that it is totally unclear to them when they must apply EU law *ex officio*.¹³¹

121 24 October 1996 CJEU judgment in case: No C-72/95 Aannemersbedrijf PK. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland.

122 Havelka L. Escaping the Trap: The Simplified Application of EU Law. Available at: <http://www.cyelp.com/index.php/cyelp/article/view/177/120>.

123 14 December 1995 CJEU judgment in case: No C-312/93 Peterbroeck, Van Campenhout & Cie SCS v Belgian State.

124 See: 1 June 1999 CJEU judgment in case: No C-126/97 Eco Swiss China Time Ltd v Benetton International NV.

125 See: 27 June 2000 CJEU judgment in joined cases: No C-240/98 Océano Grupo Editorial SA v Roció Murciano Quintero, No C-241/98 Salvat Editores SA v José M. Sánchez Alcón Prades, No C-242/98 José Luis Copano Badillo, No C-243/98 Mohammed Berroane and No C-244/98 Emilio Viñas Feliú.

126 14 December 1995 CJEU judgment in case: No C-430/93 Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten.

127 14 December 1995 CJEU judgment in case: No C-312/93 Peterbroeck, Van Campenhout & Cie SCS v Belgian State.

128 Craig P, de Burca G. EU Law. Text, Cases and Materials. 5th Edition. Oxford University press, 2011, p. 232.

129 Jaremba U. National Judges As EU Law Judges: The Polish Civil Law System. Martinus Nijhoff Publishers, 2013. p. 218.

130 Havelka L. Escaping the Trap: The Simplified Application of EU Law. Available at: <http://www.cyelp.com/index.php/cyelp/article/view/177/120>.

131 Summary report of a survey on the knowledge of EU law among Dutch and German judges ‘The court is not so sure about the law – national judges and EU law’. Available at: <http://legalresearchnetwork.eu/wp-content/uploads/2011/10/PaperTobiasNowakGroningen.doc>.

However, when legal practitioners were interviewed by the Researchers on whether the court should check the applicable law *ex officio* (even if the parties have not requested it), almost 80% of respondents replied affirmatively.¹³²

[160] In the practice of **Hungary** the reception of the principle that domestic courts in a case before them are required to raise issues of EU law *ex officio* proved to be problematic, as one of the fundamental principles of the Code of Civil Procedure is party autonomy restricting a decision of the court to go beyond party claims.¹³³ Although Hungarian courts even have made references to the CJEU for preliminary rulings concerning the *ex officio* application,¹³⁴ the practice of the Supreme Court of Hungary in this field has not been consistent.¹³⁵

[161] It is not yet clear whether and how exactly the CJEU will expand the approach of *ex officio* application of EU law to other areas of EU law in the future. Specifically in the area of civil justice some light might be shed by the forthcoming judgment of the CJEU in the **Flight Refund** case,¹³⁶ in which the **Hungarian** Supreme Court amongst other things asked the CJEU to clarify:

*Can a European payment order which has been issued in breach of the purpose of the regulation or by an authority which does not have jurisdiction *ratione materiae* be the subject of an *ex officio* review? Or must the contentious proceedings following the lodging of a statement of opposition, where there is a lack of jurisdiction, be discontinued *ex officio* or on request?*

[162] The answer to this question might reveal the point of view of the CJEU towards *ex officio* application of EU law in the area of civil justice.

[163] Thus application of EU law *ex officio* in general as well as specifically in the area of civil justice so far remains a very complicated issue. Application of EU law *ex officio* is an issue that not only makes many national judges feel a certain degree of insecurity, but also shows a lack of clarity and consistence, even in CJEU case law itself. Hopefully, in the nearest future the newest CJEU case law in the area of civil justice will add more detailed guidelines for national judges.

4. Autonomous Interpretation of Legal Concepts and its Impact on National Courts

[164] Before commencing this Research, Researchers asked lawyers, mostly those who specialize in EU private law, about the autonomous interpretation, and 57,89% indicated that the autonomous interpretation of legal concepts in EU law in civil area causes them problems.¹³⁷ Taking into consideration that a majority of stakeholders indicated that there are difficulties in applying autonomous terms in EU law to the civil arena, the Researchers considered it necessary to elaborate on this topic in this Research.

132 Results of Survey conducted by Researchers.

133 Varju M. The judicial reception of EU law. In: Varju M., Varnay E. (ed). The Law of the European Union in Hungary: Institutions, Processes and the Law. HVG-ORAC Publishing Ltd., 2014, p. 207.

134 5 October 2006 CJEU judgment in joined cases: C-290/05 Ákos Nádasdi v Vám- és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága and C-333/05 Ilona Németh v Vám- és Pénzügyőrség Dél-Alföldi Regionális Parancsnoksága; 9 November 2010 CJEU judgment in case: No C-137/08 VB Pénzügyi Lízing Zrt. v Ferenc Schneider.

135 Varju M. The judicial reception of EU law. In: Varju M., Varnay E. (ed). The Law of the European Union in Hungary: Institutions, Processes and the Law. HVG-ORAC Publishing Ltd., 2014, p. 209.

136 27 February 2014 application to the CJEU in case: No C-94/14 Flight Refund.

137 Results of Survey conducted by Researchers.

- [165]** Autonomous interpretation means that there is no reference made to the domestic law of Member States in order to interpret the concepts used in the regulations or directives. Instead, there is a reference to Community law as a whole.¹³⁸ The main goal is to establish the same meaning of legal concepts in the EU, as well as uniform application of these concepts. A divergent interpretation of the legal concepts in the field of private international law can lead to situations of *forum shopping*.¹³⁹
- [166]** There can be two ways of understanding the notion of “*autonomous interpretation*”:
- 166.1. firstly, as making autonomous – EU level – legal concepts;
- 166.2. secondly, as an independent EU-level doctrine of the interpretation.¹⁴⁰
- [167]** The first situation is more present in CJEU case law in order to attribute an autonomous meaning to the notion “*civil and commercial matters*”, etc.
- [168]** Autonomous concepts can be established either by the EU legislator (e.g., Article 32 of the Brussels I Regulation regarding the concept of “*judgment*”¹⁴¹; Article 5(1)(b) regarding the concept of “*the place of performance of the obligation in question*”¹⁴²; Article 60(1) regarding the concept of “*domicile of the company or other legal person or association of natural or legal persons*”¹⁴³; Article 60(2) regarding the “*statutory seat*” for the purposes of the **U.K.** and Ireland,¹⁴⁴ etc.) or by the CJEU interpreting EU legal acts (CJEU case law¹⁴⁵). Nevertheless, the definition of some legal concepts is still left to the national legal systems of each particular Member State, for example, “*domicile of natural person*” or “*domicile of trust*” (see: Articles 59 and 60(3) of Brussels I Regulation¹⁴⁶).
- [169]** Among the autonomous concepts defined in the Regulations, there are also concepts taken from previous CJEU case law. For example, according to Article 6(1) of the Brussels Convention “*[a] person domiciled in a Contracting State may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled*”.
- [170]** In the case of *Kalfelis*, the CJEU explained:
- [f]or Article 6 (1) of the Convention to apply there must exist between the various actions brought by the same plaintiff against different defendants a connection of such a kind that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.*¹⁴⁷
- [171]** This explanation was later incorporated in Article 6(1) of the Brussels I Regulation:
- A person domiciled in a Member State may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*
- [172]** The first judgment of the CJEU in which the method of the autonomous interpretation was mentioned was the judgment in the *Unger* case:

138 Magnus U., Mankowski P., Magnus I. Brussels I Regulation. Sellier European Law Publishers, 2007, p. 33.

139 Audit.M L'interprétation autonome du droit international privé communautaire. Journal du droit international. Juris-Classeur, 2004, n° 3, p. 796.

140 Nehne T., Methodik und allgemeine Lehren des europäischen Internationalen Privatrechts. Tübingen: Mohr Siebeck Verlag, 2012, S. 42, 43.

141 Article 2(a) of Brussels Ibis Regulation.

142 Article 7(1)(b) of Brussels Ibis Regulation.

143 Article 63(1) of Brussels Ibis Regulation.

144 Article 63(2) of Brussels Ibis Regulation.

145 See: 22 November 1977 CJEU judgment in the case No 43/77 Industrial Diamond Supplies v Luigi Riva; 26 March 1992 CJEU judgment in the case No C-261/90 Reichert v. Dresdner Bank (Reichert II); 2 June 1994 CJEU judgment in the case No C-414/92 Solo Kleinmotoren v. Boch.

146 See: Articles 62 and 63(3) of Brussels Ibis Regulation.

147 27 September 1988 CJEU judgment in case: No 189/87 Kalfelis.

[..] *The concept of “workers” in the said Articles does not therefore relate to national law, but to Community law.*¹⁴⁸

[173] However, the first relevant judgment in the field of judicial cooperation in civil matters (Brussels Convention) was the judgment in the **LTU v Eurocontrol** case, which gave an autonomous meaning to the concept of “civil and commercial matters”:

*[..]. In the interpretation of the concept “civil and commercial matters” for the purposes of the application of the Convention and in particular of Title III thereof, reference must not be made to law of one of the states concerned but, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the Corpus of the national legal systems.*¹⁴⁹

[174] After this judgment, autonomous interpretation of the Brussels Convention and later – of the Brussels I Regulation and other Regulations – has been developed by the CJEU in numerous cases.

[175] Notwithstanding the autonomous interpretation (definition) of the legal concepts made by the CJEU, there can be situations when a national judge must incorporate this autonomous concept into his own domestic legal system. This task is not easy, because of the lack of substantive EU law as a basis of this reception. Therefore a national judge will mostly use the *lege fori* criterion in order to resolve this situation.¹⁵⁰ For example, the CJEU has turned the legal term “rights in rem in immovable property” into an autonomous concept deciding in **Weber** case:

*Article 22(1) must be interpreted as meaning that there falls within the category of proceedings which have as their object “rights in rem in immovable property” within the meaning of that provision an action such as that brought in the present case before the courts of another Member State, seeking a declaration of invalidity of the exercise of a right of pre-emption attaching to that property and which produces effects with respect to all the parties.*¹⁵¹

[176] It follows from this autonomous concept that a national judge must clarify the notion of “the exercise of a right of pre-emption attaching to the property and which produces effects with respect to all parties”. Which qualification must be applied – *lege fori* or *lege commune*? It seems that *lege fori* will be the more appropriate.

[177] However, this autonomous interpretation or qualification will apply not only when an international treaty or a piece of EU secondary legislation gives an autonomous definition of the term at stake (which is the simplest situation), but also when the domestic legislation contains a reference to an international treaty¹⁵² or to EU secondary legislation.

[178] For example, according to Section 644(2) of the **Latvian** Civil Procedure Law:

*The declaration of enforcement of a judgment set out [..] in the Council Regulation No 44/2001, Council Regulation No 2201/2003 and the Council Regulation No 4/2009 shall be governed by the provisions of Chapter 77 of the present Law concerning the recognition of foreign judgments, insofar as it is compatible with the provisions of the aforementioned [..] Regulations.*¹⁵³

148 19 March 1964 CJEU judgment in case: No 75/63 Unger. See also: Audit M. L'interprétation autonome du droit international privé communautaire. *Journal du droit international. Juris-Classeur*, 2004, n° 3, p. 791.

149 14 October 1976 CJEU judgment in case: No 29/76 LTU v Eurocontrol, paras. 3, 5. See also: Audit M. L'interprétation autonome du droit international privé communautaire. *Journal du droit international. Juris-Classeur*, 2004, n° 3, p. 792.

150 Audit M. L'interprétation autonome du droit international privé communautaire. *Journal du droit international. Juris-Classeur*, 2004, n° 3, p. 804, 805.

151 3 April 2014 CJEU judgment in case: No C-438/12 Weber, para. 40; 10 January 1990 CJEU judgment in case: No C-115/88 Reichert, para. 8. See: Article 24(1) of the Brussels Ibis Regulation (Article 22(1) of Brussels I Regulation).

152 Parrot K. L'interprétation des conventions de droit international privé. *Dalloz*, 2006, p. 262 (§ 365).

153 Civil Procedure Law of the Republic of Latvia, adopted 14 October 1998, in force as from 01 March 1999, published in *Latvijas Vēstnesis* [Herald of Latvia] No 326/330, 03 November 1998.

- [179]** The word “*judgment*” used in this Section must be construed not in accordance with Section 636 of the Latvian Civil Procedure Law, but in an autonomous fashion, i.e. according to Article 2(a) of the Brussels Ibis Regulation (Article 2(4) of the Brussels Ibis Regulation).
- [180]** However, legal scholars consider that autonomous interpretation of the Brussels Convention and Brussels I Regulation, carried out by the CJEU, is based on a teleological approach rather than on the results of comparative law studies.¹⁵⁴ As a result, the CJEU formulates an autonomous definition of each precise legal term for the purposes of the Brussels Convention or Brussels I Regulation in each particular case.
- [181]** For example, according to the first sentence of Article 5(1) of the Brussels Convention and Article 5(1)(a) of the Brussels I Regulation¹⁵⁵, “*A person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question*”. In order to apply this legal provision correctly and to distinguish it from Article 5(3), it has to be determined how the term “*matter relating to a contract*” should be construed. In its judgment of 22 March 1983 in the case of **Martin Peters**¹⁵⁶ the CJEU decided that this term should not be interpreted in accordance with the domestic law of this or that Member State (i.e. rejected both the *lege fori* and the *lege causae* qualification), but that it had to be interpreted in an autonomous way, on the basis of the system and the aim of the Brussels Convention.¹⁵⁷ Thus the autonomous definition of the aforementioned term is based not on the comparative law doctrine, but on the systemic and teleological method of interpretation.¹⁵⁸
- [182]** In its further case law the CJEU limited the scope of the autonomous definition of this term, deciding that “*matters relating to a contract*” is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.¹⁵⁹ Of course, such an autonomous definition of this term is not universal.¹⁶⁰ However, at the same time, it is based neither on the *lege fori* nor on the *lege causae* criterion.
- [183]** The conclusion is that the autonomous interpretation carried out by the CJEU is not one of the methods of interpretation (aside from the systemic, teleological and historical method), but the way of *definition* of legal terms (*lege commune*), aside from the *lege fori* and *lege causae* criteria.¹⁶¹
- [184]** The autonomous definition is not always applied by the CJEU. In some cases the CJEU has indicated the need to apply the *lege fori* or the *lege causae* qualification¹⁶² (see: e.g., judgments in the cases of **Zegler** and **Tessili**¹⁶³). However, in applying the Brussels I Regulation, the EU legislator has already replaced the definitions given in the aforementioned judgments with autonomous concepts.¹⁶⁴ Consequently, it can be said that the *lege commune* or the autonomous way of definition of legal terms is used at EU level more and more.¹⁶⁵ The difficulty in this respect is the

154 Bureau D., Muir Watt H. Droit international privé. Tome I. PUF, 2007, p. 396.

155 Article 7(1)(a) of the Brussels Ibis Regulation.

156 22 March 1983 CJEU judgment in case: No 34/82 Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging, paras. 9, 10.

157 Gaudemet-Tallon H. Compétence et exécution des jugements en Europe. 4e édition. L.G.D.J. 2010, p. 169.

158 See also : Bureau D., Muir Watt H. Droit international privé. Tome II. PUF, 2007, p. 284; Audit M. L'interprétation autonome du droit international privé communautaire. Journal du droit international. Juris-Classeur, 2004, n° 3, p. 798.

159 17 June 1992 CJEU judgment in case: No C-26/91 Jacob Handte & Co. GmbH v Traitements mécano-chimiques des surfaces SA, para. 15; 27 October 1998 CJEU judgment in case : No C-51/97 Réunion européenne SA v Spliethoff's Bevrachtungskantoor BV, paras. 17,19.

160 Gaudemet-Tallon H. Compétence et exécution des jugements en Europe. 4e édition. L.G.D.J. 2010, p. 169, 170.

161 Audit M. L'interprétation autonome du droit international privé communautaire. Journal du droit international. Juris-Classeur, 2004, n° 3, p. 798, 799.

162 Ibid., p. 801.

163 7 June 1984 CJEU judgment in case: No 129/83 Zegler v Salinitri, para. 15; 6 October 1976 CJEU judgment in case: No 12/76 Tessili v Dunlop AG, paras. 14,15.

164 Audit M., L'interprétation autonome du droit international privé communautaire. Journal du droit international. Juris-Classeur, 2004, n° 3, p.801. See: e.g., Article 30 of the Brussels I Regulation concerning the moment when a court shall be deemed to be seized, and Article 5(1)(b) concerning the place of performance of an obligation.

165 Pocar F. Faut-il remplacer le renvoi au droit national par des règles uniformes dans l'article 4 du Règlement N° 44/2001? In: Vers de nouveaux équilibres entre ordres juridiques [Mélanges en l'honneur de Hélène Gaudemet-Tallon]. Dalloz, 2008, p.577.

absence of a starting point of this definition; in other words, it is more and more seldom based on a comparative analysis of the domestic legal systems, and some autonomous definitions are in fact based on a legal vacuum.¹⁶⁶

- [185] At the same time it is true that the CJEU very often makes reference to the interpretation by referring to the objectives and the scheme of the particular regulation and to the general principles which stem from the *Corpus* of the national legal systems.¹⁶⁷ The objectives and the scheme of the particular regulation can be found by using teleological, systemic and other interpretation methods. But we almost never find in the judgments of the CJEU the way in which the Court establishes these general principles which stem from the *Corpus* of the national legal systems.
- [186] For example, in the *flyLAL* case¹⁶⁸ the Court uses the teleological and the systemic, as well as the historical method of interpretation, but how Court refers to the general principles stemming from the *Corpus* of the national legal systems in order to clarify the concept of “civil and commercial matters” is not entirely clear. An example could be the *Rüffer* case (para. 10).¹⁶⁹ Probably, the reference to *Corpus* is a remnant of the methodology used by the CJEU during the early days of the Brussels Convention, when a handful of legally closely related states were its only parties.¹⁷⁰
- [187] Currently, the method seems to carry only theoretical relevance in the practice of the CJEU, thus, being potentially misleading for national courts. It is even harder to imagine that a national court may succeed making such comparative analysis of the national legal systems of all Member States.¹⁷¹
- [188] The next difficulty is the way in which the CJEU refers back to its previous case law. For example, in the *flyLAL* case (para. 26) the Court makes reference to the *Sunico* case¹⁷² (paras. 33 and 35). In the *Sunico* case there is reference to the *Realchemie Nederland BV* case¹⁷³ (para. 39). Then, in *Realchemie Nederland BV* there can be found the next reference to the *Apostolides* case¹⁷⁴ (paras. 42, 45, 46).
- [189] This chain of references can be continued: *flyLAL* (para. 26) → see: *Realchemie Nederland BV* (para. 39) → see: *Apostolides* (paras. 42, 45, 46) → see: *Rüffer*¹⁷⁵ (para. 14); *LTU*¹⁷⁶ (para. 4); *Préservatrice foncière*¹⁷⁷ (para. 21); *ČEZ*¹⁷⁸ (para. 22); *Lechouritou*¹⁷⁹ (para. 30) → see: *Baten*¹⁸⁰ (para. 29); *Henkel*¹⁸¹ (para. 29). This chain of references makes the overview of the CJEU case law quite fragmented and unclear. One shall go from one judgment to another and so on. It would be clearer if the CJEU made reference only to the most relevant judgments for the purposes of the

166 Audit M., L'interprétation autonome du droit international privé communautaire. *Journal du droit international. Juris-Classeur*, 2004, n° 3, p.812-815; Niboyet Marie-Laure, Géraud de Geouffre de La Pradelle. *Droit international privé. L.G.D.J.* 2008, p. 172, 173 (§ 252); Niboyet Marie-Laure. *La réception du droit communautaire en droit judiciaire interne et international. La réception du droit communautaire en droit privé des Etats membres.* Bergé J.-S., Niboyet M.-L. (sous la direction). Bruylant, 2003, p.177.

167 See: for example: 23 October 2014 CJEU judgment in case: No C-302/13 *flyLAL-Lithuanian Airlines v Starptautiskā lidosta „Rīga” and Air Baltic Corporation*, para. 24.

168 Ibid.

169 16 December 1980 CJEU judgment in: case No 814/79 *Niederlande v Rüffer*.

170 See: Briggs A. *Private International Law in English Courts.* Oxford University Press, 2014, p. 189.

171 Ibid.

172 12 September 2013 CJEU judgment in case: No C-49/12 *Sunico*.

173 18 October 2001 CJEU judgment in case: No C-406/09 *Realchemie Nederland BV*.

174 28 April 2009 CJEU judgment in case: No C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*.

175 16 December 1980 CJEU judgment in: case No 814/79 *Niederlande v Rüffer*.

176 14 October 1976 CJEU judgment in case No 29/76 *LTU Luftransportunternehmen GmbH & Co. KG v Eurocontrol*.

177 15 May 2003 CJEU judgment in case: No C-266/01 *Préservatrice foncière Tiard*.

178 18 May 2006 CJEU judgment in case: No C-343/04 *Land Oberösterreich v. ČEZ*.

179 15 February 2007 CJEU judgment in case: No C-292/05 *Lechouritou*.

180 14 November 2002 CJEU judgment in case: No C-271/00 *Gemeente Steenberg v Luc Baten*.

181 1 October 2002 CJEU judgment in case: No C-167/00 *Henkel*.

case. In the *flyLAL* case it gives the impression that only the *Sunico* case is relevant. For example, European Court of Human Rights (hereafter: *ECHR*) often makes the references to three of four most relevant previous judgments.¹⁸²

5. Possible Sanctions against National Judiciary in Case of Misapplication of CJEU Case Law and Preliminary Procedure

- [190]** There are no special control mechanisms against national judges for non-application of CJEU case law that would be designed specifically for the EU area of civil of justice nor at the EU level, nor in the Member States covered by this Research. Even more, control mechanisms in general regarding cases when national judiciary do not apply CJEU case law or avoid the obligation to make reference for the preliminary ruling to the CJEU are very underdeveloped. Therefore, the Research provides only a short overview on those control mechanisms, and their evaluation should be subject to separate research.
- [191]** In general, Member States covered by this Research have various forms of judicial accountability, which might include internal supervision, disciplinary procedures and in some cases even criminal and civil liability or impeachment procedures.
- [192]** For example, in **Sweden** there are mechanisms of accountability to ensure that the behaviour of judges is morally acceptable in exercise of their functions. Swedish judges are not immune from criminal and civil liability in the performance of their duties. Albeit there are no specific criminal rules applicable to judges, the offence of misuse of office applies to any person who, in the exercise of public authority disregards the duties of his office, by act or omission, intentionally or through carelessness.¹⁸³
- [193]** However, to ensure that these provisions are not abused, only the Parliamentary Ombudsman or Lord Chancellor can prosecute in any of these cases, and only the Supreme Courts can deal with cases against justices of the Supreme Courts. Cases concerning judges in lower courts are dealt with by one of the general appeals courts. In practice, prosecution of Swedish judges is extremely rare, and there are very few cases of convictions.¹⁸⁴
- [194]** Similarly, the experience of **Germany**¹⁸⁵ and **Latvia**¹⁸⁶ confirms that in most cases measures to secure judicial accountability are executed by judges themselves and take place rarely and only in exceptional circumstances.
- [195]** Researchers have no information that any disciplinary or personal liability cases of judges would concern non-application of CJEU case law or non-reference to the CJEU for a preliminary ruling.
- [196]** At the same time, in interviews few judges admitted at least the theoretical possibility of some internal supervision or even disciplinary liability in cases of very manifest breach of EU legal requirements.¹⁸⁷

182 Among many others see 17 July 2014 ECHR judgment in the case No.32541/08 *Svinarenko and Slyadnev v Russia*.

183 Adenitire J. *Judicial Independence in Europe. The Swedish, Italian and German Perspectives*. p.10. Available at <https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/judicial-independence-in-europe.pdf>.

184 The European Commission for the Efficiency of Justice. *Report on Efficiency and Quality of Justice 2010*. p. 223. Available at: http://www.coe.int/t/dgh/cooperation/cepej/evaluation/archives_en.asp.

185 Adenitire J. *Judicial Independence in Europe. The Swedish, Italian and German Perspectives*. p. 10. Available at <https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/judicial-independence-in-europe.pdf>.

186 *Judicial Disciplinary Liability Law*, adopted 27 October 1994, in force as from 24 November 1994, published at *Latvijas Vēstnesis [Herald of Latvia]* No 132, 10 November 1994.

187 13 October 2014 interview with representatives of **Latvian** judges; 20 November 2014 interview with representatives of **Hungarian** judges.

- [197]** In addition to the above-mentioned forms of liability for individual judges, it is possible to argue that misapplication of CJEU case law or avoidance of the obligation to make reference for a preliminary ruling to the CJEU breaches human rights, in particular, the right to a fair trial. Therefore, in some states it is possible to lodge a constitutional complaint on such grounds.
- [198]** The most developed case law in this regard exists in **Germany**. Article 101 of the Basic Law of the Federal Republic of Germany (*Grundgesetz*) declares that nobody may be deprived of his lawful judge.¹⁸⁸ The German Federal Constitutional Court (*Bundesverfassungsgericht*) already three decades ago recognized the CJEU as a lawful judge within the meaning of Article 101 of the German Constitution. From this the German Federal Constitutional Court concluded that the duty of German courts to make a reference to the CJEU under Article 267 TFEU forms part of the basic right to a fair trial. Thus, if a German court of the last instance didn't make a reference in a case when it should have made it, it constitutes a violation of the right to a fair trial, and individuals are entitled to lodge a constitutional complaint against such a judgment.¹⁸⁹
- [199]** A similar claim regarding breach of the right to a fair trial can be made under the European Convention on Human Rights¹⁹⁰ and lodged to the ECHR, accordingly. Indeed, the ECHR in its case law has held that non-reference may violate the right to a fair trial, particularly when this non-reference appears to be arbitrary. Yet so far there has been only one case on substance and more than 20 decisions on inadmissibility (since 1989), because the constant position of the ECHR was that the non-reference in the particular case was not arbitrary enough to qualify it as a breach of the right to a fair trial.¹⁹¹
- [200]** As one more alternative control mechanism should be mentioned the rights of the European Commission (hereafter: *Commission*) to initiate an infringement procedure as set out in Article 258 of the TFEU. Although in the most cases EU law infringement on the part of Member States has been due to incorrect or delayed transposition of directives, this procedure might serve as a control mechanism if the national judiciary does not apply CJEU case law or avoid the duty to make reference for the preliminary ruling to the CJEU.
- [201]** So far there have been no infringement proceedings against Member States resulting from decisions of the national courts. Yet, as can be seen from example below, there are some growing activity on the part of the Commission in the past two decades and it suggests that the Commission is ready to take steps in the direction of controlling the national judiciary. The Researchers found that already 20 years ago the Commission in a case against the **U.K.** has pointed out that the infringement of EU law occurred due to the interpretation of the national law by the national courts.¹⁹²
- [202]** More recent examples are from **Sweden** and **Hungary**. Against Sweden the infringement proceedings have been initiated in 2004, and the Commission in its reasoned opinion pointed out the avoidance on the part of Swedish courts to make references for the preliminary rulings and the shortcomings of Swedish procedural laws in that context. Yet the case did not reach the CJEU, as Sweden amended its procedural laws.¹⁹³

188 Article 101 of the Basic Law for the Federal Republic of Germany (*Grundgesetz*). Available at: www.gesetze-im-internet.de.

189 There are quite many examples of such judgments from the German Constitutional Court – on that in detail see, e.g., Arndt F. The German Federal Constitutional Court At the Intersection of National and European Law: Two recent Decisions. In: *German Law Journal* (2001). Available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=34>.

190 Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, adopted 4 November 1950, in force as from 3 September 1953.

191 Valutyte R. State Liability For The Infringement Of The Obligation To Refer For A Preliminary Ruling Under The European Convention On Human Rights. In: *Jurisprudence. Mykolas Romeris University periodical reviewed research papers* Vol. 19(1), 2012, p.10.

192 8 June 1994 CJEU judgment in case: No C-382/92 Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.

193 Craig P., de Burca G. *EU Law. Text, Cases, and Materials*. 5th ed. Oxford University Press, 2011, p.429.

- [203]** **Hungary** had a similar experience when the Commission in 2013 sent a letter to the Hungarian government and informed them that the Supreme Court of Hungary has not applied EU law correctly, although there were no formal stages of the infringement procedure afterwards.¹⁹⁴
- [204]** Finally, as the only control mechanism recognized by the CJEU itself, possible damage claims against Member States and the doctrine of state liability should be mentioned.
- [205]** The principle of state liability was extended to the actions of the courts of the Member States by the **Köbler** case in 2004, in which the CJEU stated that non-compliance with the obligation to refer the matter to the ECJ or misapplication of CJEU case law is a condition for state liability.¹⁹⁵
- [206]** Despite the fact that the **Köbler** case was adjudicated ten years ago, the Researchers have no information on any successful claims in the courts of Member States based on this case. Yet the Research has identified several attempts for such claims to be made in **Hungary**,¹⁹⁶ **Germany**¹⁹⁷ the **U.K.**¹⁹⁸ and in **Latvia**.¹⁹⁹ It comes as no surprise since such procedure for claiming damages would be very time consuming and complicated, as well as that pre-conditions for the state liability due to the actions of judiciary are very hard to satisfy.²⁰⁰
- [207]** Thus the overall conclusion is that in theory there are several possibilities to control national judges in cases of possible non-application of CJEU judgments or in cases where national judges avoid the obligation to make reference for the preliminary ruling to the CJEU. Yet the Research of practical application of such possibilities confirms that all of them currently are more of a theoretical nature and cannot function in practice.

194 20 November 2014 interview with the representative of the Ministry of Justice of Hungary.

195 30 September 2003 CJEU judgment in case: No C-224/01 Köbler.

196 20 November 2014 interview with representatives of Hungarian judges.

197 Lock T. Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after Francovich. In: Common Market Law Review. Vol.49(5), 2012, p. 1675-1702.

198 Cooper v. Attorney General [2008] EWHC 2178. Mentioned in: Lock T. Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after Francovich. In: Common Market Law Review. Vol. 49(5), 2012, p. 1675-1702.

199 For example, 22 July 2011 Supreme Court Senate of the Republic of Latvia decision in the case SKA-782/2011. See also Slaņķe G. ES tiesības Latvijā – maldugunis purvā? Available at: <http://www.ir.lv/2011/11/22/es-tiesibas-latvija-maldugunis-purva>.

200 There have been fairly many articles on the subject of state liability in this context – see: e.g., Anagnostaras G. Erroneous judgments and the prospect of damages: The scope of the principle of governmental liability for judicial breaches. European Law Review Vol. 31, 2006, p. 735-747; Beutler B. State Liability for breaches of Community law by national courts: Is the requirement of a manifest infringement of the applicable law an insurmountable obstacle? Common Market Law Review Vol. 46, 2009, p. 773-804.

PART I: PRACTICE OF RESPECTIVE NATIONAL COURTS IN APPLYING CJEU CASE LAW: SPECIAL ISSUES

1. International Jurisdiction under Brussels Ibis (Brussels I) Regulation

1.1. Short Introduction to Brussels Ibis Regulation

- [208]** On 27 September 1968, the six original European Economic Community Member States (Belgium, France, Italy, **Germany**, the Netherlands and Luxembourg) concluded the Brussels Convention. This Convention came into force on 1 February 1973. In 1971, the CJEU was given jurisdiction to interpret the Brussels Convention by a separate Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.²⁰¹
- [209]** In 22 December 2000 the Brussels I Regulation was adopted. In accordance with Recitals 5 and 19 of the Brussels I Regulation, continuity between both instruments should be ensured, especially as regards interpretation of the Brussels Convention by the CJEU.
- [210]** The third instrument is new: the Brussels Ibis Regulation replacing the Brussels I Regulation. According to Article 66 Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.
- [211]** Recital 34 of the Brussels Ibis Regulation also provides that the continuity between the Brussels Convention, the Brussels I Regulation and the Brussels Ibis Regulation should be ensured, including as it regards interpretation by the CJEU. Only when the particular wording of the instruments deliberately deviates from that of its predecessor, one should be cautious relying on former material.²⁰²
- [212]** The CJEU has intensively interpreted the Brussels Convention and the Brussels I Regulation. The case law consists of more than 200 judgments (see: **Annex 1**), thus it is impossible to analyse all of them in this Research, therefore the Researchers have chosen to deal with the most important and recent CJEU case law and issues that are topical in particular Member States.

201 The Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. Text as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic.

202 Magnus U., Mankowski P. European Commentaries on Private International Law Brussels I. Regulation, Sellier European Law Publishers, 2012, p. 32.

[213] Dynamic development of CJEU case law requires the parties and national courts to stay updated on this practice. It is especially important once the national court considers a motion for a preliminary ruling. In this regard a case from **Hungary** can be taken as a good example.²⁰³ When the case came before the Supreme Court of Hungary, the defendant requested the court to make reference to the CJEU for a preliminary ruling concerning jurisdiction of the court in this case. The Supreme Court in turn pointed out that according to the judgment of the CJEU in the **CILFIT** case,²⁰⁴ it is not required to initiate a preliminary ruling procedure if the CJEU already has established case law on the particular point of law. Next, the Supreme Court quoted the CJEU judgment in the **De Bloos** case,²⁰⁵ where it had already been stated that a claim for damages for non-performance of contractual obligations must be considered a contractual claim.

1.2. Jurisdiction in General and Interaction of Brussels Ibis Regulation with Other Instruments

[214] Several EU legal acts, for example, the Brussels Ibis Regulation (formerly the Brussels I Regulation), Brussels IIbis Regulation, the Insolvency Regulation, the Maintenance Regulation, Succession Regulation and other international conventions, such as the Convention on the Contract for the International Carriage of Goods by Road (hereafter: *CMR Convention*)²⁰⁶ and the Montreal Convention for the Unification of Certain Rules for International Carriage by Air (hereafter: *Montreal Convention*)²⁰⁷ deal with the matter of international jurisdiction. Thus in every case it is very important to determine the scope of each legal instrument and it shall be kept in mind that other, more specific instruments take priority and precedence over the Brussels Ibis Regulation, but only on the condition that they deal directly or indirectly with the jurisdiction.²⁰⁸ The CJEU stated:

*the rules governing jurisdiction, recognition and enforcement that are laid down by a convention on a particular matter [...] apply provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimized and that they ensure, under conditions at least as favorable as those provided for by the regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union (favor executionis).*²⁰⁹

[215] However, in practice it might be difficult for national courts to avoid confusion with all the variety of legal documents governing the jurisdiction of courts and to apply the correct instrument in a particular situation.

[216] Two recent cases provide good examples. One of those cases resulted in a reference from the Supreme Court of **Hungary** to the CJEU for a preliminary ruling concerning a refund for plane tickets in the **Flight Refund** case.²¹⁰ The Hungarian court referred to the CJEU to clarify which of three legal instruments – the Brussels Ibis Regulation, European Order for Payment Regulation or Montreal Convention – is applicable to determine the international competence of the court. However, the questions are still pending before the CJEU, and the opinion of the CJEU on the matter is unknown yet.

203 Judgment of the Supreme Court of the Republic of Hungary in the case No Gfv. IX. 30.187/2011.

204 6 October 1982 CJEU judgment in case: No 283/81 C.I.L.F.I.T.

205 6 October 1976 CJEU judgment in case: No 14-76 De Bloos v Bouyercase.

206 United Nations Convention on the Contract for the International Carriage of Goods by Road (CMR). 399 UNTS 189, 1956.

207 Montreal Convention for the Unification of Certain Rules for International Carriage by Air. 2242 U.N.T.S. 309; S. Treaty Doc. No 106-45 (2000).

208 Magnus U., Mankowski P. European Commentaries on Private International Law Brussels I. Regulation, Sellier European Law Publishers, 2012, p.847.

209 4 May 2010 CJEU judgment in the case: No C-533/08 TNT Express Nederland BV v AXA Versicherung AG.

210 27 February 2014 application to the CJEU in case: No C-94/14 Flight Refund.

- [217]** Interrelation with other instruments will be an issue before the CJEU also in the **Gazprom** case, where the opinion of the Advocate General has been already rendered.²¹¹ As discussed below in ¶ [250], the case in the main proceedings concerned the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (further: *New York Convention*) and the Brussels I Regulation.²¹² Even though now Article 73(2) of the new Brussels Ibis Regulation explicitly provides that the Regulation shall not affect application of the New York Convention, nevertheless, the effectiveness and unambiguousness of this norm have yet to be proven in practice.
- [218]** The cases vividly illustrates the complexity of private international law and the reason why national courts sometime are tempted to avoid the use of international private law instruments - alongside national law, judges have to apply not only instruments of EU law, but instruments of international public law as well. Consequently, it can be concluded that difficulties in applying specialized conventions and the Brussels Regulations will occur and grow in the future, thus the opinion of the CJEU will be very useful in this regard.

1.3. Scope of Regulation: “Civil and Commercial Matters”

- [219]** Article 1 of the Brussels Ibis Regulation sets its scope and provides the limits of its application. There have been no major changes compared with the Brussels I Regulation concerning the material scope of application. Both regulations explicitly apply to “civil and commercial matters” and this concept shall be interpreted autonomously and independently. As indicated above in ¶ [173] of this Research, upon request of the **German** court, the CJEU stated that when interpreting the concept “civil and commercial matters” for the purposes of application of the Brussels Convention (also: the Brussels I and Ibis Regulations):

*reference must not be made to the law of one of the states concerned but, first, to the objectives and scheme of the convention and, secondly, to the general principles which stem from the corpus of the national legal systems.*²¹³

- [220]** The Brussels Ibis Regulation does not give any definition of the term “civil and commercial matters”; however, the CJEU has provided a robust interpretation to fill this gap. For example, in a recent case the CJEU was approached by the Senate of the Supreme Court of **Latvia** and in this **flyLAL case** the CJEU *inter alia* ruled that:

*civil and commercial matters must be interpreted as meaning that an action such as that in the main proceedings, seeking legal redress for damage resulting from alleged infringements of EU competition law, comes within the notion of “civil and commercial matters” within the meaning of that provision and, therefore, falls within the scope of that regulation.*²¹⁴

- [221]** Thus the CJEU concluded that the action brought by flyLAL falls under the law relating to tort, delict or quasi delict.²¹⁵ Indeed, such conclusion is reasonable, because in interpreting the term “civil and commercial matters”, other EU civil instruments that are similar in structure and substance shall be taken into account. For example, the Brussels I Regulation’s and Rome II Regulation’s

211 4 December 2014 Opinion of Advocate General Wathelet in the case: No C-536/13 Gazprom OAO.

212 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 330 UNTS 38, 1968.

213 14 October 1976 CJEU judgment in case: No C-29/76 LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol, para. 3.

214 23 October 2014 CJEU judgment in case: No C-302/13 flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS, para. 23.

215 Ibid., para. 28.

substantive scope and provisions shall be consistent²¹⁶ and in accordance with Recital 23 and Article 6 of the Rome II Regulation, the activities prohibited under Articles 101 and 102 of the TFEU are within the scope of “civil and commercial matters.”²¹⁷

[222] However, one should take into account that the different objectives of the instruments may lead to distinct interpretation of civil and commercial matters. As will be shown below in ¶ [222] of this Research, the CJEU does not always support using the Rome II Regulation as a source of interpretation of the Brussels I Regulation. However, so far the CJEU has avoided such methodology in cases where its application increases the risk of the defendant of being sued outside his domicile. This method of reasoning should not prevent consulting the Rome I and Rome II Regulations when determining the scope of the Brussels Ibis Regulation. Interpretation of the scope of the Brussels Ibis Regulation *per se* does not subject the defendant to the risk of litigation outside his domicile.

1.4. Arbitration Exception under Brussels Ibis Regulation

[223] Article 1(2)(d) of the Brussels Ibis Regulation provides that the regulation shall not apply to arbitration. This exemption is of particular significance. First of all, because it is interesting to follow how the CJEU has developed its case law regarding this exclusion, that seems to be clear and simple, however, the practice turned out to be more complicated. Moreover, the Brussels Ibis Regulation has a new Recital 12 dealing with arbitration matters. Therefore, hereafter the Researchers will briefly analyse the impact of the CJEU regarding this exception in the practice of national courts.

[224] This issue was addressed in the **Rich** case by the CJEU in 1991.²¹⁸ The **U.K.** court referred the question to the CJEU, asking whether the dispute regarding validity of the arbitration agreement is within the scope of the Brussels Convention. The CJEU stated:

*it follows that, by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the Contracting parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.*²¹⁹

[225] Thus the Regulation does not cover court proceedings that are ancillary to the arbitration, for example, appointment or dismissal of arbitrators.²²⁰ In addition, other proceedings before Member State courts closely related to arbitration are excluded from the scope of the Brussels I Regulation: orders to parties to arbitrate, fixing the place of arbitration, recognition and enforcement of an arbitration award and its incorporation in a judgment.²²¹

[226] However, court proceedings which are parallel to arbitration fall within the scope of the Regulation according to the **Van Uden** case of the CJEU.²²² In this case Van Uden initiated not only arbitral proceedings, but also applied for interim relief in a state court in connection with the

216 See: Recital 7 of Rome II Regulation.

217 Huber P. (ed). Rome II Regulation: Pocket Commentary. Sellier European Law Publishers, 2011, p.181.

218 25 July 1991 CJEU judgment in the case: No C-190/89 Marc Rich & Co. AG v Società Italiana Impianti PA. In this case an Italian defendant challenged the validity of an arbitration agreement in English court, despite the fact that the Swiss claimant argued that there is a valid arbitration clause in the proceedings between the same parties in Italian court.

219 Ibid., para. 18.

220 Ibid., para. 21.

221 Hartley T. Choice-of-court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention. Oxford University Press, 2013, p. 81. Cf. Briggs A. Private International Law in English Courts. Oxford University Press, 2014, p. 200.

222 17 November 1998 CJEU judgment in the case: No C-391/95 Van Uden Maritime BV, Trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another.

arbitral proceedings. The CJEU concluded that the Brussels Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing an application, even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.²²³

[227] This is one of the few CJEU cases cited in the motivation part of the judgment by the court of **Latvia**. However, the factual background was different. In the case at hand, the claimant asked to secure the claim by seizing movable property, monies in cash and in financial institutions in Latvia and abroad. The main claim was pending in appeal within the same court. The court of appeals agreed with the claimant's submission and stated:

*Taking into consideration [the Brussels I Regulation] and the Court of Justice of European Community decision dated 17 November 1998 in the case Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line and Another (C-391/95) [1998] E.C.R. I- 7091 acknowledges the request for interim measures as grounded [...] thus seizing of funds not only in Latvia, but also abroad.*²²⁴

[228] This case did not involve provisional measures in the context of a dispute relating to a contract with an arbitration clause. It also did not concern the court proceedings in another Member State. Moreover, the Latvian court exercised its jurisdiction to order the provisional measures in other Member State.

[229] Firstly, by way of analogy with the **Van Uden** case, it appears logical to argue that Article 35 of the Brussels Ibis Regulation remains applicable to the cases where parties have – explicitly or implicitly – opted for a jurisdiction clause or when the merits of the case fall within the scope of another exclusive jurisdiction rule.²²⁵ However, Article 35 of the Brussels Ibis Regulation applies only to requests for provisional, including protective measures, filed in other Member State's court, not the one dealing with the substance of the case. Namely, if the same court deals with the merits of the case and protective measures, then Article 35 is not applicable as was in the Latvian case at hand.

[230] Secondly, before applying this Article one should check also the geographical scope, as this article cannot be invoked where the defendant is not domiciled in the EU, except where the substance of the case falls within the scope of the rules on exclusive jurisdictions (Article 24 of the Brussels Ibis Regulation, Article 22 of the Brussels I Regulation) or prorogation of jurisdiction (Article 25 and 26 of the Brussels Ibis Regulation, Article 23 and 24 of the Brussels I Regulation).²²⁶ Therefore in the case at hand there had to be clear identification that the possible seizure would be performed in another Member State.

[231] It is also important to decide whether the case falls within the material scope of this particular provision. In reference to the preliminary ruling of **Germany**, the CJEU ruled that Article 35 applies only to the "civil and commercial matters" as defined in Article 1 of the Brussels Ibis Regulation,²²⁷ thus if the case is outside the scope of the Regulation itself, Article 35 cannot be applied.

223 Ibid., para. 48. See also: 26 March 1992 CJEU judgment in the case: No C-261/90 Reichert and Kockler v Dresdner Bank, para. 32: *it must be noted in that regard that provisional measures are not in principle ancillary to arbitration proceedings, but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such, but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by their own nature, but by the nature of the rights which they serve to protect.*

224 25 March 2014 Civil Case Collegium of Riga Regional Court decision in the case No C30171108, unpublished.

225 Magnus U., Mankowski, P. European Commentaries on Private International Law Brussels I. Regulation, Sellier European Law Publishers, 2012, p.614.

226 Ibid., p.612.

227 27 March 1979 CJEU judgment in the case: No143/78 Jacques de Cavel v Louise de Cavel; 31 March 1982 CJEU judgment in the case: No C-25/81 C.H.W. v G.J.H.

- [232]** In the above cited case of the Latvian court, the main proceedings concerned the recognition of the material intellectual rights, thus it may fall within the jurisdiction of the Regulation, but there can be exceptions, too.²²⁸
- [233]** Taking into consideration the case analysed above, before referring to CJEU case law, it is very important to evaluate whether the particular case of the CJEU is indeed applicable in the domestic case at hand. It should be assessed whether the case falls within the scope of the CJEU case and whether there are similar circumstances. Moreover, it would be advisable that the court make reference to the relevant article of the regulation and the particular paragraph of the CJEU judgment in order to understand the reasoning behind the reference.
- [234]** To continue evaluating the arbitration exception in the Brussels Regulations, another case of the Latvian court shall be mentioned, particularly because practicing lawyers indicated to the Researchers that not only this exception, but also matters of interim measures, need additional consideration in **Latvia**.²²⁹
- [235]** In this particular case, the court rejected the application for securing the claim before commencement of the arbitration in London, stating that it has no jurisdiction, as the possible defendant is not situated in Latvia, and there is no property of the debtor in the territory of the court, as the monies in the bank account cannot be considered property.²³⁰
- [236]** The claimant re-submitted the application stating that the court has jurisdiction, because Section 139(2) of the Civil Procedure Law provides that if the parties have agreed to submit the dispute to an arbitration court, an application on securing the claim prior to commencement of the arbitral proceedings shall be submitted to a court in accordance with the location of the debtor or their property.²³¹ Moreover, in accordance with the **Van Uden** and **Denilauler**²³² cases:
- the courts of the place or, in any event, of the Contracting State —where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorized.*²³³
- [237]** This application and presumably, implicitly, also the jurisdiction, was accepted, but in its decision the court did not evaluate the matter of jurisdiction and did not mention the **Van Uden** case.²³⁴ But it would have been advisable that the court addresses questions of jurisdiction, as the decision was closely connected with the arbitration proceedings in the other Member State and can influence them, even though it is up to the court to decide on granting the interim measures in accordance with the national procedural law.²³⁵

228 On interaction between Article 24(4) of Brussels Ibis Regulation (former Article 22(4) of Brussels I Regulation) and Article 35 of the Brussels Ibis Regulation (formerly Article 31 of Brussels I Regulation) see: 12 July 2012 CJEU judgment in the case: No C-616/10 Solvay SA v Honeywell Fluorine Products, Europe BV, Honeywell Belgium NV, Honeywell Europe NV. For example, para. 51 states: “Article 22(4) of Regulation No 44/2001 must be interpreted as not precluding, in circumstances such as those at issue in the main proceedings, the application of Article 31 of that regulation.”

229 According to the questionnaires distributed within this project 59,1% of respondents identified that there are problems with granting of the interim measures and enforcing foreign court decisions on interim measures in the courts of Latvia.

230 24 September 2014 Riga City Ziemeļu District Court decision in the case: No 3-10/0067-14/11, unpublished. Similar decision with similar reasoning: 17 June 2010 Civil Case Collegium of Riga Regional Court decision in the case: No CA-3378-10/22, unpublished.

231 Civil Procedure Law: Law of the Republic of Latvia, Latvijas Vēstnesis [Latvian Herald], No. 1, 14.01.1993.

232 21 May 1980 CJEU judgment in the case: No 125/79 Bernard Denilauler v SNC Couchet Frères, para. 16. Preliminary ruling asked by the **German** court.

233 17 November 1998 CJEU judgment in the case: No C-391/95 Van Uden Maritime BV, Trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another, para. 39.

234 26 September 2014 Riga City Ziemeļu District court decision in the case No 3-12/00112-14/9 unpublished.

235 See: 6 June 2002 CJEU judgment in the case: No C-80/00 Italian Leather SpA v WECO Polstermöbel GmbH & Co, para. 42-43. Preliminary ruling asked by **German** court.

- [238]** Another source of constant tension between the CJEU and national courts, especially in the **U.K.**, concerns **West Tankers** judgment of the CJEU.²³⁶ There the CJEU ruled that an English court cannot issue an anti-suit injunction in order to prevent an alleged party to an arbitration agreement from litigating the dispute in Italian courts. It implicitly follows from the judgment that to a certain degree arbitration falls within the scope of the Brussels I Regulation. Yet, the precise scope and meaning of the judgment remains ambiguous.
- [239]** In the years after the **West Tankers** judgment, the English judiciary has struggled to clarify its different effects. English courts have distinguished between the **West Tankers** judgment on facts in a number of decisions. The arbitral tribunal hearing the dispute being at the heart of the **West Tankers** judgment interpreted the latter as preventing it from hearing the case simultaneously with the court in Italy.²³⁷ Since the arbitration proceedings were initiated in England, the plaintiff brought setting-aside proceedings before the English court against the arbitration award, arguing that the tribunal had wrongly refused to continue hearing the case. The English court interpreted the **West Tankers** judgment to conclude that in **West Tankers** the CJEU was dealing with a conflict between two courts. The judgment had no effect on arbitration proceedings and jurisdiction of an arbitration tribunal. Thus, the tribunal had no grounds to refuse continuing proceedings.
- [240]** The decision correctly applies the **West Tankers** judgment. Its precise scope remains ambiguous; however, to assume that the CJEU had principally changed the scope of the Brussels I Regulation, subjecting arbitration tribunals to *lis pendens* principle, would require a clear statement from the CJEU. Currently, Recital 12 of the Brussels Ibis Regulation explicitly provides for priority enforcement of arbitration awards over judgments, thus indirectly confirming the possibility of parallel proceedings between courts and arbitration tribunals.
- [241]** **West Tankers** was further distinguished in **Toyota Tsusho Sugar Trading Ltd**.²³⁸ The defendant initiated proceedings in the **U.K.**, requesting a ruling on validity of an arbitration agreement. The crux of the case was whether a court in England was competent to determine the validity of an arbitration agreement, taking into account related proceedings in Italy.
- [242]** The Commercial Court accepted the jurisdiction. The court looked at the **West Tankers** and **Rich**²³⁹ judgments to interpret the position of the CJEU in respect to arbitration proceedings. Without specifying how the court read the aforementioned cases, the court concluded that it was *"not being asked to interfere with the functions of the Italian court as no form of anti-suit injunction is being sought against Prolat. This court is being asked to determine whether or not there is an arbitration agreement and to make a declaration in light of its conclusion."*²⁴⁰
- [243]** This solution also seems correct. Foremost, the regulation does not apply to arbitration proceedings. Likewise, as indicated above in ¶ [225] other proceedings before Member State courts closely related to arbitration are excluded from the scope of the Brussels I Regulation.
- [244]** Another interesting case from **Sweden** also concerns the application of **West Tankers**. First instance court by the reference to this CJEU case noted that the claimant, which considers that the agreement is void, inoperative or incapable of being performed, should not be barred from access to the court before which it brought proceedings under Article 5(3) of the Brussels I Regulation

236 10 February 2009 CJEU judgment in case: NoC-185/07. Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.

237 04 April 2012 Queen's Bench Division (Commercial Court) judgment in case: West Tankers Inc v Allianz SpA (formerly Riunione Adriatica Scurta) [2012] EWHC 854 (Comm).

238 7 November 2014 High Court Of Justice Queen's Bench Division (Commercial Court) judgment in case: Toyota Tsusho Sugar Trading Ltd v Prolat SRL [2014] EWHC 3649 (Comm).

239 25 July 1991 CJEU judgment in the case: No C-190/89 Marc Rich & Co. AG v Società Italiana Impianti PA.

240 Ibid., para. 17.

and should not be deprived of a form of judicial protection to which it is entitled. However, in the particular case the court found that the respective agreement for jurisdiction is the shareholders agreement, and Swedish courts do not have jurisdiction in this regard.²⁴¹

[245] However, the *Svea hovrätt* (Svea Court of Appeals, **Sweden**) revised the decision of the first instance court.²⁴² The Svea Court of Appeals decided that according to the Swedish doctrine and preparatory works to the Arbitration Act, the Swedish court shall have jurisdiction to entertain proceedings concerning the validity of an arbitration agreement if arbitration proceedings under the Agreement shall take place in Sweden. The district court found that such conclusion is consistent with the CJEU judgment in **West Tankers** and returned the case for further proceedings of all other supporting grounds for inadmissibility.

[246] To conclude, after the **West Tankers** judgment certain aspects of the scope of arbitration exception remain unclear. Particularly, whether the Brussels I Regulation “entitles a national court of a Member State to deny recognition and enforcement of a judgment delivered in another Member State despite the existence of an arbitration agreement.”²⁴³ Some scholars have gone so far as to say that under truly exceptional circumstances, when the arbitration tribunal is attempting to prevent parties from parallel litigation, e.g., by ordering a penalty, the Brussels I Regulation applies even to arbitration proceedings.²⁴⁴

[247] As for courts, then according to one reading, every time a Member State court decides the case on the point of material law, these proceedings and the respective judgment are covered by the Brussels I Regulation.²⁴⁵ The practical consequence of such solution is not favorable to arbitration. It follows that every time a court by a mistake or wilfully ignores an arbitration agreement and resolves the dispute, its judgment is binding on every other court in the EU, while proceedings fall within the scope of *lis pendens* rules, preventing other courts from deciding the case. However, in the current state of CJEU case law, even though these conclusions may be considered uncertain.²⁴⁶

[248] Conversely, in cases where the object of the proceedings concerns arbitration, the proceedings and the final judgment fall outside the scope of the Brussels I Regulation.²⁴⁷ While in all those cases, where the object of proceedings is arbitration, the proceedings fall outside the scope of *lis pendens* under the Brussels I Regulation, and such judgment is not enforceable under the regulation.²⁴⁸ This understanding is also not universally accepted. For example, the Court of Appeals of England and Wales (the **U.K.**) has ruled that a Spanish judgment finding that a bill of lading did not incorporate an arbitration agreement is within the scope of the Brussels I Regulation.²⁴⁹

[249] New Recital 12 of the Brussels Ibis Regulation is intended to clarify the arbitration exception in the regulation as well as “the recital seeks to avoid the consequences of the predominant interpretation of the arbitration exclusion made apparent by the ECJ in the **West Tankers** judgment.”²⁵⁰

241 12 April 2010 Svea Court of Appeals judgment in case: Ö9250-09 (RH 2010:75). In this case Joint Stock Company *Acron* (Russia) brought an action before Stockholm District Court against *Yara International ASA* (Yara), claiming that the district court should determine that Acron was not bound by an arbitration agreement with Yara, in consequence of which the arbitral tribunal in the Stockholm Chamber of Commerce has no jurisdiction to review disputes between the parties. Yara had initiated arbitral proceedings against Acron in the Stockholm Chamber of Commerce.

242 12 April 2010 Svea hovrätt judgment in case: Ö9250-09, (RH 2010:75).

243 Reghizzi Z. C. ‘Mutual Trust’ and ‘Arbitration Exception’ in European Judicial Area: The West Tankers Judgment of the ECJ. In: Yearbook of Private International Law. Volume XI. 2009. Sellier European Law Publishers, 2010, p. 447.

244 Hartley T. The Brussels I Regulation and Arbitration. In: International and Comparative Law Quarterly. Volume 63, 2014, p. 856.

245 Ibid., p. 854.

246 Briggs A. Private International Law in English Courts. Oxford University Press, 2014, p. 201.

247 Hartley T. The Brussels I Regulation and Arbitration. In: International and Comparative Law Quarterly. Volume 63, 2014, p. 849, 860.

248 Ibid.

249 17 December 2009 Court of Appeal (Civil Division) judgment in case: National Navigation Co v Endesa Generacion SA (The Wadi Sudr) [2009] EWCA Civ 1397.

250 Wilhelmssen L.H. The Recast Brussels I Regulation and Arbitration: Revisited or Revised? Arbitration International, Kluwer Law International, Vol. 30, Issue 1, 2014, p. 182.

- [250] The Advocate General of the CJEU has already addressed this recital in the **Gazprom** case, as he considered this novelty as retroactive interpretation of the law, explaining “*how that exclusion must be and always should have been interpreted.*”²⁵¹ The Advocate General also stated the **West Tankers** judgment “*contrasted sharply with three earlier judgments of the court, namely the judgments Hofmann, Rich and Van Uden.*”²⁵² Thus in the opinion of the Advocate General, the fact that an arbitral award contains an anti-suit injunction is not sufficient grounds for refusing to recognize and enforce it in accordance with the New York Convention.
- [251] Even though the Advocate General’s Opinion is not binding, “*it is more presumably most correct to characterize the Advocate General’s Opinion as being a source of law which can and should be taken account of when clarifying the state of the law, much in the same way as writings of leading legal theorists.*”²⁵³ Thus in this case it will be fascinating to see how much the CJEU will use the argumentation of the Advocate in its ruling.
- [252] Notwithstanding the opinion of the Advocate General, scholars support diverse opinions. For some, Recital 12 of the Brussels Ibis Regulation simply restates the existing law, having no effect on validity of previous CJEU case law, including **West Tankers**.²⁵⁴ Others claim that Recital 12 will erase the negative effects of **West Tankers**.²⁵⁵ This only confirms that without further guidance from the CJEU, addition of Recital 12 to the Brussels Ibis Regulation hardly clarifies the scope of the arbitration exception.
- [253] Still it shall be more elaborated in detail whether an anti-suit injunction is in compliance with the principle of mutual trust of Member States’ courts, bearing also in mind that arbitrators are not bound by this principle. In this regard it will be interesting to follow the reasoning of the CJEU whether the Court can actually deal with interpretation of the New York Convention and whether the arbitral award including the anti-suit injunction is a matter of the Brussels I Regulation or clearly an issue of the New York Convention.
- [254] At the current state of play, as regards the arbitration exception of the Brussels I Regulation and the Brussels Ibis Regulation, there is no one correct answer. National courts could attempt to follow the principle that proceedings, whose object is substantial resolution of a dispute falling within the scope of the Brussels I Regulation or the Brussels Ibis Regulation, are covered by these instruments, even when the ancillary issues are related to arbitration. While in cases where the object of litigation is more related to arbitration, the proceedings are not covered. In principle, arbitration tribunals remain free from Brussels I Regulation or Brussels Ibis Regulation, thus arbitration proceedings do not trigger application of the *lis pendens* principle under the Brussels I Regulation or the Brussels Ibis Regulation. Nevertheless, the legal framework remains tangled, though it is possible that the CJEU judgment in **Gazprom** case will clarify things.

1.5. Prorogation of Jurisdiction (Multi-Choice Clauses)

- [255] Article 25 of the Brussels Ibis Regulation (Article 23 of the Brussels I Regulation) incorporates the principle of parties’ autonomy, i.e. parties are free to agree on jurisdiction, taking into consideration the rules of exclusive (Section 6 of the Brussels Ibis Regulation) and protective jurisdiction

251 4 December 2014 Opinion of Advocate General Wathelet in the case: No C-536/13 Gazprom OAO, para. 89.

252 Ibid., paras. 98-99.

253 Broberg M., Fenger N. Preliminary References to the European Court of Justice. Oxford University Press, 2014, p.454.

254 Hartley T. The Brussels I Regulation and Arbitration. In: International and Comparative Law Quarterly. Volume 63, 2014, p. 861.

255 Wilhelmssen L.H. The Recast Brussels I Regulation and Arbitration: Revisited or Revised? Arbitration International, Kluwer Law International, Vol. 30, Issue 1, 2014, p. 182.

(Sections 3-5).²⁵⁶ There are slight changes in the text on Article 25(1) of the Brussels Ibis Regulation. Namely, the Brussels I Regulation recognized jurisdiction agreements only where at least one party had domicile in a Member State. The court of the Member State had to be specified. However, the new version of the Article in the regulation does not include the requirement on parties' domicile, thus this Article is applicable even if none of the parties to the jurisdiction contract is domiciled in the Member State. Hence, the recast widens the scope of the regulation.

[256] Furthermore, Article 25(1) of the Brussels Ibis Regulation contains the reservation that the jurisdiction agreement shall be valid under the law of the particular Member State. This shall be read together with Recital 20, providing that the applicable law to consider the validity of the jurisdiction clause is the law of the Member State set in the jurisdiction clause.

[257] In addition, in comparison with the Brussels I Regulation, the Brussels Ibis Regulation has a new part providing that the agreement on jurisdiction is independent of the other terms of the contract, and it can survive the event if the validity of the main agreement is contested (Article 25(5)).

[258] Even though the CJEU developed a full set of principles on validity of jurisdiction clauses and their incorporation in the main contract,²⁵⁷ still, topical is the question regarding the multi-choice and hybrid jurisdiction clauses. For example, it is still uncertain how a new addition to Article 25(1) regarding the governing law of the jurisdictional clauses will be applied to clauses where the parties have agreed on several forums. Hopefully, it will be addressed by future case law, as these issues already have been a concern of Member States before being recast.

[259] For instance, one of the courts of the first instance of **Hungary** had tried to refer to the CJEU for a preliminary ruling on clarification of Article 23(1) of the Brussels I Regulation, but to no avail, as according to Article 53(2) of the Rules of Procedure, the CJEU found the request for a preliminary ruling manifestly inadmissible.²⁵⁸ Nonetheless, some useful conclusions can be drawn even from the CJEU order on inadmissibility.

[260] In the event of a dispute, parties could choose either to apply for arbitration, or to the ordinary courts either of **Germany** or **Hungary**, as set out in the various parts of the contract. One party brought a statement of claim to the first instance court of Hungary. In the court's view, the parties had made conflicting provisions regarding court's jurisdiction, thus it undertook an examination of jurisdiction on its own initiative. In that context the Hungarian court referred to the CJEU the following question:

How should Article 23(1) of Regulation No 44/2001, relating to the court which is to have exclusive international jurisdiction, be interpreted where, in the terms and conditions of the contract, the contracting parties which are in dispute have conferred jurisdiction to hear disputes relating to that contract to various courts? Furthermore, is the applicant free to choose between the court designated which has exclusive jurisdiction and the court which has alternative jurisdiction, and can it be concluded that the court which is hearing the case has exclusive international jurisdiction?

[261] At the very outset of the order the CJEU noted that the **Hungarian** court had failed to present the facts on which the two questions are based and to set out the existence of a possible connection between the subject-matter of that dispute and a specific contractual term included in the contract at issue. Nonetheless, the CJEU made some assumptions, which, the CJEU emphasized, could not be derived from the order for reference, and tried to provide at least a few useful guidelines.

256 See also: Recital 19 of the Brussels Ibis Regulation.

257 Magnus U., Mankowski P. European Commentaries on Private International Law Brussels I. Regulation. Sellier European Law Publishers, 2012, p. 445.

258 6 November 2014 CJEU order in case: No C-366/14 Herrenknecht.

[262] Firstly, if such connection would have been identified, “the referring court would have jurisdiction in accordance with the principle of recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction.”²⁵⁹ Secondly, the CJEU found that there was also no information concerning the possible challenge by the parties of the referring court’s jurisdiction. Thirdly, the referring court failed to set out sufficiently clearly and precisely the reasons which have led it to raise the question of interpretation of EU law. In those circumstances, the CJEU considered that it is unable to give a useful response to the questions referred.

[263] Among other things, this case is a valid example of the fact that the order for inadmissibility of the case is useful from the point of view of case law development. Even if the order does not provide an explicit and detailed description on how the CJEU came to the result in the above-mentioned situation, the answer itself might be relevant for the referring court and also for future issues concerning contracts with multiple choices of jurisdiction.

1.6. Jurisdiction in Contracts (Article 7(1)(b) of Brussels Ibis Regulation)

[264] There are no fundamental changes in the Chapter “Jurisdiction” of the Brussels Ibis Regulation, with the exception of additional articles regarding *lis pendens* involving third states. Therefore, in general, the former interpretation made by the CJEU regarding the jurisdiction issues can be used regarding the new Brussels Ibis Regulation. And indeed, Article 5 of the Brussels I Regulation (Article 7 of the Brussels Ibis Regulation) on special jurisdiction has been extensively discussed in the CJEU judgments in the past five years.

[265] Three judgments of the CJEU have been rendered on Article 5(1)(b) of the Brussels I Regulation (Article 7(1)(b) of the Brussels Ibis Regulation), one after another within 8 months,²⁶⁰ thus showing that it is very topical provision and needs clarification in certain cases. The said article of the regulation provides that a person domiciled in a Member State may, in another Member State, be sued in the case of provision of services, in the place in a Member state where under the contract the services were provided or should have been provided.

[266] First, it shall be noted that the concept “services” shall be interpreted autonomously and in accordance with Article 56 and 57 of the TFEU.²⁶¹ “The concept of service implies, at the least, that the party who provides the service carries out a particular activity in return for remuneration,”²⁶² thus this term shall be interpreted broadly.

[267] In general, jurisdiction should be determined by reference to the place with the closest linking factor between the contract and any court.²⁶³ However, in the case of carriage of passengers there are several places at which the services are actually provided. Therefore in the **Rehder** case the court of **Germany** wanted to know:

*where a single place of performance is to be determined: what criteria are relevant for its determination; is the single place of performance determined, in particular, by the place of departure or the place of arrival of the aircraft?*²⁶⁴

259 Ibid., para. 20.

260 See: 9 July 2009 CJEU judgment in the case: No C-204/08 Peter Rehder v Air Baltic Corporation; 25 February 2010 CJEU judgment in the case: No C-381/08 Car Trim GmbH v KeySafety Systems Srl; 11 March 2010 CJEU judgment in the case: No C-19/09 Wood Floor Solutions Andreas Domberger GmbH.v Silva Trade SA.

261 23 April 2009 CJEU judgment in the case: No C-533/07 Falco Privatstiftung, Thomas Rabitsch v Gisela Weller Lindhorst, para. 34.

262 Ibid., para. 29.

263 3 May 2007 CJEU judgment in the case: No 386/05 Color Drack GmbH v Lexx International Vertriebs GmbH, para. 40.

264 9 July 2009 CJEU judgment in the case: No C-204/08 Peter Rehder v Air Baltic Corporation, para. 25.

- [268]** Despite the fact that the Article refers to “*place*” in singular, the CJEU noted that both the place of arrival and the place of departure of the aircraft must be considered, in the same respect, as the place of provision of the services which are the subject of an air transport contract.²⁶⁵
- [269]** Even though the case concerned an air-carrier registered in **Latvia**, Latvian courts have not made reference to the **Rehder** case yet, as probably “*the place of the registered office or the principal place of establishment of the airline does not have the necessary close link to the contract.*”²⁶⁶ However, the **German** court in the main proceedings of the **Rehder** case saw it differently: in its view, an overall analysis of the circumstances of the case led to Riga, **Latvia**, as the place where the principal elements of the case were located (sale of the flight ticket, reservation of a seat, provisions of aircraft and crew, organization and planning of the transport).²⁶⁷ It shall be noted that this observation by the German court was done before referring the preliminary question to the CJEU and by the lower court instance. The Researchers are not aware of the German court’s reasoning in the main proceedings after the CJEU judgment.
- [270]** Contracts for the transport of goods or passengers come within the broad definition of contracts of services, thus there is no differentiation between either types of carriage or between different modes of transportation.²⁶⁸ Moreover, contracts for transportation are more complicated than other contracts for services. Possibly therefore the conclusions of the **Rehder** case of the CJEU regarding the airline carriage were also applicable to maritime vessels in the opinion of the court in **Sweden**. Namely, in a case before Göta Court of Appeal (*Göta hovrätt*) the court decided on the jurisdiction of Swedish courts in a contract-related dispute regarding time charter of maritime vessels.²⁶⁹
- [271]** The court considered that the plaintiff has the option to choose a forum other than the defendant’s domicile as long as there is a close link between the court and the action. The court assessed the closest connection, bearing in mind that the time charter contract foresees a vast area of the service provided. Referring to the **Color Drack** judgment²⁷⁰ the court concluded that Article 5(1)(b) of the Brussels I Regulation should apply, even if the contractual fulfilment resort is situated on several locations.
- [272]** Moreover, the court referred to the conclusions of the CJEU in the **Rehder** judgment and pointed out that, unlike deliveries of goods to different locations, which are distinct and quantifiable operations for the purpose of determining the principal delivery on the basis of economic criteria, transport consists, by its very nature, of services provided in an indivisible and identical manner from the place of departure to that of arrival of the vessel. Therefore a separate part of the service which is the principal service, which is to be provided in a specific place, cannot be distinguished in such cases on the basis of an economic criterion.²⁷¹ On these grounds, the court decided that it is impossible to identify a closest connection in the present case, and Article 5(1)(b) of the Brussels I Regulation is not applicable. Thus the **Rehder** judgment was used to justify exclusion of the particular case from the scope of Article 5(1)(b) of the Brussels I Regulation.

265 Ibid., para. 43.

266 Ibid., para. 39.

267 OLG Munchen, NJW-RR 2007, 1428, para. 18. Cited from Lein E. Modern Art- The ECJ’s Latest Sketches of Art.5 No1 lit b Brussels I Regulation. Yearbook of Private International Law, Vol.12, 2010, p.575.

268 Magnus U., Mankowski P. European Commentaries on Private International Law Brussels I. Regulation, Sellier European Law Publishers, 2012, p. 191.

269 17 December 2009 Göta hovrätt judgment in case: Ö1840-09 (RH 2010:23).

270 3 May 2007 judgment in case: No C-386/05 Color Drack GmbH v Lexx International Vertriebs GmbH.

271 9 July 2009 CJEU judgment in case: No C-204/08 Peter Rehder v Air Baltic Corporation, particularly para. 42.

- [273] To continue with application of Article 5(2) of the Brussels I Regulation, it shall be indicated that the multiplicity of places of performance has recently been the crux of the decision by the **U.K.** Commercial Court in the **Canyon** case.²⁷² To resolve the case under Article 5(1)(a) or 5(1)(b), the court had to answer three consequential questions. Firstly, whether the obligation in question amounted to provision of services? In that case, jurisdiction would have been invested into courts “*where, under the contract, the services were provided or should have been provided. . .*”²⁷³ None of the works were carried out in England, thus finding such a contract would have defeated the **U.K.** jurisdiction. Secondly, if the contract did not qualify as provision of services, then what was the characteristic performance? Thirdly, if the applicable law allowed for a number of alternative places of performance, which one determined jurisdiction?
- [274] Arguing on these points, parties alluded both to English cases and CJEU practice. Notably, party arguments mentioned the **Krejci Lager** judgment,²⁷⁴ where the CJEU qualified storage of goods as provision of services and the **Corman-Collins** judgment,²⁷⁵ where the CJEU qualified the distribution agreement as a provision of services. This line of arguments was used by the Commercial Court to distinguish the current case. In the court’s own words,
- the cited cases concern conventional commercial arrangements such as distribution agreements and matters such as how to classify an agreement involving both goods and services. The vocabulary of and assumptions behind these cases are far removed from the sort of obligations arising under the alleged contract. The assumption of the obligation to pay is not what one would usually describe as a contract for goods or services and I do not consider it to be so here. I therefore conclude that 5(1)(b) does not apply.*²⁷⁶
- [275] The negative answer on application of Article 5(1)(b) opened the way for application of Article 5(1)(a), which serves as the general provision in relation to the former. According to CJEU practice, the place of performance of obligation in question under Article 5(1)(a) is determined by the private international law of the forum.²⁷⁷ Parties agreed that the contract is governed by English law that established two alternative places of performance, either Scotland or England.
- [276] In their arguments the parties relied on different cases from the CJEU practice to argue whether only one place of performance must exist for the purposes of Article 5(1)(a). The Commercial Court commented only on a few of them, building on its own reasoning by distinguishing between them. Firstly, the defendant had relied on the wording from the **Besix** judgment that “*a single place of performance for the obligation in question must be identified.*”²⁷⁸ He read this wording to mean that once there are multiple places of performance, jurisdiction under Article 5(1)(a) is non-existent.
- [277] The Commercial Court (the **U.K.**) put this citation in context by looking at the policy of the judgment and its treatment in later practice of the CJEU. The Commercial Court believed that in the **Besix** case, the CJEU attempted to avoid granting jurisdiction to multiple courts due to the multiplicity of places of performance; thus the meaning of the court’s language was to identify

272 27 November 2014 High Court Of Justice Queen’s Bench Division (Commercial Court) judgment in case: Canyon Offshore Ltd v GDF Suez E&P Nederland BV [2014] EWHC 3810 (Comm). According to the contract between Dutch companies GDF and Cecon, Cecon undertook an obligation to transport and install pipelines at GDF’s gas and oil fields. Cecon subcontracted a Scottish company, Canyon. When Cecon was unable to perform its obligations towards Canyon, GDF informed Canyon that it is willing to pay it on behalf of Cecon. This allowed Canyon to claim direct payment from GDF at High Court (Commercial Court).

273 Ibid., para. 26.

274 14 November 2013 CJEU judgment in case: No C469/12 Krejci Lager & Umschlagbetriebs GmbH v Olbrich Transport und Logistik GmbH.

275 19 December 2013 CJEU judgment in case: No C-9/12 Corman-Collins SA v La Maison du Whisky SA.

276 27 November 2014 High Court Of Justice Queen’s Bench Division (Commercial Court) judgment in case: Canyon Offshore Ltd v GDF Suez E&P Nederland BV [2014] EWHC 3810 (Comm), para. 30.

277 6 October 1976 CJEU judgment in case: No 12/76 Industrie Tessili Italiana Como v Dunlop AG.

278 19 February 2002 CJEU judgment in case: No C-256/00 Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & KG (Plafog), paras. 29 and 32.

the place of performance having the closest connection between the dispute and the court. The support for such conclusion was sought in later practice of the CJEU, deciding on Article 5(1)(b) of the Brussels I Regulation. In the **Color Drake** judgment,²⁷⁹ the CJEU determined the court with the closest connection, even though there were multiple places of performance in one Member State. In the **Rehder** judgment,²⁸⁰ the CJEU found that the airline might be sued in the court of the place where the aircraft took off or the place of its landing, even if both was located in different Member States. In the **Wood Floor Solutions** judgment²⁸¹ the CJEU determined jurisdiction by reference to the place where the main provision of services took place.

[278] The foregoing cases interpreted Article 5(1)(b) and not Article 5(1)(a) of the Brussels I Regulation. Nonetheless, in the eyes of the Commercial Court, it was inconceivable that the CJEU would have never referred to **Besix**, if the latter established a clear-cut rule that under Article 5(1)(a) an obligation having multiple places of performance would prevent establishing residual jurisdiction under Article 5. The Commercial Court then turned its attention to the underlying principle Article 5: proximity and certainty, arguing that defendant could have foreseen that it will be sued either at its domicile in the Netherlands or England and Scotland alike. Thus, Canyon had a choice to bring a case in England or Scotland, based on Article 5(1)(a). At the same time, the Commercial Court rejected a suggestion of claimant to refer to the CJEU, noting that the Court of Appeals could do so, if necessary.

[279] In the **Canyon** case, the Commercial Court ventured into uncharted territory, without a foolproof answer, at least until further clarifications by the CJEU. However, the existing practice of the CJEU is certainly open-ended. As it was said before, in the **Besix** judgment, the CJEU in a number of paragraphs emphasized that under Article 5(1)(a) only one place of performance is permissible. However, **Besix** involved a negative obligation having no territorial limitations, thus application of Article 5(1)(a) led to universal jurisdiction, i.e. every Member State would have had jurisdiction. Such an approach would sacrifice legal certainty. Moreover, in that case the applicable law provided for no place of performance whatsoever, since from the point of view of material law, a negative obligation requires no actual performance.

[280] Cross-border trade or commerce is by far the most important special head of jurisdiction contained in Article 7 of the Brussels Ibis Regulation, since it provides a special forum in contract, i.e. in the main instrument of commerce.²⁸² However, as can be seen from the case law of CJEU and national courts, special jurisdiction in contracts is not such a simple issue.

1.7. Jurisdiction in Non-Contractual Obligations (Article 7(2) of Brussels Ibis Regulation)

[281] Article 7(2) of the Brussels Ibis Regulation (Article 5(3) of the Brussels I Regulation) provides for special jurisdiction in matters of tort, delict or quasi-delict on the courts of the place where the harmful event occurred or may occur. The CJEU has addressed this norm in seven cases within

279 3 May 2007 CJEU judgment in case: No C-386/05 Color Drack GmbH v Lexx International Vertriebs GmbH.

280 9 July 2009 CJEU judgment in case: No C-204/08 Peter Rehder v Air Baltic Corporation.

281 11 March 2010 CJEU judgment in case: No C-19/09 Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA.

282 Magnus U., Mankowski P. European Commentaries on Private International Law Brussels I. Regulation, Sellier European Law Publishers, 2012, p. 119.

the last five years.²⁸³ Both the extensive practice of the CJEU in this regard as well as observations by the Researchers lead to the conclusion that it is quite difficult for national courts to determine whether the legal relationship between the parties has arisen from contract or tort.

[282] This issue was at the core of the reference for a preliminary ruling from the Supreme Court of **Hungary** to the CJEU in the **OTP Bank case**.²⁸⁴ The Hungarian court wanted the CJEU to clarify whether the claim of OTP Bank should be considered as arising from contractual relationship or tort.

[283] The CJEU confirmed that the actions described should be considered as tort:

*An action such as that in the main proceedings, in which national legislation renders a person liable for the debts of a company which he controls, where that person did not comply with the reporting obligations following the acquisition of that company, cannot be regarded as concerning 'matters relating to a contract' for the purposes of Article 5(1)(a) of [the Brussels I regulation]."*²⁸⁵

[284] This judgment of the CJEU is in line with the rest of the case law on Article 5(1)(a) of the Brussels I Regulation regarding the contractual nature of the matter. The CJEU once more emphasized that the liability has to derive from "*obligations freely assumed*" by one party towards another - there is no such freely assumed obligation when the claim is based on a provision of national law imposing a liability on the controlling shareholder of a corporation for the debts of such corporation in case of its failure to disclose the acquisition of control to the commercial register.²⁸⁶

[285] In its final judgment, the Supreme Court of **Hungary** referred to the judgment of the CJEU, stating that the payment obligation in the case at hand did not arise from a contract, but from the law. Moreover, the Hungarian Supreme Court also mentioned another CJEU case – the ÖFAB case – according to which liability in tort, delict or quasi-delict can arise only on condition that a causal connection can be established between the damage and the event in which that damage originates.²⁸⁷ Therefore the Supreme Court ruled that there is no tort under Article 5(3) of the Brussels I Regulation in the case at hand, and Hungarian courts do not have jurisdiction to decide the case.²⁸⁸

[286] Also the **U.K.** courts have dealt with interpretation of Article 5(3) of the Brussels I Regulation and with situation when the case of CJEU has been applied to different factual circumstances. A former client of the carteliser attempted to establish jurisdiction in England, where the carteliser was domiciled.²⁸⁹ The carteliser relied on the notion of indirect financial loss, to claim that no jurisdiction can be based on Article 5(3) if the claimant has purchased a product from a subsidiary:

283 5 June 2014 CJEU judgment in case: No C-360/12 Coty Germany GmbH v First Note Perfumes NV; 3 April 2014 CJEU judgment in case: No C-387/12 Hi Hotel HCF SARL v Uwe Spoering; 13 March 2014 CJEU judgment in case: No C-548/12 Marc Brogssitter v Fabrication de Montres Normandes EURL and Karsten Fräßdorf; 18 July 2013 CJEU judgment in case: No C-147/12 ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV; 16 May 2013 CJEU judgment in case: No C-228/11 Melzer v MF Global UK Ltd.; 15 March 2012 CJEU judgment in case: No C-292/10 G v Cornelius de Visser; 25 October 2011 CJEU judgment in joined cases: No C-509/09 and C-161/10 eDate Advertising GmbH v X; Olivier Martinez and Robert Martinez v MGN Limited.

284 17 October 2013 CJEU judgment in case: No C-519/12 OTP Bank Nyilvánosan Működő Részvénytársaság v Hochtief Solution AG.

285 Ibid.

286 Kindler, P. Corporate Group Liability between Contract and Tort under the Brussels I Regulation. In: Praxis des Internationalen Privat- und Verfahrensrechts. Vol.6, 2014, p.486.

287 18 July 2013 CJEU judgement in case: No C-147/12 ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV.

288 4 February 2014 Judgment of the Supreme Court of Republic of Hungary in the case No Gfv. VII.30.319/2013/7, unpublished.

289 20 November 2013 Court of Appeal (Civil Division) judgment in case: Deutsche Bahn AG v Morgan Advanced Materials Plc (formerly Morgan Crucible Co Plc) [2013] EWCA Civ 1484.

which was not an addressee of the Commission's infringement decision could not be relied upon by the purchaser in order to found jurisdiction under Article 5(3) with respect to a claim to recover such damage, or compensation, from the cartelist.²⁹⁰

[287] The court rejected such reading of CJEU case law, through interpretation of the **Dumez** judgment.²⁹¹ Notably, in the **Dumez** case it is said that:

*It follows from the foregoing considerations that, although by virtue of a previous judgment of the Court (in Mines de potasse d'Alsace), the expression "place where the harmful event occurred" contained in Article 5(3) of the Convention may refer to the place where the damage occurred, the latter concept can be understood only as indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event.*²⁹²

[288] The Court of Appeals explained that the CJEU was not

*there saying that it is only the immediate victim of a harmful event who may rely upon that harmful event as founding jurisdiction pursuant to Article 5(3). That would be a surprising conclusion to reach about a decision designed to establish a connecting factor between the putative jurisdiction and the intended defendant.*²⁹³

[289] Instead, the Court of Appeals turned to the facts of **Dumez**, arguing that the direct loss took place in **Germany**, because the tortfeasor was domiciled in Germany. Therefore, for the Court of Appeals, **Dumez** did not stand for a proposition that only an immediate victim could claim direct loss, it stood for a proposition that indirect victims could bring cases only where the damage for immediate victims occurred. For this reason, **Dumez** could have brought its claim in Germany, where its subsidiaries had suffered the harm, but not in France.

1.8. Conclusions and Suggestions

[290] A few EU legal acts (Brussels Ibis Regulation (formerly Brussels I Regulation), Brussels IIbis Regulation, Insolvency Regulation, Maintenance Regulation and Succession Regulation) and International Conventions (Montreal Convention, New York Convention, etc.) deal with the matter of international jurisdiction, thus in every case it is very important to determine the material, geographical and temporal scope of each legal instrument before its application. In some cases the CJEU has even addressed the interrelation among those instruments; still as showed, for instance, by the case from **Hungary**, this is not particularly clear, neither in theory, nor in case law.

[291] It should be kept in mind that the continuity between the Brussels Convention and the Brussels Regulations should be ensured, including as it regards interpretation by the CJEU. The only exception is when the Brussels Convention and both Brussels I regulations deliberately deviate in the particular wording, in which case one should rely on former CJEU case law.

²⁹⁰ Ibid., para. 17.

²⁹¹ 11 January 1990 CJEU judgment in case: No C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*. The facts of **Dumez** are the following: a number of French companies brought a claim in France against a group of German Banks. Respondents had allegedly caused insolvencies to plaintiffs' subsidiaries in **Germany** by cancelling loan agreements. Thus, plaintiffs claimed that the damage occurred in France, where they were established. The CJEU disagreed with the plaintiffs' reasoning. The court distinguished direct and indirect damage. The direct damage took place in Germany, where the subsidiaries suffered financial loss. The harm to parent companies was no more than an indirect financial consequence of the direct damage.

²⁹² 11 January 1990 CJEU judgment in case: No C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*, para. 20.

²⁹³ 20 November 2013 Court of Appeal (Civil Division) judgment in case: *Deutsche Bahn AG v Morgan Advanced Materials Plc* (formerly *Morgan Crucible Co Plc*) [2013] EWCA Civ 1484, para. 22. In some sense this is confirmed by the CJEU, stating that an assignment of a claim by the creditor does not affect the jurisdiction under Article 5(3). *ÖFAB C-147/12*.

- [292]** Likewise, in the light of the case in **Latvia** it remains to be seen how the Brussels Ibis Regulation shall interact with other similar EU instruments in the civil law area. For example, the CJEU does not always support using the Rome II Regulation as a source of interpretation of the Brussels I Regulation. However, so far the CJEU has avoided such methodology in cases where its application increases the risk for the defendant of being sued outside his domicile. This method of reasoning should not prevent consulting the Rome I and Rome II Regulations when determining the scope of the Brussels I Regulation. Interpretation of the scope of the Brussels I Regulation *per se* does not subject the defendant to the risk of litigation outside his domicile. However, such a different approach may be too difficult for the litigants and the judges.
- [293]** As the Brussels Ibis Regulation is the keystone of European civil procedure law, it has been often interpreted by the CJEU and, because of this extensive case law, the judges and other legal practitioners are not always familiar with the latest or specific case. Therefore the Researchers have prepared a coherent table of CJEU case law (See: Annex) that presumably will facilitate the awareness and application of the CJEU case law.
- [294]** The CJEU has given interpretations of autonomous concepts included in the Brussels I Regulation such as "*civil and commercial matters*", "*services*", "*tort*", etc. However, the study shows that courts of Member States return with similar issues to the CJEU again and again. Also as can be seen from CJEU case law and respective national courts also of **Germany, Hungary, Latvia, Sweden** and the **U.K.**, the question of special jurisdiction is not such a simple issue. For example, the multiplicity of places of performance has recently been the crux of the decision in the national courts.
- [295]** It also can be concluded that CJEU case law has the influence to the Brussels Ibis Regulation, in particular the arbitration exception. It is suggested that Recital 12 of the Brussels Ibis Regulation has been included to avoid the consequences of previous interpretation of the arbitration exception by the CJEU. It is remarkable that the Advocate General already has addressed this Recital in its recent opinion, even though the Brussels Ibis Regulation was not applicable yet at that time.²⁹⁴ But both the new recital and the case law of the CJEU suggest that the CJEU will be again encountered with the relation of the Brussels Ibis Regulation and arbitration as the legal framework remains tangled and the cases become more complicated.
- [296]** Similarly, newly recast Brussels Ibis Regulation includes new provisions in Article 25 dealing with prorogation of jurisdiction. Among those changes, there is a new part providing that the jurisdiction clause is separable from the main contract. Indeed, such conclusion already was made by the CJEU itself before the Brussels Ibis Regulation became applicable.
- [297]** It must be noted that **Latvian** and **Hungarian** courts rarely refer to the practice of the CJEU in their adjudications. Mostly it is done by the Supreme Courts. For example, in Latvia the parties are referring the courts' attention to the relevant CJEU case law in most of the cases, but the courts are not examining this case law in the motivation part of their judgment.
- [298]** Taking into consideration the available national case law, it is advisable that legal practitioners evaluate whether the particular case of the CJEU is indeed applicable in the case at hand, i.e. whether the reference is really relevant. It should be assessed whether the facts of the case fall within the scope of the CJEU case and whether there are similar circumstances because evaluated practice shows that both parties and the court refer to the CJEU cases even if the factual and legal circumstances in the case are different.

294 4 December 2014 Opinion of Advocate General Wathelet in the case: No C-536/13 Gazprom OAO.

2. Service of Documents

2.1. Service of Documents in General

- [299]** In principle, each state designs its own rules for transmission and service of documents within its territory.²⁹⁵ However, a lack of uniformity among these rules was burdensome for both courts and litigants in international disputes. In order to facilitate transmission and service of documents, Member States adopted Council Regulation (EC) No 1348/2000, which entered into force on 31 May 2001.²⁹⁶ In 2007, Member States adopted the Service of Documents Regulation (1393/2007), repealing Council Regulation (EC) No 1348/2000. The Service of Documents Regulation took effect on 13 November 2008 and applies to all Member States (including Denmark).²⁹⁷
- [300]** The Service of Documents Regulation “*makes comprehensive provision for service of process in civil and commercial matters within European Union states, whenever a judicial document has to be transmitted from one Member State to another for service there.*”²⁹⁸ In accordance with the default rule, judicial documents are transmitted between Member State agencies.²⁹⁹ Article 7(1) of the regulation provides that “[t]he receiving agency shall itself serve the document or have it served, either in accordance with the law of the Member State addressed or by a particular method requested by the transmitting agency, unless that method is incompatible with the law of that Member State.”
- [301]** The Service of Documents Regulation also provides four additional means of transmission and service of judicial documents. Article 12 provides that in exceptional circumstances judicial documents may be transmitted using consular or diplomatic channels to the agency of another Member State. Article 13(1) establishes that judicial documents may be served on persons residing in another Member State directly through its diplomatic or consular agents. Article 13(2) allows Member States to oppose this form of service of documents. Currently, **Hungary**³⁰⁰, **Sweden**³⁰¹ and the **U.K.**³⁰² do not oppose such form of service. **Latvia**³⁰³ and **Germany**³⁰⁴ allow service of documents by diplomatic or consular agents only with respect to nationals of the transmitting Member State.
- [302]** Article 14 allows service of judicial documents directly by postal service on persons residing in another Member State by registered letter with acknowledgment of receipt or equivalent. Finally, in accordance with Article 15 “[a]ny person interested in a judicial proceeding may effect service of judicial documents directly through the judicial officers, officials or other competent persons of the Member State addressed, where such direct service is permitted under the law of that Member State.”

295 Lord Collins, Morse C.G.J., McClean D et al. Dicey, Morris & Collins The Conflict of Laws 15th Ed. Sweet & Maxwell, 2012, para. 8R-047. Available on Westlaw UK database.

296 Stone P. EU Private International Law. Edward Elgar Publishing Limited, 2010, p. 12.

297 Lord Collins, Morse C.G.J., McClean D et al. Dicey, Morris & Collins The Conflict of Laws. 15th edition. Sweet & Maxwell, 2012, para. 8-053. (Available on Westlaw UK database).

298 Ibid.

299 Stone P. EU Private International Law. Edward Elgar Publishing Limited, 2010, p. 63.

300 The European Judicial Atlas in Civil Matters. Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_otherinfostate_hu_en.jsp#ds_otherinfostate4.

301 Ibid., Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_otherinfostate_se_en.jsp.

302 Ibid., Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_otherinfostate_uk_en.jsp.

303 Ibid., Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_otherinfostate_lv_en.jsp#ds_otherinfostate6.

304 Ibid., Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_otherinfostate_de_en.jsp.

Currently, **Hungary**³⁰⁵ and **Latvia**³⁰⁶ oppose direct service. **Germany**³⁰⁷ and **Sweden**³⁰⁸ recognize direct service of documents in cases when such form of service is permitted under their national laws. In the **U.K.**, different parts of the state have different rules regarding direct service. England and Wales and Northern Ireland are opposed to such a possibility.³⁰⁹ Conversely, direct service is an appropriate means of service of documents in Scotland and Gibraltar.³¹⁰ It is important to stress that the Regulation is not applicable where the address of the person to be served with the document is not known.³¹¹

[303] According to Article 5 and 8 of the Service of Documents Regulation, the document must be accompanied by a translation into either of the following languages:

303.1. a language that the addressee understands; or

303.2. the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be carried out.

[304] This is particularly important for the transmitting and receiving agencies, as according to the Service of Documents Regulation the transmitting agency must inform the applicant that the addressee may refuse to accept the document if it is not in one of previously mentioned languages.³¹² The receiving agency, on the other hand, has to inform the addressee of its rights to refuse to accept the document to be served if it does not comply with the language requirement.³¹³

[305] In that regard the CJEU has emphasized two things. Firstly, in the *Leffler* case³¹⁴ the CJEU ruled that a refusal to accept a document on grounds that the language requirements of the Service of Documents Regulation have not been satisfied does not render the service inoperative in its entirety. The sender may remedy the situation by sending a translation of the document in due time in accordance with the procedure laid down by the regulation.

[306] Secondly, in the *Weiss* case,³¹⁵ the CJEU somewhat limited the extent of translation duties. In this case a court from **Germany** wanted to clarify whether the annexes of an application initiating court proceedings must be translated to a language understandable to the addressee. The CJEU replied that the addressee cannot refuse to receive a document instituting the proceedings if this document enables the addressee to assert his rights in legal proceedings in the Member State of transmission and if annexes attached to that document serve merely as documentary evidence. I.e. although the annexes were not in the language of the Member State addressed or in a language that the addressee understands, the annexes served purely an evidential function and were not necessary for understanding the subject matter of the claim. Therefore transmitting and receiving agencies have to be aware of these findings of the CJEU in order not to mislead the applicant or addressee of the language requirements of the transferrable documents.

305 Ibid., Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_otherinfostate_hu_en.jsp#ds_otherinfostate4.

306 Ibid. Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_otherinfostate_lv_en.jsp#ds_otherinfostate6.

307 Ibid. Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_otherinfostate_de_en.jsp.

308 Ibid. Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_otherinfostate_se_en.jsp.

309 Ibid. Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_otherinfostate_uk_en.jsp.

310 Ibid.

311 Article 1(2) of the Service of Documents Regulation. See also: 15 March 2012 CJEU judgment in the case: No C-292/10 G. v Cornelius de Visser No C-292/10, para. 54.

312 Service of Documents Regulation, Article 5(1).

313 Ibid., Article 8(1).

314 8 November 2005 CJEU judgment in the case No C-443/03 *Leffler v. Berlin Chemie AG*.

315 8 May 2008 CJEU judgment in the case No C-14/07 *Weiss v. Industrie- und Handelskammer Berlin*.

- [307]** On 1 January 2015 new amendments to the Civil Procedure Law of **Latvia** entered into force.³¹⁶ They provide that the courts of general jurisdiction become transmitting agencies³¹⁷ and must communicate directly with the competent authorities or courts in other Member States insofar as service of documents is concerned.
- [308]** There are two approaches Latvian courts use if the claimant has not translated the application into the necessary language. According to the first one, the court leaves the application not proceeded with according to Article 129 and Article 133 of the Civil Procedure Law if the appropriate translation in the particular language of the application and the annexes are not submitted to the court.
- [309]** The second approach is that the application and annexes are sent to the addressee as they are – then the addressee, if necessary, can use his or her rights to refuse to receive the application. According to the Ministry of Justice, the latter practice is the correct one, as the addressee will not always refuse to accept the documents, even if at first glance he might have done so.³¹⁸

2.2. Special Issues

- [310]** There are only six CJEU cases interpreting the **Service of Documents Regulation** (See: Annex). Therefore there are not many national cases based on these CJEU judgments. For instance, according to data available to the Researchers, courts of **Latvia** have not applied those cases in the reasoning of their judgments at all, even though the Service of Documents Regulation is applied on regular basis.
- [311]** In turn, the **U.K.** courts have clarified under what circumstances they considered that judicial documents from another Member State are correctly served in the U.K. In order to determine whether a French court was first seized under the Brussels I Regulation, the Commercial Court had to establish at what moment in time the defendant had been informed about the proceedings in France in accordance with Article 30 of the Brussels I Regulation.³¹⁹
- [312]** The defendant in England received the writ from the French court first by fax and later by post. The Commercial Court inquired into the meaning of the term “*served documents*” to answer whether a document sent by fax is considered to be duly served in accordance with the Service of Documents Regulation. The regulation referred to the Manual Containing Information Relating to Receiving Agencies, published on the Commission’s internet site, providing that in the U.K. “*Documents will be transmitted by fax and post.*”³²⁰ Thus, the court posed a question whether this laconic statement means “*either fax or post*” or “*both fax and post*”.
- [313]** The Commercial Court reasoned that service of documents under Article 30 of the Brussels I Regulation is an autonomous concept, construed in light of policies behind both the Brussels I Regulation and Service of Documents Regulation, striving for speedy and efficient procedures; hence a fax message was sufficient to put the French court in the position of being the first seized.³²¹

316 Amendments to Civil Procedure Law of the Republic of Latvia adopted 15 November 2014.

317 Before these amendments the Ministry of Justice was the transmitting agency for the purpose of the Service of Documents Regulation.

318 29 December 2014 interview with a representative of the Ministry of Justice of Latvia.

319 25 April 2013 Queen’s Bench Division (Commercial Court) judgment in case: *Arbuthnot Latham & Co Ltd v M3 Marine Ltd*, [2013] EWHC 1019 (Comm); [2014] 1 W.L.R. 190.

320 *Ibid.*, para. 23.

321 *Ibid.*, para. 25.

[314] In this case the court of the **U.K.** has interpreted the Service of Documents Regulation without any reference to CJEU case law. Nevertheless this case shows that the national courts can understand and use the autonomous concepts themselves, and there is no need to make a reference for a preliminary ruling each time.

[315] Researchers have chosen one interesting case law from **German** courts - the judgment of the District Court in Bonn (*Landgericht Bonn*)³²² that mentions the **Weiss** case.³²³ In this particular case the District Court in Bonn had sent the court documents and an annex to the defendant, who was habitually resident in France. The document instituting the proceedings was sent in English, but the annex to this document was in German. The District Court had evidence that the defendant understood English, as he had previously sent e-mail letters and correspondence in English to the plaintiff. Therefore, Article 8(1) of the Service of Documents Regulation could not be applied. It means that the defendant could not claim that he did not understand English and therefore having no rights to refuse to accept the document to be served. The District Court in Bonn made a reference to the **Weiss** case in order to explain that:

[316] **Firstly,**

*the addressee of a document instituting proceedings which is to be served does not have the right to refuse to accept that document, provided that it enables the addressee to assert his rights in legal proceedings in the Member State of transmission.*³²⁴

[317] **Secondly,**

*In order to establish whether the addressee of a document served understands the language of the Member State of transmission in which the document is written, **the court** must examine all the relevant evidence submitted by the applicant. [...] the degree of knowledge of a language required for correspondence is not the same as that needed to defend an action. However, that is a matter of fact to be taken into account by the court in determining whether the addressee of a document served is capable of understanding the document so as to be able to assert his rights. It is necessary for the court, in accordance with the principle of equivalence, to take account of the extent to which an individual domiciled in the Member State of transmission would understand a judicial document written in the language of that State.*³²⁵

[318] It means that the national court must examine the degree of knowledge of a language by the defendant (the addressee). The defendant (the addressee) must be able to assert his/her rights in legal proceedings in the Member State of transmission. The District Court in Bonn in the particular case came to the conclusion that the defendant had a sufficient degree of knowledge of English.

[319] The annex (in German) had also been sent correctly. As the CJEU said in the **Weiss** case:

*if the annexes are attached to the document consisting of documentary evidence which is not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, but which has a purely evidential function and is not necessary for understanding the subjectmatter of the claim and the cause of action, than the addressee does not have the right to refuse to accept that annex.*³²⁶

322 30 November 2010 LG Bonn 10. Zivilkammer, 10 O 502/09. Available at: www.juris.de

323 8 May 2008 CJEU judgment in the case No C-14/07 Weiss v. Industrie- und Handelskammer Berlin.

324 *Ibid.*, para. 78.

325 *Ibid.*, paras. 80, 87.

326 *Ibid.*, para. 78.

[320] The judgment of the District Court in Bonn is well reasoned, and CJEU case law is correctly applied. The court has verified *ex officio* all the necessary facts in this case.³²⁷ The only remark is that the District Court in Bonn did not mention the paragraphs of the judgment in its references to CJEU case law making it harder to identify the particular issues in the CJEU judgment. Therefore the Researchers emphasize the necessity to make more precise references.

2.3. Conclusions and Suggestions

[321] There are only six CJEU judgments interpreting the Service of Documents Regulation. Two of them have been delivered according to the reference of a preliminary ruling made by German courts – in the **Weiss** case³²⁸ and the **Cornelius de Visser** case.³²⁹

[322] On the basis of **German** and **British** domestic case law the Researchers can conclude that German courts can use CJEU case law well in order to solve the issues relating to translation and language problems. The judgment of the District Court in Bonn has also been discussed in German legal literature.³³⁰ The courts of the **U.K.** have interpreted the Service of Documents Regulation taking into consideration the main goal and the principles lay down by this Regulation. Therefore British courts are also well prepared to apply this Regulation.

[323] Until now the courts in **Latvia**, **Hungary** and **Sweden** have not been confronted with serious interpretation problems of the Service of Documents Regulation. Nevertheless, technical legal norms of the regulation were applied, for example, by Latvian and Hungarian courts.

3. Taking of Evidence

3.1. Taking of Evidence in General

[324] The taking of Evidence Regulation has been applicable in the EU since 1 January 2004,³³¹ (excluding Denmark³³²) and it ensures an easier procedure for taking evidence in another Member State.

[325] The taking of Evidence Regulation is applicable in civil and commercial matters where a court of a Member State requests a competent court from another Member State to obtain evidence or requests gathering of evidence in another Member State. Only evidence for on-going judicial proceedings can be obtained using the Taking of Evidence Regulation. In compliance with the Taking of Evidence Regulation each Member State must designate a central authority that is responsible for supporting courts in case any difficulties arise regarding transmission of evidence.

327 See also : M.Würdinger. Das Sprachen- und Übersetzungsproblem im Europäischen Zustellungsrecht – ein Spannungsfeld zwischen Justizgewährung und Beklagtenschutz im Europäischen Justizraum. Praxis des Internationalen Privat- und Verfahrensrechts (IPRax). 33.Jahrgang, 1/2013, S. 61-63.

328 8 May 2008 CJEU judgment in the case No C-14/07 Weiss v. Industrie- und Handelskammer Berlin.

329 15 March 2012 CJEU judgment in the case No C-292/10 G. v. Cornelius de Visser.

330 M.Würdinger. Das Sprachen- und Übersetzungsproblem im Europäischen Zustellungsrecht – ein Spannungsfeld zwischen Justizgewährung und Beklagtenschutz im Europäischen Justizraum. Praxis des Internationalen Privat- und Verfahrensrechts (IPRax). 33.Jahrgang, 1/2013, S. 61-63.

331 Except for Articles 19, 21 and 22, which apply from 1 July 2001. See: Article 24(2) of Taking of Evidence Regulation.

332 Recital 22 of Taking of Evidence Regulation.

- [326]** The scope *ratione materiae* of this Regulation is limited to two methods of taking evidence, namely, the taking of evidence by the requested court in accordance with Articles 10 to 16 thereof, following a request from the requesting court of another Member State, and the taking of evidence directly by the requesting court in another Member State, the detailed rules for which are set out in Article 17 of the Taking of Evidence Regulation and the CJEU judgment in the **Lippens** case.³³³ However, according to CJEU case law, this Regulation does not contain any provisions governing or excluding the possibility for the court in one Member State of summoning a party residing in another Member State to appear and make a witness statement directly before it, as concluded in **Lippens**.³³⁴
- [327]** The requests for taking of evidence must be filed using the form in the Taking of Evidence Regulation, and they must be drafted in the official language of the Member State where the request is to be pursued.
- [328]** At the time of this Research the CJEU has rendered three judgments interpreting the Taking of Evidence Regulation (See: **Annex**). None of the requests of preliminary rulings were submitted by the five examined Member States in this Research.
- [329]** In the **Weryński** case³³⁵ the CJEU ruled that Articles 14 and 18 of the Taking of Evidence Regulation must be interpreted as meaning that a requesting court is not obliged to pay an advance to the requested court for the expenses of a witness or to reimburse the expenses paid to the witness examined.
- [330]** In **Lippens**³³⁶ the CJEU allowed a national court to use its national proceedings to summon a witness residing in another country. Accordingly, if for the sake of swift proceedings especially when a witness is voluntarily willing to cooperate, the court is not required to use the Taking of Evidence Regulation, but may summon the witness using the tools provided in its domestic procedure. In **ProRail** the CJEU stated that Taking of Evidence Regulation does not restrict options available to court and its domestic procedure, since “[i]n certain circumstances, it may be simpler, more effective and quicker for the court ordering such investigation, to take such evidence without having recourse to the Regulation.”³³⁷
- [331]** The Report on the Taking of Evidence Regulation noted that application of the Taking of Evidence Regulation has “generally improved, simplified and accelerated the cooperation between the courts on the taking of evidence in civil or commercial matters.”³³⁸ Introduction of direct court-to-court transmission (although requests are still sometimes or even often sent to central bodies) and introduction of standard forms have been mentioned as the key success factors of the Taking of Evidence Regulation. The Report on the Taking of Evidence Regulation concluded that modifications of the Regulation are not required, but it has been indicated that the Regulation is not sufficiently known among lawyers. The Researchers were able to identify very few cases where the Taking of Evidence Regulation has been applied in the five Member States examined in this Research.

333 6 September 2012 CJEU judgment in case: No C-170/11 Maurice Robert Josse Marie Ghislain Lippens, Gilbert Georges Henri Mittler, Jean Paul François Caroline Votron v Hendrikus Cornelis Kortekaas, Kortekaas Entertainment Marketing BV, Kortekaas Pensioen BV, Dirk Robbard De Kat, Johannes Hendrikus Visch, Euphemia Joanna Bökkerink, Laminco GLD N-A, Ageas NV, formerly Fortis NV, para. 26.

334 Ibid., para. 27.

335 17 February 2011 CJEU judgment in case: No C-283/09 Artur Weryński v Mediatel 4B spółka z o.o.

336 6 September 2012 CJEU judgment in case: No C-170/11 Maurice Robert Josse Marie Ghislain Lippens, Gilbert Georges Henri Mittler, Jean Paul François Caroline Votron v Hendrikus Cornelis Kortekaas, Kortekaas Entertainment Marketing BV, Kortekaas Pensioen BV, Dirk Robbard De Kat, Johannes Hendrikus Visch, Euphemia Joanna Bökkerink, Laminco GLD N-A, Ageas NV, formerly Fortis NV.

337 21 February 2013 CJEU judgment in case: No C-332/11 ProRail BV v Xpedys NV, FAG Kugelfischer GmbH, DB Schenker Rail Nederland NV, Nationale Maatschappij der Belgische Spoorwegen NV, para. 45.

338 Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 5 December 2007 on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [COM(2007) 769 final - Not published in the Official Journal]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007DC0769&from=EN>.

3.2. Special Issues

- [332]** Two cases before the CJEU have been used as a supporting authority in the **U.K.** court practice, defining the scope of the said regulation.
- [333]** A number of French companies in accordance with a decision by Commission, where found to be members of a cartel.³³⁹ Victims of this cartel, brought a follow-on damages claims in England. In order to prove the full amount of damages, the plaintiffs requested disclosure of certain information by defendants. Defendants refused to do so, relying on a French law prohibiting disclosure of such information, subject to criminal penalty.
- [334]** Defendants sought support for their position in the **ProRail** judgment, stating that:
- It must be stated that, in so far as the expert designated by a court of a Member State must go to another Member State in order to carry out the investigation which has been entrusted to him, that might, in certain circumstances, affect the powers of the Member State in which it takes place, in particular where it is an investigation carried out in places connected to the exercise of such powers or in places to which access or other action is, under the law of the Member State in which the investigation is carried out, prohibited or restricted to certain persons.*
- In such circumstances, unless the court wishing to order cross-border expert investigation foregoes the taking of that evidence, and in the absence of an agreement or arrangement between Member States within the meaning of Article 21(2) of Regulation No 1206/2001, the method of taking evidence laid down in Articles 1(1)(b) and 17 thereof is the only means to enable the court of a Member State to carry out an expert investigation directly in another Member State.³⁴⁰*
- [335]** English court rejected these arguments, supporting its opinion by interpretation of CJEU cases. Hence, the court saw no indications in the foregoing judgments, preventing it from requesting a disclosure. As to the foregoing citation from the **ProRail** judgment, the court distinguished it, arguing that it applies to an expert investigating abroad, but not to right of court to require disclosure in its own jurisdiction. The court likewise distinguished in principle both **Lippens** and **ProRail** from the current case, as they dealt with a witness not party to the proceedings. Thus in the courts opinion, these cases had no impact on the powers that the court had in relation to parties of the dispute in its own jurisdiction.
- [336]** The reasoning of the case seems well-founded. Recital 6 of the Taking of Evidence Regulation provides that the objective behind the regulation was the improvement of cooperation between the courts on the taking of evidence in civil or commercial matters. If the regulation is read to limit the rights of a Member State court to request evidence from parties at the proceedings within its jurisdiction, the effect would drastically weaken the efficiency of national proceedings. This would not improve cooperation between the courts, but overburden them with numerous requests. Moreover, it would cause discrimination between parties based on their domicile or nationality, as a foreign party would be relieved from producing any evidence. Obtaining such evidence would always require using the Taking of Evidence Regulation.
- [337]** The foregoing case shows the dangers related to misinterpretation of EU instruments. It is possible that similar arguments will be used in other jurisdictions to prevent submitting evidence. In these cases, the national court may rely on English practice, but likewise use extensive interpretation of the Taking of Evidence Regulation in light of CJEU case law to decline such attempts.

339 22 October 213 Court of Appeals judgment in case: Secretary of State for Health v Servier Laboratories Ltd, [2013] EWCA Civ 1234. For substantially identical case see: 11 April 2013 England and Wales High Court (Chancery Division) judgment in case: National Grid Electricity Transmission Plc v ABB Lt [2013] EWHC 822 (Ch).

340 21 February 2013 CJEU judgment in case: No C-332/11 ProRail BV v Xpedys NV, FAG Kugelfischer GmbH, DB Schenker Rail Nederland NV, Nationale Maatschappij der Belgische Spoorwegen NV, paras. 47-48.

[338] Researchers were able to identify a case from **Sweden** where Svea Court of Appeals has applied Taking of Evidence Regulation. In this case, the court noted that Taking of Evidence Regulation grants the courts an opportunity to request assistance from other Member States courts. The court also found that in paternity cases the investigative obligation rests on courts and first instance court should have tried to obtain evidence from **Germany** using Taking of Evidence Regulation.³⁴¹ Such conclusion fully complies with conclusion of CJEU in the **Zarraga** case where it was stated:

*the court of the Member State of origin must, in so far as possible and always taking into consideration the child's best interests, use all means available to it under national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by Regulation No 1206/2001.*³⁴²

[339] In **Germany** there are few judgments regarding the application of CJEU case law in order to interpret Taking of Evidence Regulation. In a decision of Higher District Court of Oldenburg (*Oberlandgericht Oldenburg*)³⁴³ the court had to decide whether the double costs of the taking of cross-border evidence had to be reimbursed to the parties. Researchers do not focus on the question of reimbursement of costs (in accordance with German national law); Researchers were more interested whether and how Higher District Court of Oldenburg used the case law of CJEU in the reasoning of its decision. The court decided that direct taking of evidence in another Member State (the Netherlands) ordered by first instance court complies with Article 17(2)(3) of Regulation. However, a court ordered repetition of taking of evidence by applying Article 17(1) of Taking of Evidence Regulation and by submitting a request to the central body in the Netherlands was also justified. In its reasoning Higher District Court of Oldenburg made a reference to the Opinion of the Advocate General in the **ProRail** case:

*[...] if a court does not intend to use that form of judicial cooperation, because it considers that the assistance of the local authorities is not necessary for the investigation it is conducting to be completed successfully, it is not required to comply with the formalities laid down by Regulation No 1206/2001.*³⁴⁴

[340] This approach is correct and was later approved by CJEU judgment in the **ProRail** case:

*[...] a national court wishing to order an expert investigation which must be carried out in another Member State is not necessarily required to have recourse to the method of taking evidence laid down in Articles 1(1)(b) and 17 of Regulation No 1206/2001.*³⁴⁵

[341] The Researchers could identify one judgment of the courts of **Latvia** in applying recent case law of the CJEU regarding the Taking of Evidence Regulation.³⁴⁶ In this case the Riga Regional Court (*Rīgas apgabaltiesa*) noted that claimants' request for hearing of witnesses is within the scope of the Taking of Evidence Regulation and the public order regulating the request of information from credit institutions but is not covered by the notion of "provisional, including protective, measures." Therefore request for hearing of witnesses is not subject for enforcement in accordance with the CJEU conclusions in the **St. Paul Dairy Industries** judgment.³⁴⁷ The Riga Regional Court's approach is in line with the notion of the Taking of Evidence Regulation. Thus, the courts should also consider the standard for taking of evidence established by the regulation even when the parties do not refer to the regulation itself and try to sidestep from the procedures and standards under the regulation.

341 30 November 2012 Svea Hovrätt judgment in case: T8355-12, RH 2012:66.

342 22 December 2010 CJEU judgment in case: No. C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz, para. 67.

343 29 November 2012 OLG Oldenburg, 8. Zivilsenat, 8 W 102/12. Available at: www.juris.de.

344 6 September 2012 Advocate General Jääskinen Opinion in the case: No C-332/11 ProRail NV, para. 50.

345 21 February 2013 CJEU judgment in the case: No C-332/11 ProRail NV, para. 49.

346 27 December 2013 Riga Regional Court judgment in case: No C27242011, unpublished.

347 28 April 2005 CJEU judgment in case: No C-104/03 St. Paul Dairy Industries NV v Unibel Exser BVBA, paras. 23; 25.

3.3. Conclusions and Suggestions

- [342]** There are only three CJEU judgments interpreting the Taking of Evidence Regulation, but Member States examined in this Research submitted none of these requests for preliminary rulings.
- [343]** The existing CJEU case law and also the Opinion of the Advocate General have been used to reason the judgments by **German** and the **U.K.** courts. The Researchers conclude that **German** and the **U.K.** courts have an adequate understanding of the Taking of Evidence Regulation.
- [344]** The court of the **U.K.** moreover has interpreted the Taking of Evidence Regulation considering existing CJEU case law, but distinguished the circumstances in the particular case and concluded that CJEU case law had no impact on the powers that the court had in relation to the parties to the dispute in its own jurisdiction. The **U.K.** court hence also considered the goal of the regulation and interpreted the regulation in a way that the regulation does not limit the efficiency of the national proceedings.
- [345]** The Researchers identify certain dangers regarding possible misinterpretation of EU instruments and the scope of the Taking of Evidence Regulation. In cases where similar arguments are used in other jurisdictions to prevent submission of evidence, national courts may rely both on English practice, but likewise use extensive interpretation of the Taking of Evidence Regulation in light of CJEU case law to decline such attempts.
- [346]** German courts have not always applied Taking of Evidence Regulation if no assistance of the local authorities is necessary for taking of certain evidence in another Member State. Researchers note that efficiency of direct evidence taking must always be weighted before applying the procedures under Taking of Evidence Regulation.
- [347]** The Researchers were not able to identify any case law from **Latvia, Hungary** or **Sweden** where the Taking of Evidence Regulation had been interpreted. The Researchers assume that the national courts apply the Regulation and its application has not caused major problems.

4. Conflicts of Law

4.1. Conflicts of Law in General

- [348]** Litigation with a cross-border element poses two major challenges – the determination of the court competent to hear the case and the determination of the law applicable to the legal relation in question. The first challenge is primarily contemplated in the Brussels I Regulation and the Brussels IIbis Regulation. The EU has addressed the second challenge by adopting three main instruments on conflict of laws.
- [349]** The Rome I Regulation contains rules on conflicts of law applicable to contractual obligations. The Rome I Regulation was adopted on 17 June 2008 and is applicable to contracts concluded after 17 December 2009, in all Member States, except Denmark. Even after entering into force of the Rome I Regulation, its predecessor - the Rome Convention³⁴⁸ - remains in force. Notably, the

348 Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC). Official Journal of European Union L 266, 9.10.1980.

Rome Convention applies in relations with Denmark.³⁴⁹ Since in accordance with Article 28 of the Rome I Regulation, the latter applies only to contracts concluded after 17 December 2009, then the Rome Convention remains applicable to earlier contracts.

- [350]** The law specified by the regulation must be applied by the court even if it is the law of a non-Member State (Article 2). The regulation provides several rules for determination of applicable law. In most cases, parties may freely choose applicable law (Article 3). In the absence of a choice, the regulation determines applicable law using different connecting factors for a number of specific contracts (Article 4(1)). For other obligations, the habitual residence of the party effecting characteristic performance is such a connecting factor (Article 4(2)). If from all the circumstances of the case it is clear that the case is manifestly more closely connected to another state, the latter's law applies (Article 4(3)). If connecting factors of Articles 4(1) and 4(2) fail to point out the applicable law, the law of the country most closely connected to the contract applies (Article 4(4)).
- [351]** For several contracts: contracts of carriage, consumer contracts, insurance contracts and individual employment contracts, special rules are provided (Articles 5, 6, 7, 8).
- [352]** The EU has complemented conflict of law rules for non-contractual obligations by adoption of the Rome II Regulation. The Rome II Regulation was adopted on 11 July 2007. The Rome II Regulation applies to conflict of law in torts (Articles 4, 5, 6, 7, 8, 9), unjust enrichment (Article 10), *negotiorum gestio* (Article 11) and *culpa in contrahendo* (Article 12). Like its sister-act, the Rome II Regulation applies in all Member States, except Denmark.³⁵⁰ The temporal scope of the Rome II Regulation, due to poor-quality drafting, has caused controversy, a problem that will be discussed below in ¶ [369].
- [353]** The third "Rome" document is Rome III Regulation. This regulation was adopted on 20 December 2010 and it contemplates law applicable to divorce and separation. Unlike other regulations, it has limited territorial scope. To date, Belgium, Bulgaria, **Germany**, Spain, France, Italy, **Latvia**, Lithuania, **Hungary**, Malta, Austria, Portugal, Romania and Slovenia are participating in the Rome III Regulation. Two states covered by this Research – **Sweden** and the **U.K.** – are not bound by the Rome III Regulation. The regulation is effective as of 21 June 2012.
- [354]** Overall, there is only one CJEU judgment on the Rome II Regulation that will be analysed below in ¶ [368] of this Research. There is also case law of national courts applying the Rome II Regulation, raising complicated, controversial issues as to application of the regulation. One such decision will be analysed below in ¶ [372] of this Research.
- [355]** There are no CJEU judgments on the Rome I Regulation. However, there are currently six judgments of the CJEU on the Rome Convention.³⁵¹ Taking into account the similarity of both instruments, case law on the Rome Convention is relevant for interpretation of the Rome I Regulation. The Researchers have identified several judgments of national courts of **Sweden** and the **U.K.** either referring to the very limited CJEU case law or substantially developing interpretation of the Rome I Regulation and/or the Rome II Regulation. The Researchers have not identified pertinent cases in **Germany**, **Hungary** and **Latvia**.
- [356]** Up to now, there are no CJEU cases on Rome III. The Researchers have found no national cases applying the regulation.

349 Saleron F., Franzina P. (eds). Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (« Roma I »). I commentari. Le nuove leggi civili commentate, N. 3-4, Maggio-Agosto 2009, p. 535.

350 Ferrari F. (ed.). Rome I Regulation. Pocket Commentary. Sellier European Law Publishers, 2015, p. 69.

351 23 October 2014 CJEU judgment in case: No C-305/13 Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and Others; 17 October 2013 CJEU judgment in case: No C-184/12 United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare; 12 September 2013 CJEU judgment in case: No C-64/12 Anton Schlecker v Melitta Josefa Boedeker; 15 December 2011 CJEU judgment in case: No C-384/10 Jan Voogsgeerd v Navimer SA; 15 March 2011 CJEU judgment in case: No C-29/10 Heiko Koelzsch v État du Grand Duché de Luxembourg; 6 October 2009 judgment in case: No C-133/08 Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and MIC Operations BV.

4.2. Rome I Regulation

- [357]** As was mentioned before, there is no CJEU practice under the Rome I Regulation. However, the Researchers have identified a number of national judgments applying the Rome Convention. In these judgments, national courts have referred to the practice of the CJEU under both the Rome Convention and the Brussels Convention.
- [358]** One such judgment was rendered by the Labour court in **Sweden**.³⁵² A.W. (Sereetz, **Germany**), J.D. and R.K. (Hamburg, **Germany**) were dismissed from their jobs at TJ's haulage company in Lund AB (**Sweden**). The former workers claimed damages, unpaid holiday pay and compensation. The Labour court had to examine which country's law is applicable to the dispute. The court noted that the Rome Convention determines the law applicable to contractual obligations, and the Rome I Regulation is applicable from December 17, 2009. As the disputed employment contracts were concluded before December 17, 2009, under Article 28 of the Rome I Regulation the applicable law was to be assessed under the Rome Convention.
- [359]** The court found that the employment contracts did not have an expressed choice of law between the parties; thus being governed by the law of the country in which the employee in performance of the contract habitually carried out his work or if the employee did not habitually work in any one country, the law of the country where the place of business through which he was engaged is situated. The court noted that CJEU statements about the meaning of similar concepts in the Brussels Convention are of interest for interpretation of the Rome Convention. In **Herbert Weber**,³⁵³ the CJEU ruled that the place where the employee habitually carries out his work constitutes the place where or from where he actually, having regard to all the circumstances of the individual case, performs the essential part of his obligations to the employer or most of his working hours, if the work is carried out in more than one state.
- [360]** In this case, the employees carried out their work as truck drivers in several countries in Europe. The company argued that workers were stationed in Travemünde, **Germany**, and their trips both began and ended in Germany. The workers objected, arguing that they were stationed in Malmö, **Sweden**, for work mainly emanating from Sweden. The court found that in the case it is not proven that the workers usually carried out their work either in Germany or Sweden, on the contrary, the investigation revealed that they did not carry out their work in a single country. Under these conditions, the place of business through which the employee was engaged was basis for establishment of applicable law. The court found that Swedish law is applicable.
- [361]** For today's perspective, the methodology behind the Labour court's judgment has received CJEU confirmation. In 2011, the CJEU rendered judgment in **Heiko Koelzsch**, ruling that under Article 6(2)(a) of the Rome Convention:
- [I]n a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer.*³⁵⁴
- [362]** In fact, just like the Labour court, the CJEU reached its conclusion through explicit references to its own case law under Article 5(1) of the Brussels Convention.³⁵⁵ Thus, in retrospect, the reference to the CJEU practice under the Brussels I Regulation is justified.

352 22 September 2010 Arbetsdomstolen judgment in case: B-22-2010, (AD 2010:67).

353 27 February 2002 CJEU judgment in case: No C-37/00 Herbert Weber v Universal Ogdén Services Ltd.

354 15 March 2011 CJEU judgment in case: No C-29/10 Heiko Koelzsch v État du Grand Duchy of Luxembourg, para. 51.

355 Ibid., paras. 33, 39 and 41.

- [363]** While the Labour court referred to CJEU case law under the Brussels Convention, the **U.K.** courts have used CJEU case law under the Rome Convention. To mention one example, the **U.K.** courts have made extensive references to the CJEU to clarify the content of carriage of goods contract under the Rome Convention.
- [364]** This contract is regulated by Article 4(4) of the Rome Convention. In a recent **ICF** case the CJEU decided that:
- the last sentence of Article 4(4) of the Convention must be interpreted as meaning that the connecting criterion provided for in the second sentence of Article 4(4) applies to a charter-party, other than a single voyage charter-party, only when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods.*³⁵⁶
- [365]** This judgment was relevant in the *Martrade Shipping & Transport GmbH v United Enterprises Corporation* case, dealing with a time-charter contract, lacking any choice of law provision.³⁵⁷ One of the parties argued that the law applicable to such contract is determined by Article 4(4), dealing with carriage of goods. The court refuted the argument, using the **ICF** judgment as support. Unlike the charter party contract analysed in the **ICF** judgment:
- a time charter is not such a charterparty: the owner does not agree to carry goods from and to specific or nominated ports, but rather to make the vessel and her crew available to the charterer, in return for hire, as a means for the charterer to transport goods. The defining characteristic of a time charter is that the vessel is under the directions and orders of the charterer as regards its employment. It is the charterer who determines what voyages the vessel is to undertake and what cargo it is to carry, within the geographical and other constraints contained in the particular charterparty clauses.*³⁵⁸
- [366]** Thus, the Commercial Court turned its attention to Article 4(2) of the Rome Convention, seeking characteristic performances of a time-charter contract. Once the time-charter was excluded from the scope of Article 4(4), the court applied the law of habitual residence of the party effecting characteristic performance of the contract. Here again, the court made a reference to the **ICF** case, stating that “[i]n a charter-party, the owner, who effects such a performance, undertakes as a matter of course to make a means of transport available to the charterer.”³⁵⁹ This reflects the general rule that the party making the pecuniary obligation is not considered to effect the characteristic performance.³⁶⁰ In a time-charter like in other charter party contracts, the owner of the ship provides characteristic performance.
- [367]** The the **ICF** judgment is an example where by defining the carriage of goods contract, the CJEU has confirmed what was believed to be the correct opinion already before – the time-charter contract is not carriage of goods. Here, the CJEU fulfilled its role of the court of last resort, providing a clear, precise answer to a legal question, diminishing the uncertainty of EU private international law.

356 6 October 2009 CJEU judgment in case: No C-133/08 Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and MIC Operations BV, para. 37.

357 12 June 2014 England and Wales High Court (Commercial Court) judgment in case: *Martrade Shipping & Transport GmbH v United Enterprises Corporation* [2014] EWHC 1884 (Comm).

358 *Ibid.*, para. 30. Cf., Ferrari F. (ed.). *Rome I Regulation: Pocket Commentary*. Sellier European Law Publishers, 2015, p. 192; Plender R., Wilderspin M. *The Rome Convention on the Choice of Law for Contracts*. 2nd edition. Sweet & Maxwell, 2001, p. 133.

359 6 October 2009 CJEU judgment in case: No C-133/08 Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and MIC Operations BV, para. 35.

360 Ferrari F. (ed.). *Rome I Regulation: Pocket Commentary*. Sellier European Law Publishers, 2015, p. 155; Plender R., Wilderspin M. *The Rome Convention on the Choice of Law for Contracts*. 2nd edition. Sweet & Maxwell, 2001, p. 116.

4.3. Rome II Regulation

- [368]** To date, the temporal scope of the Rome II Regulation has been the sole issue determined by the CJEU. In its **Homawoo** judgment, the CJEU was asked by the High Court of Justice of England and Wales to determine the temporal scope of the Rome II Regulation.³⁶¹
- [369]** Due to unsatisfactory drafting, the temporal scope of this instrument has provoked controversies. The text of the regulation was published in the Official Journal on 31 July 2007.³⁶² According to Article 264(1) of the EC Treaty, the regulation came into force on the 20th day after its publication, namely, on 20 August 2007.³⁶³ Article 31 established that the regulation should apply to events giving rise to damages which occur after its entry into force. If read literally, the regulation would apply to events giving rise to damages occurring after 20 August 2007.³⁶⁴ This reading is problematic, since Article 32 provides that the regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008.
- [370]** The CJEU solved this conflict definitively in its **Homawoo** judgment. The court ruled that the regulation applies to events giving rise to damages occurring after 11 January 2009.³⁶⁵ However, it is one thing to determine the critical date for application of the regulation, and it is a different thing to determine when the event giving rise to damages occurred.
- [371]** The latter problem was addressed in a recent decision by the Queen's Bench Division of England and Wales, the **U.K.**³⁶⁶ The relevant facts of the case: a group of overseas claimants brought a claim of liability for defective implants manufactured by an English company. Applicability of the Rome II Regulation was a preliminary question for determination of applicable law. The said regulation would apply, provided the tort fell within the temporal scope of application. Hence, the court had to pinpoint the exact moment when the event giving rise to damages occurred.
- [372]** The Queen's Bench Division based its reasoning on the **Kainz** judgment.³⁶⁷ In the Kainz case, the CJEU ruled that Article 5(3) of the Brussels I Regulation "*must be interpreted as meaning that, in the case where a manufacturer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured.*"³⁶⁸
- [373]** The Queen's Bench Division extended Kainz's reasoning in two directions. Firstly, the court applied the reasoning to the Rome II Regulation. Secondly, while Kainz concerned the place of the event giving rise to damages, the Queen's Bench Division used the same reasoning to determine the time when the event giving rise to damages occurred.³⁶⁹
- [374]** **Allen v Depuy International Ltd** is an example of ingenious application of CJEU case law relevant for the Brussels I Regulation to the Rome II Regulation. Article 5 of the Rome II Regulation, containing conflict of laws rules for product liability, does not rely on the event giving rise to liability. Therefore, for most purposes, this notion is not central for the Rome II Regulation. However, it remains important for its temporal scope. It is only natural that the Queen's Bench Division relied on the CJEU judgments under the Brussels I Regulation, as the Rome II Regulation contains no separate guidelines on interpretation of this notion.

361 17 November 2011 CJEU judgment in case: No C412/10, Deo Antoine Homawoo v GMF Assurances SA.

362 Huber P. (ed). Rome II Regulation: Pocket Commentary. Sellier European Law Publishers, 2011, p. 458.

363 Ibid. See also: Dickinson A. The Rome II Regulation: The Law Applicable to Non-contractual Obligations. Oxford University Press, 2010, p. 288.

364 Huber P. (ed). Rome II Regulation: Pocket Commentary. Sellier European Law Publishers, 2011, p. 459; Dickinson A. The Rome II Regulation: The Law Applicable to Non-contractual Obligations. Oxford University Press, 2010, p. 288.

365 17 November 2011 CJEU judgment in case: No C412/10, Deo Antoine Homawoo v GMF Assurances SA, para. 37.

366 18 March 2014 Queen's Bench Division judgment in case: Allen v Depuy International Ltd, [2014] EWHC 753 (QB).

367 16 January 2014 CJEU judgment in case: No C-45/13, Andreas Kainz v Pantherwerke AG.

368 Ibid., para. 34.

369 18 March 2014 Queen's Bench Division judgment in case: Allen v Depuy International Ltd, [2014] EWHC 753 (QB), para. 13.

[375] Notwithstanding the said example, there is a problem of convergence between EU private international law instruments. Recital 7 of the Rome II Regulation and Recital 7 of the Rome I Regulation declare that both instruments should be interpreted consistently with the Brussels I Regulation and with each other. The CJEU, however, has cast a shadow of doubt over this uniformity. In the *Kainz* judgment, the CJEU declared that Article 5 of the Brussels I Regulation could not have been interpreted in light of the Rome II Regulation, if it is contrary to the scheme and objective of the Brussels I Regulation.³⁷⁰ The divergence created by the CJEU is only starting to show, and it is suggested that the CJEU abstains from such declaration, instead attempting to fulfil the legislator's mandate for uniform interpretation of related sister-acts, unless the different context surrounding similar concepts is evident. Otherwise, it may be difficult for judges to determine when they have to follow explicit language of recitals commanding uniform interpretation and when they have to abstain from doing so.

4.4. Rome III Regulation

[376] Up until now, the CJEU has not delivered any preliminary rulings on the Rome III Regulation. Therefore, there are currently no national cases referring to CJEU case law on the Rome III Regulation.

4.5. Conclusions and Suggestions

[377] Case law analysed by the Researchers shows that conflict of laws instruments are rarely applied by national courts. In some cases, courts have failed to refer to these instruments even when parties have referred to them in their submissions. Such approach violates the obligation of Member States to apply EU law. It is necessary for national courts to apply conflict of laws instruments, provided the requirements for their application are satisfied and likewise offer reasoning supporting the choice of the particular law.

[378] At the same time, conflict of laws suffers from scarcity of case law at the EU level. Only the Rome II Regulation has a unique CJEU judgment. It also seems that national courts do not consider conflict-of-law issues sufficiently significant to request constant clarifications by the CJEU.

[379] Analysis of CJEU case law has also identified a particular methodological problem. In an ideal scenario, similar notions in the Rome Regulations and the Brussels I Regulation should have been interpreted similarly. For the purpose of conflict of laws, such methodology is particularly welcomed due to a scarcity of case law. In some cases, the CJEU has emphasized the importance of this approach. Unfortunately, in other cases the CJEU has taken the opposite stance, refusing to use the Rome II Regulation to interpret the Brussels I Regulation. Theoretically, the CJEU practice is not problematic, since the Brussels I Regulation must be interpreted in conformity with the Rome Regulations when it confirms with its own scheme and objectives. In practice, national courts may find it difficult identifying legal notions that are subject to uniform interpretation and those that are not.

[380] There is no single answer to avoid the problem of uncertainty. However, national courts should attempt interpreting the rationales behind CJEU judgments. Until now, the CJEU has emphasized that under the Brussels I Regulation, heads of jurisdiction depriving the defendant of his right

370 16 January 2014 CJEU judgment in case: No C-45-13, *Andreas Kainz v Pantherwerke AG*, para. 20.

to litigate at his domicile are interpreted narrowly.³⁷¹ In these cases, divergence between the instruments is most likely to occur. Thus, national courts must establish whether a notion in the Brussels I Regulation was not given an overly narrow meaning by the CJEU before its extension to the Rome Regulations. Conversely, national courts must verify whether notions from the Rome Regulations are not so extensive that their transmission to the Brussels I Regulation would endanger a defendant's rights to litigate at his home forum.

5. Insolvency

5.1. Insolvency in General

- [381]** The Insolvency Regulation entered into force on 31 May 2002³⁷² (except Denmark³⁷³) and creates a common framework for cross-border insolvency proceedings across the EU. The Insolvency Regulation is generally regarded as a successful instrument for the coordination of insolvency proceedings of EU Member States, and its uniform application is guaranteed by CJEU case law.³⁷⁴ Article 1(1) of the Insolvency Regulation provides that the Insolvency Regulation applies “*to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator*”. The regulation is applicable whenever the debtor has assets or creditors in more than one Member State, irrespective of whether he is a natural or legal person.
- [382]** Article 3 of the Insolvency Regulation sets jurisdiction in the member state where the centre of a debtor's main interests (hereafter: *COMI*) is situated. Article 3(1) of the Insolvency Regulation contains a presumption that the place of registered office shall be recognized as *COMI* of a legal person in absence of proof to the contrary. This concept indicates the main concern under the Insolvency Regulation – avoidance of debtor's incentives to transfer assets or judicial proceedings from one Member State to another in search for more favourable legal position.³⁷⁵ As noted by other scholars, *COMI* is of paramount importance for application of the Insolvency Regulation, but the Insolvency Regulation does not provide for a clear definition.³⁷⁶ Hence, in the past five years the CJEU has interpreted Article 3(1) and the concept of *COMI* in a broad way, considering various grounds for exception under the presumption of the registered office.
- [383]** The Insolvency Regulation also allows for opening of secondary insolvency proceedings in another Member State than where *COMI* is situated if the debtor possesses establishments in that other Member State. In insolvency proceedings, the law applicable to insolvency proceedings and their effects is the law of the Member State where the insolvency proceedings have been opened.
- [384]** The principle of mutual recognition under Article 16(1) of the Insolvency Regulation secures successful application of the Regulation as “*[a]ny judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognized in all the other Member States.*”

371 16 January 2014 CJEU judgment in case: No C-45-13, *Andreas Kainz v Pantherwerke AG*, para. 21.

372 Article 47 of Insolvency Regulation.

373 Recital 33 of Insolvency Regulation.

374 Hess B., Oberhammer P., Pfeiffer T. *European Insolvency Law. The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No 1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4)*. p. 10.

375 Recital 4 of Insolvency Regulation.

376 Hess B., Oberhammer P., Pfeiffer T. *European Insolvency Law. The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No 1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4)*. p. 103.

[385] Noting that the Insolvency Regulation has been applied for more than ten years, proposals for amendments in the Insolvency Regulation have been drafted.³⁷⁷ Insolvency Proposal tends to cover national procedures in Member States that provide for restructuring of companies at the pre-insolvency stage. The Insolvency Proposal also indicated problems relating to the rules on publicity of insolvency proceedings and the lodging of claims. However, in July 2014 the European e-Justice Portal made available the interconnected insolvency registers of Czech Republic, Austria, the Netherlands, Estonia, Slovenia, and **Germany**.³⁷⁸

5.2. Temporal applicability of Insolvency Regulation

[386] One of the most discussed cases in **Hungary** in the area of civil justice is Postabank (*Postabank és Takarékpénztár Rt.*) case arising from insolvency proceedings in Austria, which were initiated even before Hungary acceded the European Union.³⁷⁹ The case was also referred to the CJEU for the preliminary ruling to clarify the issue of temporal application of the Insolvency Regulation.

[387] The Supreme Court of Hungary decided to stay proceedings and refer a preliminary question to CJEU regarding scope of Article 5(1) of Insolvency Regulation.³⁸⁰ CJEU in **ERSTE Bank Hungary** judgment ruled that Article 5(1) of Insolvency Regulation must be interpreted as meaning that the provision is applicable to the existence of rights in rem in the particular case.³⁸¹ Following the judgment of CJEU, Supreme Court of **Hungary** based its decision on the fact that CJEU unambiguously stated that in the present case Article 5(1) of Insolvency Regulation shall be applied and accordingly “*the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are situated in another Member State at the time of the opening of the proceedings.*”

[388] It must be noted that the preliminary question of Supreme Court of **Hungary** was criticized by Advocate General Mazák for the fact that Hungarian courts, in his view, were proceeding on the assumption that it must determine the applicable law in order to establish whether it has jurisdiction but did not deal with the determination whether Hungarian courts had international jurisdiction at all.³⁸²

[389] Advocate General Mazák noted that it should have been appropriate to apply the CJEU conclusions in the **Seagon** judgment to determine the jurisdiction of court in accordance with Article 3(1) of Insolvency Regulation, which leads to Austrian courts, on the assumption that COMI in the current case is in the territory of Austria.³⁸³ Finally, Advocate General Mazák noted that it follows that CJEU’s answer to the question referred for a preliminary ruling is of no use to the referring court for the purpose of ruling on the action, given that that court has no international jurisdiction for that purpose and that the question referred for a preliminary ruling is therefore

377 Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM (2012) 744).

378 Available at: https://e-justice.europa.eu/content_interconnected_insolvency_registers_search-246-en.do.

379 13 November 2012 Supreme Court of Republic of Hungary judgment in case: No. Gfv.VII.30.236/2012/5, unpublished.

380 The Supreme Court of Hungary wanted to know whether the fact that the debtor’s asset (in the present case, the held by Austrian company and the monetary sums which replaced them) over which the third parties have a right *in rem* (namely the financial security provided in favour of bank) is situated within the territory of a Member State (here, Hungary) other than that in which the insolvency proceedings were opened (here, Austria), in the case where the State in which the asset concerned is located became a Member State of EU only after the insolvency proceedings had been opened against the debtor

381 5 July 2012 CJEU judgment in case: No C-527/10 ERSTE Bank Hungary Nyrt Republic of Hungary, BCL Trading GmbH, ERSTE Befektetési Zrt.

382 26 January 2012 Opinion of Mr Advocate General Mazák in case: No C-527/10 ERSTE Bank Hungary Nyrt Republic of Hungary, BCL Trading GmbH, ERSTE Befektetési Zrt., para. 38.

383 *Ibid.*, para. 42.

hypothetical.³⁸⁴ The Supreme Court of Hungary did not consider the conclusions made by Advocate General Mazák, and strictly followed the judgement of the CJEU. Thus the court did not differentiate between determination of jurisdiction under the regulation and under the applicable law. Such approach is dangerous as it might contradict the jurisdictional rule under the regulation.

5.3. Determining COMI of Natural and Legal Persons

[390] Article 3(1) of the Insolvency Regulation contains a presumption that the place of registered office shall be recognized as COMI of a legal person in absence of proof to the contrary. This provision is easily applied when all evidence in the case of insolvency of a legal person supports the location of COMI in only one Member State.

[391] For instance, the courts of **Hungary** have interpreted the concept of COMI in the context of the Insolvency Regulation several times.³⁸⁵ In a recent case before the Metropolitan Court of Appeal of the Republic of Hungary an owner of a company registered in the **U.K.** wanted to open insolvency proceedings of his company in Hungary.³⁸⁶ The court concluded that it is a “*clear cut case*” where in accordance with Article 3(1) of the Insolvency Regulation all business assets of the company at issue were in Hungary, and all of its business activities were related to a Hungarian-registered establishment, and this was clearly ascertainable by third parties, therefore COMI was located in Hungary, and the Hungarian court had jurisdiction to open the main insolvency proceedings of the company in Hungary.

[392] In another case the Hungarian court drew the conclusion that COMI of a Slovakian company is in **Hungary**, because the director’s address, the place of a formal judicial enforcement against the company and the taxation documents all showed unambiguously that COMI was in Hungary.³⁸⁷ These two cases, even though they have no reference to the CJEU case law show that COMI is correctly applied in cases where there are no doubts that there is a connection between the debtor and another Member State where COMI could be located.

[393] However, Member States seem to face difficulties when COMI of natural persons or legal persons operating in more than one Member State has to be determined. Therefore one of the landmark cases of the CJEU in the field of insolvency law is the **Euro Food** judgment.³⁸⁸ The case made a number of crucial pronouncements, establishing the overall framework of the Insolvency Regulation. In its judgment in **Euro Food**, the CJEU provided the guiding principles for determination of COMI, stating that:

[w]here a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

[394] Thus, a national court must determine the weight of different factors ascertainable by third parties to rebut the presumption that the place of registration is also COMI. The so-called **Euro Food** test has been applied and thus clarified by courts of Member States on numerous occasions.

384 Ibid., para. 45.

385 CMS Guide to Finding COMI: European cases. Available at: https://eguides.cmslegal.com/pdf/finding_comi.pdf.

386 14 January 2009 Metropolitan Court of Appeal of Republic of Hungary judgment in case: No 9.Fpk. 01-08-006081/6.

387 14 October 2008 Metropolitan Court of Appeal of Republic of Hungary judgment in case: No 9.Fpk. 01-08-003390/6.

388 2 May 2006 CJEU judgment in case: No C-341/04 Eurofood IFSC Ltd, para. 37.

[395] A recent judgment of Chancery Division (the **U.K.**) proves the importance of **Euro Food** judgment for national courts.³⁸⁹ In that case the question for Chancery Division was rather simple – whether COMI of the company in question under Insolvency Regulation was in its place of registration (Luxembourg) or place of management (England). The Chancery Division went directly to **Euro Food** test, considering it to represent good law on the issue. In the court’s words:

Applying that test, on the facts as disclosed by the evidence before the court, it is, I think, apparent that the decisions which govern the administration and management of the company are taken in London with the director based in London being primarily involved in the affairs of the company and responsible for communication of the decisions of the company to those with whom it deals. The persons with whom it primarily deals are the agents. [...]

It may be a difficult question whether the COMI of the company is affected by where the agents appointed by the company are operating, but they are in any event operating in London. [...]

Accordingly, for the purposes of the Regulation, I am satisfied that the COMI of the company is located in England and that the presumption in favour of Luxembourg, being the location of its registered office, is rebutted.³⁹⁰

[396] In the **Euro Food** judgment, the CJEU made a crucial decision on favouring protection of creditors for determination of COMI. This approach is based on the “*real seat*” theory, developed in Continental company law.³⁹¹ The emphasis here is on the impression generated in the eyes of creditors as to the place of the debtor’s decision management. It is recognized that English courts prefer to emphasize the place where the decisions are made as the main connecting factor between the debtor and COMI.³⁹²

[397] It is important to note that scholars offer different readings of Article 3 of the Insolvency Regulation. Some scholars have argued that COMI must be determined in accordance with the domestic law of the state of registration.³⁹³ This approach would generate particularism and narrow down the certainty and role of the Insolvency Regulation. There are different criteria that scholars have offered as crucial for determination of COMI.³⁹⁴ The English approach, however, allows for easy identification of the COMI of legal persons.

[398] The practice of the CJEU does not provide a black-letter rule for identification of COMI. Hence, courts of each Member State must evaluate the relative weight of criteria that will determine COMI, whether it is place of management, place of providing services, information on the company’s webpage, etc. The vagueness of the CJEU judgments may be seen as their weakness. On the other hand, it allows English courts to evaluate where COMI lies according to their understanding how COMI must be ascertained. At the same time, the decision of the Chancery Division cited above shows that courts are able to use abstract language of the CJEU in order to apply their methods of identification of COMI, which benefits from comparative simplicity.

[399] Another **U.K.** decision on COMI shows that English courts are able to make analogies and apply principles enumerated in CJEU judgments under different circumstances. Even though Article 3 of Insolvency Regulation does not expressly mention COMI of a natural person, nevertheless, Insolvency Regulation applies to insolvency proceedings of legal and natural persons alike.³⁹⁵

389 09 October 2013 England and Wales High Court (Chancery Division Companies Court) judgment in case: ARM Asset Backed Securities SA, Re [2013] EWHC 3351 (Ch).

390 Ibid., paras. 19-22.

391 Paschalidis P. Freedom of Establishment and Private International Law for Corporations. Oxford University Press, 2012, para. 89.

392 Pannen K. (ed.). European Insolvency Regulation. De Gruyter, 2007, p. 96.

393 Khairallah G. The ‘Centre of Debtor’s Main Interests’: Comments on the Eurofood Judgment of the ECJ. Ringe W.-G., Gullifer L., Théry P. (eds). Current Issues in European Financial and Insolvency Law. Bloomsbury Publishing, 2009, p. 113-114.

394 Pannen K. (ed.). European Insolvency Regulation. De Gruyter, 2007, p. 96-102.

395 Ibid., p. 41.

English practice shows that while **Euro Food** and later CJEU judgments, elaborating the test applicable for determination of COMI of legal persons, are not useless in relation to COMI of a natural person. In this case two Irish citizens who through various corporate vehicles owned properties in the U.K., **Sweden** and America, presented petitions for bankruptcy in the U.K.³⁹⁶

[400] The court built the normative context, setting up circumstances that will determine COMI through references to CJEU case law and earlier English case law, applying the principles developed by the CJEU. The **Euro Food** and **Interedil**³⁹⁷ cases were cited to establish that the core of COMI is determined by circumstances that must be ascertainable by third persons. Thus, the impression of third persons was the most relevant consideration. The court therefore considered where the petitioners had pursued economic activity that was ascertainable to third parties and doing so, the court used the whole flurry of circumstances (time spent in England, usage of address in England). However, the court also considered facts that pointed towards COMI in Ireland for instance a website where the petitioner was describes as “*Dublin lawyer*”, “*Dublin solicitor*”, “*Dublin-based solicitor*” and “*Irish solicitor*”; the fact that decisions were taken mostly in Ireland; Dublin address was mentioned in various transaction documents; witnesses’ statements indicated that third parties assumed that the petitioners’ COMI is in Dublin. Wide variety of circumstances lead the court to conclusion that third persons were not aware of all petitioners’ activities:

[t]hird parties could not, for example, have discovered that the O’Donnells had applied to reserve a grave at Mill Hill Cemetery, shopped at Fortnum and Mason, visited the Tate Britain gallery, acquired a Westminster library card, eaten at a London restaurant or attended a performance at a London theatre. Nor will it have been apparent to creditors generally that the O’Donnells had consulted English insolvency practitioners (David Rubin & Partners) or English solicitors (Edwin Coe).

[401] Thus, taking into account all the circumstances, the court concluded that the COMI remained in Ireland.

[402] The foregoing approach may be contrasted with that of the **Latvian** courts. In a case, the court applied **Interedil**³⁹⁸ and other CJEU judgments (presumably **Euro Food** judgment) by analogy where a Lithuanian citizen submitted for opening of insolvency proceedings in Latvia pursuant to his declaration.³⁹⁹ Latvian court focused mostly on publicly available information including the place of declaration for natural person, rather than impression of COMI of third persons.

[403] The court applied CJEU practice regarding COMI of legal persons to natural persons, considering that the place of declaration (registered address) creates a presumption of COMI under Article 3(1) of Insolvency Regulation just like place of registration for companies. Thus, the court first established a formal presumption that **Latvia** is where COMI is located based on the place of declaration of address in accordance with the commentary of legal scholars of the national law. Fortunately, the court did not follow the misleading commentary but also evaluated the intention of the debtor to seek a more favourable legal position through change of registered address. Thus the Latvian court also made a case-by-case test of specific circumstances but started with a presumption of COMI in place of registered address.

[404] The approach of the court in this case is dangerous for two reasons. Firstly, the court initially based its conclusion of COMI on domestic understanding of declaration (registration of address) as having some relation with COMI of the person because declaration does not create a permanent link with a particular place. Under the national law a debtor may be declared in Latvia, but have

396 21 December 2012 England and Wales High Court (Chancery Division in Bankruptcy) judgment in case: *O’Donnell & Anor v The Bank of Ireland* [2012] EWHC 3749 (Ch).

397 20 October 2011 CJEU judgment in case: *No C-396/09 Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA*.

398 *Ibid.*

399 10 December 2013 Vidzemes Regional Court decision in case: *No CA-0239-13/9*.

all his or her economic activities outside. Declaration can likewise be easily changed. For foreign creditors unfamiliar with declaration system, existence of such register may be unknown or unimportant, thus third persons might not be aware of such circumstances.

- [405]** Moreover, Article 3 of Insolvency Regulation identifies both jurisdiction and *lex concursus*, because Article 4 subjects insolvency proceedings to *lex fori*.⁴⁰⁰ Conflict of laws in **Latvia** is not solved through the connection factor of declaration. Article 8 of Latvian Civil Law provides that the habitual residence (also called domicile) directs to the country which laws are applied.⁴⁰¹ The said article determines capacity of legal persons through connecting factor of real seat and not the place of registration. Thus, conflict of laws in Latvian legal system never relies on declaration or even registration of legal persons, unless international or EU law provides otherwise. Secondly, the court used commentary of legal scholars of the national law to apply Insolvency Regulation. Insolvency Regulation should not be interpreted in accordance with domestic legal system and understanding of insolvency proceedings as it encumbers harmonization of cross-border insolvency proceedings.
- [406]** Therefore such reliance on national law and national legal commentaries in other circumstances could lead to wrongful interpretation of Insolvency Regulation and notions of CJEU case law regarding autonomous definition of COMI.⁴⁰²
- [407]** Not only courts but also parties tend to rely on the declaration principle. In another case the Riga Regional Court (*Rīgas apgabaltiesa*) reviewed the location of COMI of a debtor, Lithuanian citizen, who intended to initiate insolvency proceedings in Latvia.⁴⁰³ The debtor referred to the *Interedil* judgment⁴⁰⁴ and stated that his COMI is in Latvia and greater importance should be attached to the place of the company's central administration – his declared place of residence.
- [408]** The Riga Regional Court did not refer to any case law of CJEU but correctly concluded that place of declaration does not automatically relocate COMI of a debtor, especially considering that declaration was made one day before submission for opening of insolvency proceedings. The court formally considered the declaration in Latvia but followed the *Euro Food* approach and evaluated all evidence in the case and came to the right conclusion on the location of COMI.
- [409]** It must be noted from the reviewed cases and previous research⁴⁰⁵ that declaration has been often used by Lithuanian citizens as an attempt to claim relocation of COMI to open insolvency proceedings in **Latvia** or the **U.K.**
- [410]** However, a similar approach considering the declaration principle as presumption for location of COMI can be seen in Swedish practice. In a case the Supreme Court of **Sweden** applied findings of CJEU in *Euro Food*⁴⁰⁶ and *Staubitz-Schreiber*⁴⁰⁷ and found that under Article 3(1) of Insolvency Regulation and its autonomous interpretation in *Euro Food*⁴⁰⁸ judgment there is a rebuttable presumption that a national registration in Sweden corresponds to person's COMI unless otherwise proved. The court found that at the moment of opening of insolvency proceedings

400 Virgós M., Garcímartín F. The European Insolvency Regulation: Law and Practice. Kluwer Law International, 2004, p. 72.

401 Civil Law: Law of the Republic of Latvia, Latvijas Vēstnesis [Latvian Herald], No. 41, 20.02.1937.

402 2 May 2006 CJEU judgment in case: No C-341/04 Eurofood IFSC Ltd., para. 31.

403 27 January 2014 Riga Regional Court decision in case: No. CA-940-14/7, unpublished.

404 20 October 2011 CJEU judgment in case: No C-396/09 Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA, para. 59.

405 Hess B., Oberhammer P., Pfeiffer T. European Insolvency Law. The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No 1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), p. 139, available at: <http://www.mpi.lu/news-and-events/latest-news/detail/detail/the-external-evaluation-of-reg-no-13462000ec-on-insolvency-proceedings/>.

406 11 June 2009 Högsta domstolen judgment in case: Ö1545-08 (alt NJA 2009:383).

407 17 January 2006 CJEU judgment in case: No C-1/04 Susanne Staubitz-Schreiber.

408 2 May 2006 CJEU judgment in case: No C-341/04 Eurofood IFSC Ltd.

the debtor owned property in Sweden, paid maintenance for children in Sweden and also had tax liabilities and parking fines imposed in Sweden; hence COMI at the moment of opening of insolvency proceedings undoubtedly was located in Sweden.

[411] Thus Swedish court both relied on the national registration fact but also intended to verify the facts that prove where COMI was located at the moment of opening of insolvency proceedings. Swedish court's approach is a synthesis between Latvian and English courts for two reasons. Firstly, Supreme Court of Sweden has assessed evidence, as done by English courts. Secondly, all evidence is primarily used to prove the premise that COMI lies in the place of declaration, as considered by Latvian courts.

5.4. Application of *Seagon* Judgment

[412] The ruling of the CJEU in *Seagon*,⁴⁰⁹ where a preliminary ruling was sought from the Federal Court of Justice (*Bundesgerichtshof*), **Germany**, is also widely applied in the scope of the Research, especially in Sweden.

[413] In the main proceedings, Frick, a German company, transferred money to an account in Dusseldorf in the name of Deko. A few days later insolvency proceedings were opened in Germany. Mr Seagon, as the liquidator of Frick, brought a claim for setting aside the aforementioned transaction and recovering the damages from Deko. Under these circumstances the CJEU found that a claim for setting a transaction aside is clearly intended to increase the assets of the undertaking that is the subject of insolvency proceedings, and therefore are covered under Article 3(1) of the Insolvency Regulation. The CJEU thus interpreted Article 3(1) as meaning that it also confers international jurisdiction of the Member State within the territory of which insolvency proceedings were opened in order to hear and determine actions which derive directly from those proceedings and which are closely connected to them⁴¹⁰.

[414] In a case before County Court of Upper Northland (**Sweden**)⁴¹¹ court noted that there is no case law of CJEU that explains this matter, but noted that German *Bundesgerichtshof*, however, has sought a preliminary ruling from CJEU in *Seagon*.⁴¹² Notwithstanding the lack of CJEU case law, the court concluded that if the jurisdiction rule in Insolvency Regulation applies to a recovery action against a defendant domiciled in another Member State, it is Swedish court's jurisdiction to hear the bankruptcy estate proceedings against debtor. The Swedish court also gave its reasons to not wait before CJEU rules on the matter because should the answer to the request for a preliminary ruling in *Seagon* become negative, there is at least not any EU law obstacles to the **Swedish** court to hear the case and the question of jurisdiction shall, be evaluated according to national Swedish law. Thus the court used the future notion of the *Seagon* judgment but also gave clear reasoning why a preliminary question before CJEU should not be made but the proceedings in the particular case should not be delayed.

[415] Similarly in a case in relation with the insolvency proceedings in Finland⁴¹³ the Supreme Court of **Hungary** found that according to *Seagon*⁴¹⁴ both – judgments deriving directly from the insolvency proceedings and those that are closely linked with them – should be recognized with no

409 12 February 2009 CJEU judgement in case: No C-339/07 Christopher Seagon v Deko Marty Belgium NV.

410 12 February 2009 CJEU judgement in case: No C-339/07 Christopher Seagon v Deko Marty Belgium NV, para. 21.

411 15 January 2008 Hovrätten för Övre Norrland judgment in case: Ö 749-07, (alt NJA 2008:9).

412 12 February 2009 CJEU judgement in case: No C-339/07, Seagon v Deko Marty Belgium NV.

413 21 April 2011 Supreme Court of Republic of Hungary judgment in case: No. Pfv. X. 21.978/2010.

414 2 February 2009 CJEU judgment in case: No C-339/07 Christopher Seagon v Deko Marty.

further formalities. The Hungarian court also referred to the **MG Probud** case⁴¹⁵ and concluded that Insolvency Regulation does not contain specific rules for the enforcement of judgments relating to insolvency proceedings, but refers to the system of enforcement established by Brussels Convention; the judgment of the Finnish court must be enforced based on Brussels I Regulation.

[416] This judgment is a positive example of a comprehensive analysis of CJEU case law. The Supreme Court of Hungary not only referred to the recent CJEU case law regarding interpretation of the Insolvency Regulation, but also has taken into consideration older judgments discussing more general issues in the context of the Brussels Convention, like the **Industrial Diamond Supplies** case⁴¹⁶ dealing with staying of proceedings, the **SISRO** case⁴¹⁷ about judgments given on an appeal against authorization of enforcement and the **Krombach** case⁴¹⁸ concerning public policy and enforcement of judgments.

5.5. Application of Insolvency Regulation in Relation to Third States (and Denmark) in Relation to Recovery Actions

[417] The Researchers identified some cases in Sweden where the Insolvency Regulation in relation to recovery actions is applied also in relation to third states and Denmark.

[418] In one case the Supreme Court of **Sweden**⁴¹⁹ referred to the CJEU judgment in **Seagon**⁴²⁰ and concluded that Article 3(1) of the Insolvency Regulation is construed that court of the Member State in whose territory insolvency proceedings have been opened has jurisdiction to review recovery actions directed against a defendant domiciled in another Member State. Furthermore the court *obiter dictum* noted that the application of the Insolvency Regulation is not inconsistent with the Nordic Bankruptcy Convention,⁴²¹ as it does not regulate the issue of jurisdiction. The court found that in the particular case the recovery action was clearly related to the bankruptcy proceedings in Sweden and even though the Insolvency Regulation does not bind Norway, the efficiency reasons were taken into account establishing jurisdiction of Swedish courts.

[419] In another case before the Supreme Court of Sweden⁴²² the court referred to the **Seagon**⁴²³ judgment and by analogy applied the Insolvency Regulation even though the debtor in the recovery action was not registered in any EU Member State and the Insolvency Regulation was not directly applicable. The jurisdiction of Swedish courts was established considering the fact insolvency proceedings were opened in Sweden and there were no other laws regulating this matter.

[420] The Supreme Court of Sweden had also applied the **Seagon** judgment for determination of the jurisdiction in a dispute between Swedish and Danish enterprises.⁴²⁴ In one case the Supreme Court of Sweden, even though its judgment was based on the implications of the jurisdiction clause after termination of contract, noted that the Insolvency Regulation is not applicable to Denmark (domicile of defendant), however the court noted that the interpretation of Insolvency

415 21 January 2010 CJEU judgment in case: No C-444/07 MG Probud Gdynia sp. z o.o.

416 22 November 1977 CJEU judgment in case: No 43/77 Industrial Diamond Supplies v Riva.

417 11 August 1995 CJEU judgment in case: No C-432/93 SISRO v Ampersand Software.

418 28 March 2000 CJEU judgment in case: No C-7/98 Dieter Krombach v André Bambersk

419 31 January 2013 Högsta domstolen judgment in case: Ö743-11 (alt NJA 2013:22).

420 12 February 2009 CJEU judgment in case: No C-339/07, Seagon v Deko Marty Belgium NV.

421 Berglund M. Cross-border Enforcement of Claims in the EU: History, Present Time and Future. Kluwer Law International, 2009, p.80.

422 31 January 2013 Högsta domstolen judgment in case: Ö4631-11, (alt NJA 2013:31).

423 12 February 2009 CJEU judgement in case: No C-339/07, Seagon v Deko Marty Belgium NV.

424 30 December 2010 Högsta domstolen judgment in case: Ö2782-10, (alt NJA 2010:734).

Regulation by the CJEU gives a permission for a Swedish court to find jurisdiction in a recovery action. Thus Swedish courts applied the Insolvency Regulation in a dispute between Swedish and Danish enterprises.

- [421]** Even though the interpretation of **Seagon** by Swedish courts in aforementioned cases could be recognized as correct by the virtue of the Insolvency Regulation, the Swedish courts had widened the scope of the **Seagon** judgment as it applies only to jurisdiction to decide an action to set a transaction aside that is brought against a person whose registered office is in another Member State. However, such practice of Swedish courts was later indirectly justified by the CJEU judgment in the **Schmid** case.⁴²⁵
- [422]** Notwithstanding the fact that the **Seagon** judgment was already available, in the **Schmid** case the reference for a preliminary ruling was made by the Federal Court of Justice of **Germany** (*Bundesgerichtshof, BGH*) asking whether Article 3(1) of Insolvency Regulation had to be interpreted as meaning that the courts of Member State within the territory of which insolvency proceedings were opened (Germany) had jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency proceedings that were brought against a person whose place of residence was in the territory of a non-member State (Switzerland).
- [423]** In its judgment the CJEU answered to the question referred as follows:
- Article 3(1) of the Regulation must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is not within the territory of a Member State.*⁴²⁶
- [424]** In another case the Federal Court of Justice of Germany made a very short reference to the judgment of CJEU in the **Schmid** case, pointing out that Federal Court of Justice is bound by the interpretation made by CJEU and therefore the courts of Member State within the territory of which insolvency proceedings had been opened (German courts) had jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency proceedings brought against a person whose place of residence is not within the territory of a Member State.⁴²⁷
- [425]** This very short reference to the case law of the CJEU can be explained by the very good quality of the judgment in the **Schmid** case. The answer to the question referred was clear and the national court could simply make a reference to it without any deeper analysis. Researchers conclude that the clearer the answer of the CJEU, the clearer and shorter is the national court's judgment (decision) in the particular case.

5.6. Conclusions and Suggestions

- [426]** Courts of all Member States considered in this Research have uniformly applied the Insolvency Regulation. From the reviewed cases the Researchers conclude that the national courts still struggle with determination of COMI of natural persons and distinguishing between matters of jurisdiction and applicable law.
- [427]** The approach to the question of COMI shows an important difference of application of the practice of the CJEU. For **English** courts, which historically have used elaborated factual investigations, the open-ended nature of the CJEU practice in relation to COMI seems perfectly acceptable. The

425 16 January 2014 CJEU judgment in case: No C-328/12 Ralph Schmid v Lilly Hertel, para. 39.

426 Ibid.

427 BGH, 9.Zivilsenat, 27.March 2014, IX ZR 2/12,Im. Available at: www.juris.de.

Researchers conclude that English courts have simply taken an important guideline of third-party impression and used its own understanding on weighing different facts. However, **Latvian** courts seem to have used a misleading interpretation of national law that indicated that COMI lies in the place of declaration, thus substituting its own law for the Insolvency Regulation. Even though the court found that declaration is one of the circumstances to be taken into account for determination of COMI, then again, there was no legal basis, neither in the Insolvency Regulation, nor CJEU case law to turn declaration into a presumption of COMI. The Researchers suggest that the approach of English courts should be encouraged for establishment of COMI of natural persons.

- [428]** The practice of **Sweden** shows that the courts successfully apply the conclusions from the CJEU in the **Seagon** judgment regarding jurisdiction to decide an action to set a transaction aside that is brought against a person whose registered office is in a third state. The Researchers find this approach correct by the virtue of the Insolvency Regulation and justified by the later CJEU judgment in **Schmid**.
- [429]** From the reviewed cases the Researchers conclude that reference to judgments of the CJEU is mostly used to justify an exception from the general principle under Article 3(1) of the Insolvency Regulation when COMI is established in a Member State than other the Member State where the registered office is located.
- [430]** The Researchers conclude that the clearer the answer of the CJEU, the clearer is the national court's judgment (decision) in the particular.

6. Family Matters

6.1. Family Matters in General

- [431]** Two main instruments establishing jurisdiction and recognition and enforcement of judgments in regards to family matters are the Brussels IIbis Regulation and the Maintenance Regulation. These instruments established specialized rules by reference to the Brussels I Regulation.
- [432]** The Brussels IIbis Regulation deals with two subject matters: matrimonial matters and certain matters relating to parental responsibility. The first category covers divorce, legal separation and marriage annulment (Article 1(a)). The second - the attribution, exercise, delegation, restriction or termination of parental responsibility (Article 1(b)).
- [433]** For matrimonial matters, the Brussels IIbis Regulation established several alternative heads of jurisdiction (Article 3). In cases of parental responsibility, the habitual residence of the child at the time the court is seized determines jurisdiction (Article 8). However, the regulation provides certain exceptions from this rule (Articles 9 and 10). Finally, under certain circumstances, the Brussels IIbis Regulation allows parties to prorogate jurisdiction over matrimonial and parental responsibility matters (Article 12).
- [434]** Like the Brussels I Regulation, the Brussels IIbis Regulation contains both jurisdictional rules and rules on recognition and enforcement of judgments across EU (Article 21 *et seq.*). The Brussels IIbis Regulation contains no rules on conflicts of law. The Brussels IIbis Regulation fully applies as of 1 March 2005, to all Member States, except Denmark.
- [435]** The second specialized instrument is the Maintenance Regulation. It applies only to maintenance obligations arising from a family relationship, parentage, marriage or affinity falling into the scope of application of the regulation *ratione materiae*.

- [436]** According to Article 76(3) of the Maintenance Regulation, it applies as of 18 June 2011 and is subject to the 2007 Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations being applicable in EU by that date. Failing that, the regulation shall apply from the date of application of that Protocol in the European Union.
- [437]** According to Article 1(2) of the regulation the term “*Member State*” means Member States to which this regulation applies. Notwithstanding Recitals 47 and 48 of the regulation, it applies also to the **U.K.** and Denmark.
- [438]** According to the Commission Decision of 8 June 2009 No 2009/451/EC,⁴²⁸ the Maintenance Regulation shall apply to the **U.K.** The regulation entered into force in the **U.K.** on 1 July 2009. Article 2(2), Article 47(3) and Articles 71, 72 and 73 of the regulation apply since 18 September 2010. The other provisions of the regulation apply from 18 June 2011 and are subject to the 2007 Hague Protocol on the law applicable to maintenance obligations being applicable in the Community by that date. Failing that, the regulation applies from the date of application of that Protocol in the Community.
- [439]** In accordance with Article 3 of the Council Decision of 30 November 2009 No 2009/941/EC⁴²⁹ the **U.K.** and Denmark are not bound by the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. Therefore, Articles 23 – 38 of the Maintenance Regulation are applicable to the court decisions rendered in the **U.K.** and Denmark.

6.2. Special issues under the Brussels IIbis Regulation

- [440]** Researchers have identified several cases applying CJEU case law on the Brussels IIbis Regulation from all Member States studied in the Research. Firstly, there are a few cases from **Latvia** applying the Brussels IIbis Regulations. Only some of them include references to the older CJEU case law, however, most of them are confidential as decided *in camera*. However, one case will be analyzed in detail. Secondly, the Researchers have identified several decisions of the Supreme Court of **Hungary** referring to CJEU case law. Finally, in several decisions, courts in the **U.K.** and **Sweden** have made extensive references to CJEU case law on the Brussels IIbis Regulation. The Researchers have likewise identified a number of cases, where national courts dealt with issues already clarified by the CJEU, without expressly referring to its practice.⁴³⁰ These cases will not be analysed in this Research, however, they demonstrate that not always national courts refer to the CJEU case law, even when such references would have been appropriate.

428 Commission Decision of 8 June 2009 on the intention of the United Kingdom to accept Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (notified under document number C(2009) 4427) (2009/451/EC). Official Journal of the European Union L 149, 12.6.2009., p. 73.

429 Council Decision of 30 November 2009 on conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC). Official Journal of the European Union L 331, 16.12.2009., p. 17.

430 For example, a number of national decisions analysed the notion of child’s habitual residence without making any references to the CJEU case law. See, 15 June 2010 Svea hovrätt judgment in case: Ö4263-10, (RH 2010:85); Judgment of the Supreme Court of Republic of Hungary in the case: No. Pfv. II. 21.339/2011, unpublished.

- [441]** Determination of a child's habitual residence is one of the most important issues under the Brussels IIbis Regulation for national courts. To clarify the notion of habitual residence, the Court of Appeal of England and Wales had made reference for a preliminary ruling, *inter alia*, asking the CJEU to clarify the appropriate test for determining the habitual residence of a child for the purpose of Articles 8 and 10 of the Brussels IIbis Regulation.⁴³¹
- [442]** The Brussels IIbis Regulation does not define the concept of habitual residence. Answering a court's request, the CJEU did not provide a definition of habitual residence, but the CJEU provided certain guidelines on its identification. Firstly, "*it merely follows from the use of the adjective "habitual" that the residence must have a certain permanence or regularity.*"⁴³² Secondly, the place of habitual residence reflects some degree of integration by the child in a social and family environment.⁴³³ Thirdly, it is not a temporary or intermittent place.⁴³⁴ Finally, the CJEU indicated that in order to determine the scope of "*habitual residence*", both the age of the child as well as the duration, regularity, conditions and reasons for the stay in the territory of particular Member State shall be taken into consideration.⁴³⁵
- [443]** The *Mercredi* case has been an important point of reference for national courts. It has been used as the principle authority by the Supreme Court of **Hungary**, in a case concerning alleged abduction of a child by his mother.⁴³⁶ The court referred to *Mercredi*,⁴³⁷ enlisting all the factors which have to be taken into account when determining the habitual place of a child, who, because of his young age, cannot really integrate into society himself. The Supreme Court of Hungary found that the mother had spent only a short period of time in Hungary, which served as the primary factor to decline jurisdiction in Hungary. In other words, the child had no habitual residence in Hungary.
- [444]** *Mercredi* has been an equally useful point of reference for Swedish courts. The Supreme Court of **Sweden**⁴³⁸ reviewed a case where A.W. and M.B. had a son, O., born in 2003. All three family members were Swedish citizens. By judgment of the Court of Appeals, A.W. was awarded sole custody of O. A.W. moved with O. to Bali in Indonesia in December 2009, selling all her property in Sweden and obtaining a visa to Indonesia for one year, where they both still lived in 2010 when M.B. brought proceedings before the court. At the time when court proceedings were started,

431 22 December 2010 CJEU judgment in the case: No. C-497/10 Barbara Mercredi v. Richard Chafee. Part 1 of Article 8 of Brussels IIbis Regulation provides: The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seized.

Article 10 states:

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and: (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met: (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained; (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i); (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7); (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

432 Ibid., para. 44.

433 Ibid., para. 47.

434 Ibid., paras. 49-50.

435 Ibid., para. 56.

436 Judgment of the Supreme Court of Republic of Hungary in the case No. Pfv.II.20.769/2013/5, unpublished.

437 22 December 2010 CJEU judgment in case: No C-497/10 PPU Mercredi. Mercredi was quoted by a claimant in another similar case, where a mother took her infant baby to Hungary without the permission of the father of the child. See, Judgment of the Supreme Court of Republic of Hungary in the case No. Pfv. II. 20.769/2013.

438 5 July 2011 Högsta domstolen judgment in case: Ö5155-11, (alt NJA 2011:42).

O's school place in Sweden was also terminated, and since January 2010 O. had enrolled in an international school in Bali. The Supreme Court of Sweden elaborated whether Swedish courts have jurisdiction to hear M.B.'s claims.

- [445]** The Supreme Court of **Sweden** noted that Swedish jurisdiction may be determined under Articles 8-13 of the Brussels IIbis Regulation that contain provisions on the jurisdiction of national courts in matters of parental responsibility, including custody and access rights. The Supreme Court of Sweden further noted that if no court of any Member State is identified as competent under the said articles, then in accordance with Article 14, jurisdiction has to be determined in accordance with national law. The court emphasized that the Brussels IIbis Regulation concerning parental responsibility goes beyond coordination between EU states only, and the question whether the child is habitually resident in Sweden should therefore be considered under Article 8(1) of the Brussels IIbis Regulation, although this case has no connection with another EU Member State. The question whether a Swedish court has jurisdiction should be tried first under the provisions of the Brussels IIbis Regulation.
- [446]** Considering that the Brussels IIbis Regulation does not define the concept of domicile, the Supreme Court has referred to case law of the CJEU – the **A.**⁴³⁹ and **Mercredi** cases.⁴⁴⁰ As in previously reviewed cases, the Supreme Court draws support from the CJEU's practice, and concludes that habitual residence corresponds to the place where the child is integrated in social and family terms, taking into account the duration and regularity of the stay in a particular Member State, the conditions of the stay, the reasons for the stay, the reasons why the family moved to the other Member State, the child's nationality, the place and the conditions of schooling, the child's language skills, and the family and social ties in that Member State.
- [447]** For these reasons and following the ruling in the **Mercredi** case, the court established the parent's intention to work and reside in another state with a child, through indirect indications, such as acquiring or renting a residence in the Member State to which they moved, can prove the habitual residence of a child. The court considered that O. was under the sole custody of A.W., who had the right to decide on their place of settlement, therefore O's habitual residence is identical to that of A.W. The court found that despite the short time that elapsed from the time of the move to Indonesia, A.W. and O. at the time the proceedings were brought before court did not have habitual residence in Sweden in the meaning of Article 8 of the Brussels IIbis Regulation. The court also found that there are no other legal grounds for establishing the jurisdiction of Swedish courts in this case.
- [448]** **Mercredi** is one of the cases referred to by the first instance court in **Latvia**. Mother Z.Š. submitted the claim against father I.F. on the determination of the daily custody for their son A.F in the court in **Latvia**.⁴⁴¹ The court established that son's declared place of residence is in Latvia⁴⁴² but the claimant also has identified that son was born in the **U.K.** and continued to live there with his father. Thus the judge denied jurisdiction, since A.F. was integrated in social and family environment in the U.K. The court supported its conclusion by a reference to the **Mercredi** case, stating that the jurisdiction is in Member State where the habitual residence of the child is, i.e., in the place where child has been integrated socially and in this case it is obviously in the **U.K.**

439 2 April 2009 CJEU judgment in case: No C-523/07 A., paras. 37-44.

440 22 December 2010 CJEU judgment in case: No C-497/10 PPU Mercredi, paras. 47-56.

441 29 November 2011 Ventspils court decision in the case No.3-10/0084, unpublished.

442 Each person has an obligation to declare its place of residence in accordance with the Article 2 of Law on Declared Place of Residence. Adopted 20.06.2002, published in Latvijas Vēstnesis (Latvia's Harrods) No. 104, 10.07.2002.

- [449]** It can be concluded that the judge effectively used the CJEU’s case law as well as did not apply the national rules of the declared address as the basis to establish the habitual residence of the child. As suggested by the CJEU, the “*habitual residence*” of a child must be established on the basis of all the circumstances specific to each individual case as it was done by the judge in the case at hand.⁴⁴³
- [450]** Some examples from the U.K. show that while the **Mercredi** test of habitual residence is flexible, sometimes it does not allow reaching a definite conclusion. In *Lambeth LBC v JO*, Family Division court made an attempt to apply the **Mercredi** test to the following facts.⁴⁴⁴ The parents of two children lived between London and Nigeria. The older child, R., was four years old and had spent more time in Nigeria than in London. But R. spent time with relatives in both jurisdictions. The second child, Y., was only seven months old during the time of proceedings and had never visited Nigeria, but for the court it was beyond doubt that the mother of the child had habitual residence in Nigeria.
- [451]** Evaluating all these circumstances in light of the **Mercredi** judgment, the Family Division court acknowledged its inability to determine the habitual residence of the children. Instead, the court established jurisdiction on Article 13 of the Brussels IIbis Regulation, as both children were present within its jurisdiction.
- [452]** In another case, the Family Court failed to establish habitual residence based on the **Mercredi** test.⁴⁴⁵ C. was a six-year old girl born in Zimbabwe, where she lived until age three. Her father, F., was a United States citizen, while her mother, M., a citizen of Zimbabwe. At the age of three, C. moved to the United States and thus lost her habitual residence in Zimbabwe. In the United States, she was not allowed by her father to fully communicate with other members of her family. Later, her father took her to England, where he applied for British citizenship. During that time, F. and C. lived in a tent.
- [453]** The Family Division court applied the comprehensive factual analysis of the **Mercredi** case and found that under such extreme circumstances, where the child was constantly moving and was unable to integrate in the local environment, no habitual residence was identifiable. Again, the court established jurisdiction under Article 13 of the Brussels IIbis Regulation.
- [454]** In regards to other aspects of the Brussels IIbis Regulation not focusing on the habitual residence of a child, the Researchers have identified a number of pertinent judgments delivered by **German** courts containing extensive references and analysis of CJEU cases.
- [455]** The Researchers found an interesting judgment regarding international jurisdiction in divorce proceedings between German and Maltese nationals who had their habitual residence in Malta.⁴⁴⁶ The plaintiff (a German national) pursued her action to have set aside the judgments of lower courts by appealing on points of law (Revision) to the Federal Court of Justice (*Bundesgerichtshof*). The lower courts dismissed the claim on divorce as inadmissible, as German courts lacked international jurisdiction (Article 3(1)(a) of the Brussels IIbis Regulation). The appeal was also rejected by the Federal Court of Justice of **Germany** due to the lack of international jurisdiction of German courts.
- [456]** The plaintiff (a German citizen) brought a divorce claim against her husband (a Maltese citizen) in German court – the Local Court in Schöneberg (*Amtsgericht Schöneberg*). This court made its judgment on 17 December 2008, when divorce did not exist in Malta. Only on 1 October 2011 was divorce established in the Maltese legal system. This means that at the time of appealing on a point of law (Revision), the possibility for divorce already existed in Malta. Therefore, the Federal

443 1 April 2009 CJEU judgment in the case: No. C-523/07 A., para. 37.

444 31 October 2014 Family Division judgment in case: *Lambeth LBC v JO* [2014] EWHC 3597 (Fam).

445 30 July 2014 Family Court judgment in case: *Derbyshire CC v F* [2014] EWFC 26.

446 20 February 2013 judgment of Federal Court of Justice of Germany (Bundesgerichtshof, BGH) in case: No. XII ZR 8/11.

Court of Justice pointed out that, because of the changes in the Maltese legal system, the court would not make a reference for a preliminary ruling in order to find out whether the Brussels IIbis Regulation could provide international jurisdiction based on *forum necessitatis*. This interpretation was not necessary anymore.

[457] The plaintiff wanted to prove the international jurisdiction of German courts by referring to Article 3(1)(b) – the nationality of both spouses. As in this particular case the spouses had two different nationalities, the plaintiff argued that this Article was discriminating towards spouses with different nationalities, and, therefore, Article 3(1) (b) had to be applied also regarding two different nationalities.

[458] The Federal Court of Justice rejected this argument and based its counterargument on the interpretation of the Brussels IIbis Regulation and two the CJEU cases. In the **Hadadi** case, the CJEU ruled that:

Where the court of the Member State addressed must verify, pursuant to Article 64(4) of the Brussels II bis Regulation, whether the court of the Member State of origin of a judgment would have had jurisdiction under Article 3(1)(b) of that regulation, the latter provision precludes the court of the Member State addressed from regarding spouses who each hold the nationality both of that State and of the Member State of origin as nationals only of the Member State addressed. That court must, on the contrary, take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case.⁴⁴⁷

[459] In **Lopez** case, the CJEU ruled that:

Articles 6 and 7 of the Brussels II bis Regulation are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation.⁴⁴⁸

[460] The Federal Court of Justice inferred from this case law that international jurisdiction could not be based solely on the nationality of one spouse within the meaning of Article 3(1)(b). Also, Article 7(1) could not be applied, because of Article 3(1)(a). In this case the courts of Malta had international jurisdiction, and the fact that Maltese legislation regarding divorce had been changed during the procedure in Germany did not change the international jurisdiction of the Maltese courts.

[461] The second case is the **Purrucker I** case, where the Federal Court of Justice of Germany made a reference for a preliminary ruling in order to clarify the interpretation of Article 21 of the Brussels IIbis Regulation.⁴⁴⁹ In this case observations were also submitted by seven governments, including the governments of the **U.K.** and **Hungary**.

[462] The question whether the provisions laid down in Article 21 *et seq.* of the Brussels IIbis Regulation were also applicable to provisional measures within the meaning of Article 20 of that regulation or only to judgments on the substance was a matter of debate in academic circles and had not been definitively solved by the case law at that time.⁴⁵⁰ Therefore, the Federal Court of Justice of **Germany** posed the following preliminary question:

447 16 July 2009 CJEU judgment in case: No. C-168/08 Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady), para. 43.

448 29 November 2007 CJEU judgment in case: No. C-68/07 Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo, para. 28.

449 15 July 2010 CJEU judgment in case: No. C-256/09 Bianca Purrucker v Guillermo Vallés Pérez.

450 *Ibid.*, para. 47.

*Do the provisions of Article 21 et seq. of the Brussels IIbis Regulation concerning the recognition and enforcement of decisions of other Member States, in accordance with Article 2(4) of that regulation; also apply to enforceable provisional measures, within the meaning of Article 20 of that regulation, concerning the right to child custody?*⁴⁵¹ The answer to the question referred was: *The provisions laid down in Article 21 et seq. of the Brussels II bis Regulation do not apply to provisional measures, relating to rights of custody, which fall within the scope of Article 20 of that regulation.*⁴⁵²

[463] Normally, according to Article 24 of the Regulation, courts of other Member States may not review the assessment made by the first court concerning its jurisdiction.⁴⁵³ However, this prohibition does not preclude the possibility that a court to which a judgment is submitted and which does not contain material which unquestionably demonstrates the substantive jurisdiction of the court of origin may determine whether it is evident from that judgment that the court of origin had intended to base its jurisdiction on a provision of the Brussels IIbis Regulation.

[464] Making such a determination is not the same thing as reviewing the jurisdiction of the court of origin, but merely to ascertain the basis on which that court considered itself competent.⁴⁵⁴ Therefore where the substantive jurisdiction of a court which has taken provisional measures is not plainly evident from the content of the judgment adopted (in accordance with Regulation), or where that judgment does not contain a statement free of any ambiguity in support of the substantive jurisdiction of that court, with reference to one of the criteria specified in Articles 8 to 14 of that Regulation, it may be inferred that that judgment was not adopted in accordance with the rules of jurisdiction laid down by that Regulation. Nonetheless, that judgment may be examined in light of Article 20 of the Regulation, in order to determine whether it falls within the scope of that provision.⁴⁵⁵

[465] Following the interpretation offered by the CJEU, the Federal Court of Justice of **Germany** decided to refuse recognition and enforcement of a decision by a Spanish court regarding urgent and provisional measures (awarding of the rights of custody of the two children (twins) to the Spanish father, ordering the return of one of the infants to his father in Spain) towards the child (one of the two twins) habitually resident in Germany with his German mother.⁴⁵⁶

[466] The Federal Court of Justice noted that it was bound by the interpretation made by the CJEU in the **Purrucker I** case. Nevertheless, the Federal Court of Justice concluded (in accordance with CJEU case law in **Purrucker I** and **Purrucker II**⁴⁵⁷) that the court had to differentiate between the two situations:

466.1. if the court which has jurisdiction according to Article 8 of the Regulation takes provisional measures, the recognition and enforcement of such decision has to be made according to Article 21;

466.2. if the court which has no jurisdiction according to Article 8 of the Regulation takes provisional measures, the jurisdiction to make such provisional measures can be based on Article 20. However, Article 20 gives no substantive jurisdiction in the meaning of the Regulation.

451 Ibid., para. 53.

452 Ibid., para. 100.

453 Ibid., para. 74.

454 Ibid., para. 75.

455 Ibid., para. 76.

456 9 February 2011 Federal Court of Justice of Germany judgment in case: No. XII ZB 182/08.

457 9 November 2010 CJEU judgment in case: No. C-296/10 Bianca Purrucker v Guillermo Vallés Pérez.

- [467]** Therefore, Article 21 of the Regulation is not applicable. CJEU case law in *Purrucker I* does not prevent all recognition or all enforcement of those measures in another Member State. Other international instruments or other national legislation may be used in a way compatible with the regulation.
- [468]** The Federal Court of Justice then made a very professional verification of all necessary facts in this particular case, where:
- 468.1. there was no substantive jurisdiction evident from that judgment that the Spanish court of origin based its jurisdiction on a provision of the Brussels IIbis Regulation – Articles 8 to 14;
- 468.2. the habitual residence of the child was not in Spain, but in Germany, within the meaning of Article 8 of the regulation;
- 468.3. in the Spanish decision there was no indication regarding the international jurisdiction mentioned in Articles 9 or 12 of the regulation.
- [469]** Based on these facts, the court refused recognition and enforcement of the Spanish decision in Germany. It is interesting that the CJEU itself in its judgment criticized the Spanish court's approach.
- [470]** It is clear that most of the facts referred to by the Spanish court do not represent criteria capable of establishing jurisdiction under Articles 8 to 14 of the Regulation. As regards the facts representing the criteria specified in Articles 8, 9 and 10 of that Regulation, which are capable of establishing such jurisdiction, namely the child's habitual residence and the child's former habitual residence, they do not make it possible to ascertain on which of those three provisions that court relied, if it did so, to hold that it had jurisdiction under that regulation.⁴⁵⁸
- [471]** Overall, national case law shows comparatively high awareness of CJEU case law on the Brussels IIbis Regulation. In particular, the CJEU practice on a child's habitual residence has been used as a starting point of legal analysis by national courts. Likewise, national courts have made careful analysis of the *Purrucker I* judgment to construe a legal regime for provision measures. Finally, CJEU case law has been used to clarify under what circumstances nationality of parties to a divorce dispute determines a court's jurisdiction.

6.3. Maintenance Regulation

- [472]** On 18 December 2014 the CJEU rendered the first judgment on the Maintenance Regulation.⁴⁵⁹ In the judgment, the CJEU interpreted Article 3(b), vesting jurisdiction over maintenance obligations to the court of the place where the creditor is habitually resident.
- [473]** As the CJEU has only recently delivered its first judgment on the Maintenance Regulation, there are no known references to it in national case law that is known to the Researchers. Nevertheless, there is **German** case law where the Maintenance Regulation has been applied with reference to CJEU case law. For example, the Higher Regional Court of Karlsruhe (*Oberlandgericht Karlsruhe*) in the case 8 W 61/13⁴⁶⁰ has decided on the recognition and enforcement of a judgment from the Netherlands in Germany in a maintenance case.

458 Ibid., para. 66.

459 18 December 2014 CJEU judgment in case: No C-400/13 and C-408/13 *Sophia Marie Nicole Sanders v David Verhaegen and Barbara Huber v Manfred Huber*.

460 OLG Karlsruhe, 8.Zivilsenat, 27.January 2014, 8 W 61/13. Available at: www.juris.de.

- [474]** The defendant opposed recognition and enforcement of the judgment, allegedly being contrary to German public policy (*ordre public*) (Article 24(a) of the Maintenance Regulation). According to the defendant a translator was not present during the main procedure in the Netherlands. However, a Dutch court (*Rechtbank R.*) had noted in its judgment that the defendant had waived legal assistance in this procedure. Therefore, the Higher Regional Court of Karlsruhe found that there was no violation of German public policy (*ordre public*) in this case and rejected the defendant's appeal. The Higher Regional Court of Karlsruhe referred to the CJEU judgment in **Trade Agency**⁴⁶¹ in order to explain that Article 24(a) of the Maintenance Regulation had to be interpreted strictly.
- [475]** The **Trade Agency** interpreted Article 34(1) of the Brussels I Regulation. But in this national case, the Higher Regional Court of Karlsruhe used systemic interpretation, applying case law on the Brussels I Regulation to interpret Article 24(a) (public policy) of the Maintenance Regulation. However, further, the Higher Regional Court of Karlsruhe preferred to make a reference to the case law of the Federal Supreme Court of Germany⁴⁶² in order to explain that the public policy clause (included in the Maintenance Regulation) can be envisaged only where the recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought, inasmuch as it would infringe a fundamental principle of law.
- [476]** It would have been more suitable had the court referred to the CJEU case law, instead to that of national courts. Several CJEU judgments would allow the court to reach the same conclusion, supporting its reasoning by statements of the court having the highest authority of interpreting EU legal acts. In the case at hand, the court could have supported its conclusion by referring to **Trade Agency** (para. 51), **Krombach**⁴⁶³, **Renault**⁴⁶⁴ and/or **Apostolides**.⁴⁶⁵

6.4. Conclusions and Suggestions

- [477]** The cases analysed by the Researchers show that, in principle, courts of Member States frequently apply the Brussels IIbis Regulation. On many occasions, national courts make extensive references to CJEU practice. However, this principle is not universally observed, creating the risk of misapplication. As the number CJEU cases is increasing, references to case law must be the starting point for interpretation of the Brussels IIbis Regulation by national courts.
- [478]** In the practice of national courts, the concept of a child's habitual residence is of paramount importance. Usually, habitual residence serves as a connecting factor for jurisdiction. This concept is not defined in the regulation and must be interpreted autonomously.⁴⁶⁶ Here, the **Mercredi** judgment is an invaluable aid for national adjudicators seeking to establish an autonomous meaning of this concept. This judgment is extensively cited in national case law. It is suggested that national courts analyse this and other CJEU judgments dealing with same issue when determining a child's habitual residence.

461 6 September 2012 CJEU judgment in case No C-619/10 *Trade Agency v Seramico Investments*, para. 48.

462 BGH NJW-RR 2012, 1013, 1014, Rn. 10.

463 28 March 2000 CJEU judgment in case No C-7/98 *Krombach v Bamberski*, para. 37.

464 11 May 2000 CJEU judgment in case No C-38/98 *Renault v Maxicar*, para. 59.

465 28 April 2009 CJEU judgment in case No C-420/07 *Apostolides v Orams*, para. 30.

466 Gallant E. *Règlement Bruxelles II bis (Matières matrimoniales et de responsabilité parentale)*. 2013, para. 136. (Available on Dalloz.fr database, available at: www.dalloz.fr).

- [479]** Nevertheless, judgments like *Mercredi* provide only general guidelines. National case law shows that courts deal with very different factual patterns. Determination of habitual residence may be affected by the child's age, relations with other family members, division and extent of custody. Research shows that so far many national courts have avoided the route of preliminary references.
- [480]** Using the flexible criteria for habitual residence established by the CJEU, courts consider themselves capable of adapting the approach to different fact patterns. Theoretically, this could be explained by the confidence of national adjudicators. Nevertheless, once the facts of the case strongly differ from those decided by the CJEU, it may be necessary for the court to consider referring to the CJEU. Otherwise, such open-ended concepts as habitual residence may end up being misapplied.
- [481]** The Brussels IIbis Regulation strongly diverges from the Brussels I Regulation. Even at the level of structure, the Brussels I Regulation seems to have more in common with the Rome I Regulation and the Rome II Regulation than the Brussels IIbis Regulation. Consequently, the potential for uniform interpretation is limited. However, the precise boundaries of uniform interpretation may be less than apparent.
- [482]** In some cases, these boundaries are drawn by the very text of the Brussels IIbis Regulation. For example, Article 1 of the Brussels IIbis Regulation defines its scope by use of the term "*civil matters*". While the same term "*civil matters*" is used in Article 1 of the Brussels I Regulation, one cannot simply transfer the concept into the Brussels IIbis Regulation, since Article 1 enlists different matters, by default falling within its scope.⁴⁶⁷ These matters are covered by the regulation, even when they are characterized as public law under national law.⁴⁶⁸ Therefore, a court of a Member State should not attempt mechanical extension of CJEU case law under the Brussels I Regulation to establish the scope of the Brussels IIbis Regulation.
- [483]** There are also other cases, when similar provisions in the Brussels IIbis Regulation and the Brussels I Regulation have substantial textual differences. For example, Article 20 of the Brussels IIbis Regulation permits a court of a Member State in urgent cases to take provisional measures, even if that court otherwise lacks jurisdiction under the Brussels IIbis Regulation. A similar provision of the Brussels I Regulation (Article 31) does not contain the urgency requirement, thus courts interpreting any of these provisions must take into account these substantial differences.⁴⁶⁹
- [484]** In other cases, the divergence between instruments is far from being apparent. Such is the already mentioned concept of a child's habitual residence under the Brussels IIbis Regulation. The CJEU has rejected reliance on interpretation of habitual residence under other EU instruments.⁴⁷⁰ In cases like this, when the text of the Brussels IIbis Regulation does not hint of the possibility of uniform interpretation, it is advisable that courts clarify uncertainties of interpretation by lodging a preliminary reference, rather than through an extension of case law under the Brussels I Regulation.
- [485]** In long run, the applicability of CJEU case law made with respect to the Brussels I Regulation to the Brussels IIbis Regulation may become by its own means a source of uncertainty. For example, in a recent case, the Supreme Court of the **U.K.** avoided answering whether rulings of the CJEU on prohibition of the *forum non conveniens* doctrine under the Brussels I Regulation are extendable to the Brussels IIbis Regulation.⁴⁷¹ As more cases are decided on the Brussels IIbis Regulation, these questions will have to be addressed by the CJEU.

467 Magnus U., Mankowski P. (eds). Brussels IIbis Regulation. SELP, 2012, p. 55.

468 Ibid., p. 56.

469 Briggs A. Private International Law in English Courts. Oxford University Press, 2014, p. 66.

470 1 April 2009 CJEU judgment in the case; No. C-523/07 A., para. 36.

471 9 September 2013 Supreme Court of the United Kingdom judgment in case: A v A (Children) (Habitual Residence) [2013] UKSC 60, para. 70.

- [486]** The Research shows that up to this moment, national courts do not make unnecessary references to CJEU case law on the Brussels I Regulation, in order to interpret the Brussels IIbis Regulation. On the contrary, it seems that both regulations are perceived as isolated legal regimes.
- [487]** Overall, in comparison with the Brussels I Regulation, the Brussels IIbis Regulation has been the subject of academic studies to a lesser degree. Consequently, there are more gaps in its interpretation. Likewise, CJEU case law on the Brussels IIbis Regulation has been subject to lesser scrutiny. Nevertheless, national courts have to use the tools at their disposal. So far, their main tools are CJEU case law that should be cited and discussed in national decisions and possibility to make new preliminary references when necessary.
- [488]** The situation is different in regards to the Maintenance Regulation. Here, CJEU case law is just starting to develop a uniform interpretation. The scarce national practice shows courts filling that gap by referring to their own national practice. For example, the **German** Higher Regional Court of Karlsruhe interpreted the Maintenance Regulation in light of the case law of the German Federal Supreme Court (*Bundesgerichtshof, BGH*). In principle, here, too, it may be more beneficial for all Member States that particularly complicated issues are solved not within the case law of one particular Member State, but amount to common knowledge through references to the CJEU.

7. European Procedures

7.1. European Procedures in General

- [489]** With European Procedures – the European Small Claims Regulation, European Order for Payment Regulation, and European Enforcement Order Regulation – the EU legislator has created separate EU level procedures in order to build autonomous, simple, fast and cost-effective procedures in cross-border disputes. European procedures cancel the recognition and exequatur process and promote the principle of mutual trust of the courts.⁴⁷² It is important that European Procedures are interrelated with the Brussels Ibis Regulation. For example, the Brussels Ibis Regulation shall apply when jurisdiction,⁴⁷³ cross-border cases and domicile⁴⁷⁴ is established.
- [490]** European Procedures are relatively new EU instruments in civil justice, thus there is also no extensive CJEU case law. For example, there is no single judgment on the European Small Claims Regulation, only two judgments on the European Enforcement Order Regulation, but five on the European Order for Payment Regulation; however, some of these judgments have played a great role in national case law (See: Annex).

472 See: Kačevska I., Rudevska B., Mizaras V., Brazdeikis A., Torga M. 2013. Research on Practical Application of EU Regulations Relating to EU-Level Procedure in Civil Cases: the Experience in the Baltic States, TM 2012/04/EK, Ministry of Justice of Latvia and European Commission, 2013.

473 Form A (4) of European Small Claims Regulation; Article 6 of the European Orders for Payment Regulation.

474 Article 3 of European Small Claims Regulation; Article 3 of European Orders for Payment Regulation, Article 6(1) of European Enforcement Order Regulation.

7.2. European Procedures as an Alternative to National Procedures of the Same Kind

- [491]** Recital 8 of the European Small Claims Regulation provides that the optional procedures existing under the national law of Member States shall remain unaffected. Similarly, Recital 10 of the European Order for Payment Regulation provides that the particular regulation neither replaces nor harmonizes the existing mechanism for the recovery of uncontested claims under national law.
- [492]** The Research showed that, firstly, it is unclear for practicing lawyers whether the particular European procedure can be used to interpret the national similar procedure and *vice versa*. Secondly, in practice it is not acknowledged that European procedures are an alternative, i.e. the parties can freely choose one of them. Therefore the interpretation by the CJEU of European procedures is very important in this regard.
- [493]** This particular case of the Supreme Court of Republic of **Latvia** is a good example of when the judges changed the established case law due to the relevant CJEU case law.⁴⁷⁵ Natural person K.K. submitted small claim for recovery of unpaid salary in the amount of around 427 EUR against its former employee on 10 October 2013. The procedure did not involve any international element. The first instance court refused to accept the claim, as employment disputes are not within the scope of the national small claims procedure. K.K. submitted an ancillary complaint to the second instance and in its decision dated 2 January 2014 the court agreed with the decision of the first instance. Additionally, the second instance referred to the previous case law of the Supreme Court⁴⁷⁶ and an article in the legal journal stating that the national small claims procedure incorporated in the Civil Procedure Law is based on the European Small Claims Regulation. Therefore, in the view of the court, the employment law was not within the scope of the Civil Procedure Law, as Article 2(2) (f) of the Regulation excludes those matters.
- [494]** In this case the Supreme Court as the cassation instance referred to Article 1 of the European Small Claims Regulation, stating that the European Small Claims Procedure shall be available to litigants as an alternative to the procedure existing under the laws of the Member State. A very similar provision is included in the regulatory framework of the national small claims procedure.⁴⁷⁷ In the case at hand judges indicated that this principle that European procedures concerning cross-border cases shall not be applied to the national similar procedures emerges from the judicature of the CJEU, namely, the **Banco Español** case.⁴⁷⁸ Consequently, the national small claims procedure included in the Civil Procedure Law does not contain the restrictions that disputes arising out of employment relations are outside the scope of this procedure, therefore, the Supreme Court receded from its previous judicature and overturned the second instance's decision and sent the case for new review.
- [495]** It should be mentioned that the cited **Banco Español** case of the CJEU concerned another European procedure – the European Order for Payment, however, the CJEU conclusion that the EU-level procedure neither replaces, nor harmonizes the existing mechanisms under national law can be referred also to other European procedures.

475 29 April 2014 Decision of the Supreme Court of Republic of Latvia in the case No SKC-2113/2014. Available at: <http://at.gov.lv/files/uploads/files/archive/department1/2014/SKC-2113-2014.docx> (in Latvian).

476 12 July 2013 Decision of Senate of the Supreme Court of Republic of Latvia in the case No SKC-1859. Available at: <http://at.gov.lv/files/uploads/files/archive/department1/2013/1859-sk-2013.doc> (in Latvian).

477 Civil Procedure Law, part 2 of the Article 250.18 provides: The provisions of this Chapter shall not prejudice application of Regulation No 861/2007 of the European Parliament and of the Council.

478 14 June 2012 CJEU judgment in case: No C-618/10 Banco Español de Crédito SA v Joaquín Calderón Camino, para. 79.

7.3. Other Specific Issues

- [496]** Having doubts regarding the delivery of a judgment by default against a defendant on whom, because it was impossible to locate him, the document instituting proceedings was served by public notice under national law, the court of **Germany** referred the question to the CJEU for a preliminary ruling.⁴⁷⁹ Namely, the court could not trace the defendant and it was impossible to effect service to defendant at his probable addresses, thus the court made a public notice by affixing it to a bulletin board. It is acknowledged that EU law does not preclude the issue of judgments in default.⁴⁸⁰ However, it is precluded to certify judgment by default issued against a defendant whose address is unknown in accordance with the European Enforcement Order Regulation.⁴⁸¹
- [497]** The issue that judgment has been rendered in the absence of participation of the debtor in the main proceedings as his/her address is not known with certainty is very topical in **Latvia**, too. For example, in one case, legal person S. asked to certify a judgment as a European Enforcement Order against natural person H.A.K.G, taking into consideration that S. is not a consumer in the case at hand; the claim is uncontested, as the defendant never has participated in the proceedings and has not contested the claim.⁴⁸² The judge rightly indicated that this claim cannot be defined as uncontested within the meaning of Article 3 of the European Enforcement Order Regulation.
- [498]** Moreover, the summons was sent to the address indicated in the contract between claimant and defendant, but it had been returned with inscription “*addressee is not known*”. Also, the court summoned the defendant to the court hearing by publishing the invitation in the official gazette. The court came to the conclusion that the judge did not know the defendant’s address with certainty. Pursuant to these circumstances, the judge refused to certify the judgment as a European Enforcement Order. In its motivation the court referred to Article 14(2) of the Regulation, stating that “*service under paragraph 1 is not admissible if the debtor’s address is not known with certainty*.” To strengthen its argumentation the court could also elaborate on Recital 13 of the Regulation, providing that any method of service that is based on a legal fiction as regards the fulfilment of minimal standards cannot be considered sufficient for the certification of a judgment as a European Enforcement Order. Moreover, the **Visser** case could also be a valuable source in this case.
- [499]** Minimal procedural standards included *inter alia* also in the European Order for Payment Regulation has been an issue in applying European procedures. A court in **Germany** addressed this issue to the CJEU in the **Eco Cosmetics** case.⁴⁸³ In the main proceedings the German court declared the order enforceable, as in the first case the order was served to the address of defendant provided by the claimant, and the advice for receipt did not contain any other information about service of the order, but in the second case the order for payment was served by depositing it in the letter box in the address provided by the claimant. In both cases the court declared the orders to be enforceable, but the respondents claimed that they had not been served, and they lodged applications for review.
- [500]** In this case the CJEU stated that the:
- European order for payment procedure must be interpreted as meaning that the procedures laid down in Articles 16 to 20 thereof are not applicable where it appears that a European order for payment has not been served in a manner consistent with the minimum standards laid down in Articles 13 to 15*

479 15 March 2012 CJEU judgment in the case: No C-292/10 G. v Cornelius de Visser.

480 Ibid., para. 59.

481 Ibid., para. 68.

482 6 June 2014 Zemgale District Court’s decision in case No C06030611, unpublished. See also: 9 April 2014 Riga City Latgale Suburb Court’s decision in case No C29626509, unpublished; 16 June 2014 Gulbene regional court decision in case No C14049712, unpublished.

483 4 September 2014 CJEU judgment in the joined cases Eco Cosmetics GmbH & Co. KG v Virginie Laetitia Barbara Dupuy and Raiffeisenbank St. Georgen reg. Gen. mbH v Tetyana Bonchuk No C-119/13 and No C-120/13.

of that regulation. Where it is only after a European order for payment has been declared enforceable that such an irregularity is exposed, the defendant must have the opportunity to raise that irregularity, which, if it is duly established, will invalidate the declaration of enforceability.⁴⁸⁴

[501] Thus in this case the court tries to balance efficiency of the procedure and the rights of defense; however, efficiency decreases as the minimal procedural standards are not met in many cases.

7.4. Conclusions and Suggestions

[502] In practice, European procedures are not applied very often in the respective Member States. Also, there are only a few cases interpreting the European Enforcement Order Regulation and European Order for Payment Regulation, but there is no case by the CJEU on the European Small Claims Regulation. Therefore, reference to particular CJEU case law in national judgments is not easily found.

[503] It should be noted that the Brussels Ibis Regulation is applicable in determining jurisdiction with regard to the European Small Claims Regulation and the European Orders for Payment Regulation, thus these regulations shall be assessed together, as is also evident from CJEU case law.

[504] During the Research it was discovered that neither lawyers, nor judges have any clear understanding of the interaction of national law and European procedures, thus very beneficial was the CJEU reminder in the *Banco Español* case that European procedures neither replace, nor harmonize the existing similar mechanisms under national law, thus creating a new alternative cross-border procedure in Europe. This CJEU judgment already has been reflected in national case law and even has changed the present judicature (for instance, in *Latvia*).

[505] Abolishment of exequatur and full implementation of free movement of judgments in the EU required introduction of minimal procedural standards, i.e. guarantees of the defendant's rights to be properly informed of his/her rights. Nonetheless, the question on minimal procedural standards has been very topical in national court practice, because those standards are not always very clear. It is complicated to understand the relation between national law and the Service of Documents Regulation; however, those issues haven't been fully addressed by the CJEU yet, but it can be predicted that there will be requests for preliminary rulings regarding the minimal procedural standards.

8. Recognition and Enforcement of Judgments under the Brussels Ibis (Brussels I) Regulation

8.1. Recognition and Enforcement in General

[506] Chapter III of the Brussels Ibis Regulation is based on the free movement of judgments within the EU and abolition of exequatur. According to Article 39 of the Brussels Ibis Regulation "a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other

484 Ibid., para. 49.

Member States without any declaration of enforceability being required." It means that the exceptions to recognition and enforcement will be examined at the enforcement stage only, if the judgment debtor so requests (see Article 46 of this Regulation).⁴⁸⁵

[507] Article 2(a) of the Brussels Ibis Regulation (formerly Article 32 of the Brussels I Regulation) defines an autonomous and very broad concept of "*judgment*."⁴⁸⁶ Until recently a default judgment of the **U.K.** courts, which disposes the substance of the case, but does not contain any assessment of the subject-matter or the basis of the action and is devoid of any argument on the merits, was not considered within the scope of this concept in legal science (literature).⁴⁸⁷ However, this was abandoned by the latest CJEU case law (see: **Trade Agency** case⁴⁸⁸).

8.2. Special Issues of Recognition and Enforcement

[508] Specifically, the Supreme Court of the Republic of **Latvia** by its decision referred for a preliminary ruling to the CJEU asking *inter alia* whether the judgment given in default of appearance and without motivation is in line with public policy, consequently, whether recognition and enforcement can be refused for such default judgment pursuant to Article 34(1) of the Brussels I Regulation (now Article 45(1)(a)).

[509] The CJEU decided that enforcement of such judgments may be refused:

*only if it appears to the court, after an overall assessment of the proceedings and in light of all the relevant circumstances, that that judgment is a manifest and disproportionate breach of the defendant's right to a fair trial referred to in the second paragraph of Article 47 of the Charter, on account of the impossibility of bringing an appropriate and effective appeal against it.*⁴⁸⁹

[510] Thus it can be concluded that the defendant's right to a fair trial includes receipt of the document enabling to arrange for his defence. Initially, it was considered that such document shall be served before the rendering of the judgment and the proper time for the defendant to have an opportunity to defend himself is the time at which proceedings are commenced.⁴⁹⁰ However, after the CJEU's judgments in **ASML**⁴⁹¹ and also in **Trade Agency**, it is clear that the judgment in default can also be served on the defendant during the procedure of exequatur (the declaration of enforceability), and that is sufficient, in principle, "*if the defendant has sufficient time in which to mount a valid defense against the judgment in the state of origin.*"⁴⁹²

485 P.A.Nielsen. The Recast Brussels I Regulation. *Nordic Journal of International Law*, 2014, No 83, p. 65; F.Cadet. Le nouveau règlement Bruxelles I ou l'itinéraire d'un enfant gâté. *Journal du droit international*. Clunet, juillet-août 2013, n° 3, p. 772.

486 Article 2(a) provides :

"judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.

For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.

487 Gaudemet-Tallon H., *Compétence et exécution des jugements en Europe*. L.G.D.J., 2010, p. 376.

488 6 September 2012 CJEU judgment in case No C-619/10 *Trade Agency v Seramico Investments*.

489 6 September 2012 CJEU judgment in the case: No 619/10 *Trade Agency Ltd. v Seramico Investments Ltd*, para.62.

490 12 November 1992 CJEU judgment in the case: No C-123/91 *Minalmet GmbH v Brandeis Ltd.*, paras. 19-20. A preliminary ruling was asked for by a court in **Germany**.

491 14 December 2006 CJEU judgment in the case: No C-283/05 *ASML Netherlands BV pret SEMIS*.

492 26 April 2012 Opinion of Advocate General Kokott in the case: No 619/10 *Trade Agency Ltd. v Seramico Investments Ltd*, paras.61-62.

- [511]** The period of time for the defendant to organize his defence starts to run as soon as the document has been served on him at his habitual residence or elsewhere.⁴⁹³ The court of the Member State addressed shall determine whether the time was sufficient, taking into consideration all factual and legal circumstances of the case.
- [512]** As mentioned above, the CJEU and the Supreme Court of **Latvia** evaluated the question on recognition and enforcement of a default judgment through the public policy clause in Article 34(1), but not via Article 34(2) of the Brussels I Regulation. In the view of the Researchers, Article 34(2) of the Brussels I Regulation is a special legal norm (*lex specialis*) in this case, as it explicitly deals with default judgments.⁴⁹⁴ Therefore, the CJEU and Senate had to make reference to Article 34(2), instead of Article 34(1).⁴⁹⁵
- [513]** Consequently, the Supreme Court had to evaluate whether the English default judgment was served to defendant – Trade Agency – in sufficient time and in such a way as to enable the defendant to arrange for his defence and possible challenge of the judgment, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so (Article 34(2)). This was also implicitly indicated by the Advocate General in the **Trade Agency** case – the defendant shall have the effective rights to take the redress action available.⁴⁹⁶
- [514]** Instead, the Supreme Court evaluated only:
- 514.1. whether the application commencing the proceedings (particulars of claim) in the English court was served to the defendant,
 - 514.2. whether the defendant was able to arrange for his defence in England and,
 - 514.3. whether enforcement of the default judgment without reasoning is in compliance with public policy.⁴⁹⁷
- [515]** The condition of “*sufficient time*” was not checked as, well as service of the default judgment to the defendant.⁴⁹⁸
- [516]** Finally, the Supreme Court concluded that the particular default judgment is recognizable and enforceable in Latvia.
- [517]** Nevertheless, in case No SKC-1255/2014⁴⁹⁹ the Supreme Court made a reference to the **Trade Agency** case⁵⁰⁰ in order to motivate the refusal of recognition and enforcement of a Polish default judgment in Latvia. In this case the Supreme Court had verified the information about the service of the document (which instituted the proceedings or equivalent document) to the defendant (located in Latvia). For this purpose the Supreme Court compared the information included in the certificate (Article 54 and Annex V of the Brussels I Regulation) by the Polish court with evidence

493 16 June 1981 CJEU judgment in the case: No166/80 Klomps v Michel, para. 19.

494 Rudevska B. Zur Frage der Anerkennung und Vollstreckung eines englischen Versäumnisurteils (default judgment) in Lettland (zu Augstākās tiesas Senāts, 13.2.2013-SKC-1/2013-Trade Agency Ltd./ Seramico Investments Ltd.). Praxis des Internationalen Privat- und Verfahrensrechts (IPRax), 34. Jahrgang, 1/2014, S. 86, 87; Rudevska B., Kačevska I. Aizmugurisko spriedumu atzišanas un izpildes problemātika Brisele I Regulas sistēmā (A Few Problems of the Recognition and Enforcement of Default Judgments under the System of Brussels I Regulation). In : Tiesību efektīvas piemērošanas problemātika. LU 72. Konferencēs rakstu krājums. LU Akadēmiskais apgāds, 2014., 376. lpp.

495 14 December 2006 CJEU judgment in case No C-283/05 ASML Netherlands (paras. 29, 31); Rudevska B. Zur Frage der Anerkennung und Vollstreckung eines englischen Versäumnisurteils (default judgment) in Lettland (zu Augstākās tiesas Senāts, 13.2.2013-SKC-1/2013-Trade Agency Ltd./ Seramico Investments Ltd.). Praxis des Internationalen Privat- und Verfahrensrechts (IPRax), 34. Jahrgang, 1/2014, S. 86, 87.

496 26 April 2012 Opinion of Advocate General J. Kokott in the case: No 619/10 Trade Agency Ltd. v Seramico Investments Ltd, para. 85.

497 13 February 2013 Supreme Court Senate of the Republic of Latvia decision in case SKC-1/2013. Available at <http://at.gov.lv/files/uploads/files/archive/department1/2013/1-sk-2013.doc> (in Latvian).

498 14 December 2006 CJEU judgment in case No C-283/05 ASML Netherlands (paras. 29, 31); Rudevska B. Zur Frage der Anerkennung und Vollstreckung eines englischen Versäumnisurteils (default judgment) in Lettland (zu Augstākās tiesas Senāts, 13.2.2013-SKC-1/2013-Trade Agency Ltd./ Seramico Investments Ltd.). Praxis des Internationalen Privat- und Verfahrensrechts (IPRax), 34. Jahrgang, 1/2014, S. 87.

499 2 July 2014 Supreme Court of Latvia (Department of Civil Law) decision in case SKC-1255/2014, not published.

500 6 September 2012 CJEU judgment in case No C-619/10 Trade Agency v. Seramico Investments, para. 46.

brought by the defendant. The information in the certificate did not correspond to that evidence. Also, the default judgment had not been served to the defendant. The Supreme Court made this verification in accordance with CJEU case law in the **Trade Agency** case, namely:

“Article 34(2) of the Brussels I Regulation, to which Article 45(1) thereof refers, read in conjunction with recitals 16 and 17 in the preamble, must be interpreted as meaning that, where the defendant brings an action against the declaration of enforceability of a judgment given in default of appearance in the Member State of origin which is accompanied by the certificate, claiming that he has not been served with the document instituting the proceedings, the court of the Member State in which enforcement is sought hearing the action has jurisdiction to verify that the information in that certificate is consistent with the evidence.”⁵⁰¹

[518] Indeed, interpretation of public policy within the meaning of Article 45(1)(a) of the Brussels Ibis Regulation (formerly Article 34(1) of the Brussels I Regulation) is a current question in legal practice. Lawyers practicing in **Latvia** indicated this as well, as it is evidenced by case law and preliminary questions by the courts to the CJEU.

[519] The concept of public policy depends on the national conception of State where recognition or enforcement is sought, which has to respect the limits set by the CJEU.⁵⁰² Namely, this concept is not autonomous; however, the CJEU provides the framework of this concept. In other words, the CJEU in replying to the court of **Germany** identified that Contracting States (Member States) in principle remain free to determine according to their own conceptions what public policy requires, still taking into consideration that the limits of that concept area matter for interpretation of the regulation.⁵⁰³

[520] As in the **Trade Agency** case, also in the **flyLAL** case the Supreme Court of **Latvia** wanted to know the scope of the public policy (*order public*) concept.⁵⁰⁴ First, the CJEU again dealt with the question on the failure to give reasons in the judgment (similarly as in the **Trade Agency** case) and concluded:

*the extent of the obligation to give reasons may vary according to the nature of the judgment and must be examined, in light of the proceedings taken as a whole and all the relevant circumstances, taking account of the procedural guarantees surrounding that judgment, in order to ascertain whether those guarantees ensure that the persons concerned have the possibility to bring an appropriate and effective appeal against that decision.*⁵⁰⁵

[521] But most importantly, in the case at hand the CJEU identified that the concept of “*public policy*” within the meaning of Article 45(1)(a) of the Brussels Ibis Regulation (formerly Article 34(1) of the Brussels I Regulation) seeks to protect legal interests which are expressed through a rule of law, and not purely economic interests.⁵⁰⁶

[522] The Researchers have identified two decisions of the Federal Court of Justice of **Germany** (*Bundesgerichtshof, BGH*) delivered on the basis of Article 44 of the Brussels I Regulation.

501 Ibid., para. 46.

502 Magnus U., Mankowski, P. European Commentaries on Private International Law Brussels I. Regulation, Sellier European Law Publishers, 2012, p.657.

503 28 March 2000 CJEU judgment in the case: No C-7/98 Dieter Krombach v André Bamberski, para. 27.

504 15 May 2013 Supreme Court Senate of the Republic of Latvia decision in the case SKC-955/2013. Available at <http://at.gov.lv/files/uploads/files/archive/departament1/2013/955-sk-2013.doc> (in Latvian).

505 23 October 2014 CJEU judgment in the case: No C-302/13 flyLAL-Lithuanian Airlines AS, in liquidation, v Starptautiskā lidosta Rīga VAS, Air Baltic Corporation AS, para. 52.

506 At the time of drafting this Research, the Supreme Court has not rendered judgment in this case in which a preliminary ruling was motioned for.

[523] In the decision of the 10 October 2013⁵⁰⁷ the Federal Court of Justice made reference to the CJEU case law in **van Dalfsen**⁵⁰⁸ and **Klomps**.⁵⁰⁹ The Federal Court gave its answer to two questions: on stay of the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin (Article 46(1)) and on service of a document in the meaning of Article 34(2):

523.1. firstly, if the court of appeals (under Article 43) has refused to stay the exequatur proceedings, this decision “taken under Article 46 of the Brussels I Regulation does not constitute a “judgment given on the appeal” within the meaning of Article 44 of the Brussels I Regulation and may not”, therefore, be contested by a cassation appeal or similar form of appeal (**van Dalfsen** case). For this reason the Federal Court of Justice refused to examine this question.

523.2. secondly, the defendant (the person against whom the enforcement was sought) has asserted that he has not received the document instituting the proceedings. The Federal Court of Justice mentioned in its decision that this document has been served to the defendant at his habitual residence in Verona (Italy) in accordance with Italian domestic legislation. The Federal Court of Justice based its reasoning on the **Klomps** case,⁵¹⁰ in which the CJEU had given its interpretation of Article 27(2) of the Brussels Convention. It has to be mentioned that Article 34(2) is not equivalent to Article 27(2) of the Brussels Convention, therefore the most recent CJEU case law (regarding Article 34(2))⁵¹¹ could be applied by the Federal Court of Justice.

[524] The second decision of the Federal Court of Justice was given on 15 May 2014 regarding recognition and enforcement of a Polish default judgment in **Germany**.⁵¹² In this case the court made reference to the **Apostolides** case.⁵¹³

[525] According to Article 344(1) of the Civil Procedure Law of Poland the defendant (the person against whom the enforcement was sought) had commenced proceedings in Poland to challenge the default judgment. Under those circumstances the Federal Court of Justice considered that the default judgment had to be recognised and enforced in Germany. This reasoning was supported by the **Apostolides** case, namely, the rights of the defence that the Community legislation wished to safeguard by Article 34(2) of the Brussels I Regulation were respected where the defendant did in fact commence proceedings to challenge the default judgment, and these proceedings enabled him to argue that he had not been served with the document instituting the proceedings in sufficient time and in such a way as to enable him to arrange for his defence. If the person has commenced such proceedings in the Member State of origin to challenge the default judgment, then Article 34(2) of the Brussels I Regulation cannot legitimately be relied upon.⁵¹⁴

[526] There are also two other decisions of lower **German** courts – higher district courts (*Oberlandgericht, OLG*) – made under Article 43 of the Brussels I Regulation:

[527] In the decision of the Higher District Court of Koblenz (*OLG Koblenz*)⁵¹⁵ (regarding enforcement of the Italian judgment in Germany) the court established that the defendant (the person against whom the enforcement was sought) sought revision of an Italian judgment and could not give

507 10 October 2013 BGH, IX ZB 238/11. Available at: www.unalex.eu.

508 4 October 1991 CJEU judgment in case No C-183/90 *van Dalfsen v. van Loon and Berendsen*.

509 16 June 1981 CJEU judgment in case No 166/80 *Klomps v. Michel*.

510 *Ibid.*, para. 19.

511 For example: 14 December 2006 CJEU judgment in case No C-283/05 *ASML Netherlands BV v. Semiconductor Industry Services GmbH (SEMIS)*; 6 September 2012 CJEU judgment in case No C-619/10 *Trade Agency v. Seramico Investments*; 28 April 2009 CJEU judgment in case No C-420/07 *Apostolides v. Orams*.

512 5 May 2014 BGH, IX ZB 26/13. Available at: www.unalex.eu.

513 28 April 2009 CJEU judgment in case No C-420/07 *Apostolides v. Orams*.

514 28 April 2009 CJEU judgment in case No C-420/07 *Apostolides v. Orams*, paras. 78, 79.

515 23 July 2013 OLG Koblenz, 2 U 156/13. Available at: www.unalex.eu.

the reasons for refusing the enforcement of this judgment in Germany as mentioned in Article 34-35 of the Brussels I Regulation. Only one of the grounds specified in Article 34 and/or 35 can serve for refusing the declaration of enforceability. This argument was also motivated by CJEU case law in the **Prism Investments** case:

*Article 45 of Regulation must be interpreted as precluding the court with which an appeal is lodged under Article 43 or Article 44 of that regulation from refusing or revoking a declaration of enforceability of a judgment on a ground other than those set out in Articles 34 and 35 thereof, such as compliance with that judgment in the Member State of origin.*⁵¹⁶

[528] The second decision was made by the Higher District Court of Stuttgart (*OLG Stuttgart*) on 5 November 2013. It concerns enforcement of an Austrian judgment in Germany. In this case the defendant (the person against whom enforcement was sought) based his argument upon the fact that neither the document which instituted the proceedings, nor the default judgment had been sent to him by the Austrian court.⁵¹⁷ Therefore, enforcement had to be refused according to Article 34(2) of the Brussels I Regulation. The Higher District Court of Stuttgart verified the information concluded in the certificate delivered by the Austrian court by means of other evidence available in this case. Regarding this question the Higher District Court of Stuttgart made reference to the **Trade Agency** case and decided that the defendant himself must prove the incorrectness of the information included in the certificate. In the **Trade Agency** case the CJEU wrote that:

*Where the defendant brings an action against the declaration of enforceability of a judgment given in default of appearance in the Member State of origin which is accompanied by the certificate, claiming that he has not been served with the document instituting the proceedings, the court of the Member State in which enforcement is sought hearing the action has jurisdiction to verify that the information in that certificate is consistent with the evidence.*⁵¹⁸

[529] Thus the question about burden of proof is left to the domestic legal provisions of each Member State. For example, according to Article 642(2) of the Civil Procedure Law of **Latvia**, the court seized in appeal can also obtain the proof in order to clarify the information concluded in the certificate. There are two additional ways: (1) by asking the parties to submit proof; (2) by requesting the court of origin to deliver the proof. In the **Trade Agency** case the Supreme Court of Latvia asked plaintiff *Seramico Investments Ltd.* to submit evidence that the document instituting the proceedings in England had been sent to the defendant, *Trade Agency*.⁵¹⁹ Thus in **Latvia** and in **Germany** there are two different approaches to the burden of proof of the information included in the certificate. Latvian courts of appeal (see Articles 43, 44 of the Brussels I Regulation) have a larger margin of appreciation.

8.3. Conclusions and Suggestions

[530] The Researchers have made the observation that there are two main problems for the national courts regarding recognition and enforcement of foreign judgments, namely:

516 13 October 2011 CJEU judgment in case No C-139/10 *Prism Investments BV v. van der Meer*.

517 5 November 2013 *OLG Stuttgart*, 5 W 13/13. Available at: www.unalex.eu.

518 6 September 2012 CJEU judgment in case No C-619/10 *Trade Agency v. Seramico Investments*, para. 46.

519 13 February 2013 judgment of the Senate of the Supreme Court of Latvia in case No SKC-1/2013. Available at: http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-civillietu-departaments/hronologiska-seciba_1/hronologiska-seciba/.

530.1. interpretation and understanding of the public policy (*ordre public*) concept [Article 34(1) of the Brussels I Regulation and Article 45(1)(a) of the Brussels Ibis Regulation]. The national courts (especially in **Latvia**) cannot always determine the framework of this concept in the particular case;

530.2. interpretation and application of Article 34(2) of the Brussels I Regulation (Article 45(1)(b) of the Brussels Ibis Regulation) regarding default judgments. In practice, the judgment debtors very often make reference to this Article.

[531] Article 34(1)⁵²⁰ and Article 34(2)⁵²¹ must be strictly separated. If the question deals with a default judgment and the defendant refers to the fact that the document or default judgment had not been served to him, Article 34(2) must be applied as the *lex specialis* in respect to Article 34(1).

[532] The case law of **German** domestic courts shows that generally they are able to apply CJEU case law very well. In one case a German court made reference to the **Klomps** case, an old case, since it interprets Article 27(2) of the Brussels Convention. Article 34(2) of the Brussels I Regulation⁵²² is not equivalent to the corresponding Article in the Brussels Convention; therefore, the most recent CJEU case law could be applied by a German court.

[533] The Researchers have observed that there were many cases where a foreign default judgment had to be enforced. This means that already during the service of documents abroad, there could be some procedural or technical problems.

9. Other Instruments

9.1. In General

[534] The Researchers included legal instruments that are very new or regarding which there is no case law or limited CJEU case law in this part of the Research. However, those instruments are interrelated with other EU acts in civil law area.

[535] For example, it has been indicated that Article 50 of the Brussels I regulation is not in line with the Legal Aid Directive, as it does not address the legal aid for the judgment debtor and does not define the scope of the legal aid, especially not if it covers the recovery of additional costs incurred in the cross-border context (Article 7 of the Legal Aid Directive).⁵²³ The application for legal aid is simpler under Article 50 of the Brussels I Regulation than under the Legal Aid Directive. However, the Heidelberg Report shows that there is a positive experience with the granting of legal aid in **Hungary, Germany** and the **U.K.**⁵²⁴ It is remarkable that there is no such article in the new Brussels Ibis Regulation.

520 45(1)(a) of the Brussels Ibis Regulation.

521 45(1)(b) of the Brussels Ibis Regulation.

522 Article 45(1)(b) of the Brussels Ibis Regulation.

523 B. Hess, T. Pfeiffer, P. Schlosser. The Brussels I-Regulation (EC) No 44/2001. The Heidelberg Report on Application of Regulation Brussels I in 25 Member States (Study JI2/C4/2005/03), 2008, p. 134, paras. 462, 463.

524 Ibid., p. 133, para. 461.

9.2. Mediation

- [536]** The Mediation Directive was adopted on 21 May 2008 with a view to stimulate the use of mediation as a means of settlement of cross-border disputes. The directive also enhances recognition of settlements reached by mediation in other Member States and likewise provides for extension of limitation periods pending mediation proceedings and regulates confidentiality of mediation.
- [537]** Unlike most other instruments touching upon the area of civil justice, mediation is regulated through a directive. According to Article 12, Member States are obliged to transpose the directive into their national law by 21 November 2010. Denmark has opted out of the Mediation Directive.
- [538]** Up until now, the CJEU has delivered only one judgment with respect to the Mediation Directive - **SIMSA**.⁵²⁵ An Italian court submitted several questions to the CJEU on the compatibility of its national legal order with the directive. The court asked whether the Mediation Directive precludes introduction of national legislation favoring compulsory mediation of certain types of disputes and subjecting the party evading the mediation to certain negative consequences in future court proceedings.⁵²⁶
- [539]** Unfortunately, the preliminary ruling did not offer any insights into interpretation of the Mediation Directive. The CJEU found that the controversial Italian legislation, having spawned the preliminary request, was found unconstitutional by the Italian Constitutional Court.⁵²⁷ Hence, the CJEU held all the questions submitted to be hypothetical and not worth answering.
- [540]** It follows that so far there are no pertinent judgments of the CJEU clarifying the functioning of the Mediation Directive. Unsurprisingly, Researchers have found no cases from the **U.K., Latvia, Hungary, Germany** or **Sweden**, applying CJEU case law, interpreting Mediation Directive. This is unfortunate, as abstract provisions of the Mediation Directive dealing with confidentiality or use of information disclosed in mediation proceedings in future litigation may require clarifications by the CJEU. Moreover, there is always a risk that some Member States have incorrectly transposed the directive. For now, the CJEU has had no opportunity to answer these and other questions.
- [541]** Researchers were also unable to identify cases from the **U.K., Latvia, Hungary** or **Sweden** applying the Mediation Directive.
- [542]** However, the Researchers have identified such cases in **Germany**. The most interesting of them is the decision of the Higher District Court in Cologne (*Oberlandgericht Köln*) in case No 25 UF 24/10.⁵²⁸ In this case, the court had referred to the Mediation Directive as well as to the Legal Aid Directive in order to motivate the prolongation of legal aid to mediation in cases where a court refers the parties to mediation in family matters.
- [543]** The plaintiff (father of a child) had obtained legal aid in family proceedings relating to his visiting rights. He had also applied for legal aid in mediation proceedings proposed by the court itself. Thus, there was a question of prolongation of legal aid resulting in mediation. In 2011, there was a disagreement between domestic case law and German legal scholars on this point. The case law supported the prolongation of legal aid, while scholars were divided on the issue. The court

525 27 June 2013 CJEU judgment in case: No C-492/11 *Ciro Di Donna v Società imballaggi metallici Salerno srl (SIMSA)*.

526 *Ibid.*, para. 18.

527 *Ibid.*, paras. 30 and 31.

528 3 June 2011 OLG Köln, 25.Zivilsenat, 25 UF 24/10. Available at: www.juris.de.

considered that the **German** legislator has likewise in favour of prolongation of legal aid in mediation proceedings. In order to emphasise this goal of the legislator, the court referred to Recital 5 of the Mediation Directive.⁵²⁹

[544] Thus the court concluded that there should be access to rights and not only access to the courts. Mediation can ensure this access to rights, and legal aid in mediation proceedings granted by a court is in accordance with the principle of equality of legal protection. The court also referred to recitals 5, 20 and 21 of the Legal Aid Directive to support its reasoning. The Researchers find that recital 21 is the most appropriate for this purpose: “*Legal aid is to be granted on the same terms both for conventional legal proceedings and for out-of-court procedures such as mediation, where recourse to them is required by the law, or ordered by the court.*”

[545] The court also stressed that this legal aid covers only necessary costs and therefore the parties should minimise these mediation costs, if possible.

[546] This case shows that the courts can use the Mediation Directive in order to build or strengthen the reasoning in cases where the respective legal questions have not yet been decided or settled by the legislator, by case law and/or by legal opinion. A reference to the Mediation Directive can achieve harmony between the national legal system and EU legal system.

[547] In sum, the Mediation Directive has no pertinent CJEU case law. On the national level, there are very few cases available. However, the scarce national practice shows that the abstract provisions and even recitals of the Mediation Directive provide useful police guidance to courts of Member States. Hence, recitals from the Mediation Directive allowed a German court to determine the legislator’s intention to guarantee legal aid in mediation proceedings. Nevertheless, the Mediation Directive with its abstract provisions may be a source of uncertainty to national courts, requiring new references to the CJEU.

9.3. Legal Aid

[548] Legal aid issues are covered not only by the Legal Aid Directive, but also, for example, by chapter V of the Maintenance Regulation, providing rules for access to justice. It was the goal of the EU legislator to provide for a very favourable legal aid scheme, thus special rules were added in addition to those provided in the Legal Aid Directive (Recital 36 the Maintenance Regulation).⁵³⁰

[549] According to the Legal Aid Directive, legal aid is considered to be appropriate when it guarantees pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings and legal assistance and representation in court (Article 3(2)), and its aim is to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid in such dispute (Article 1(1)).

[550] The CJEU has rendered one case concerning the interpretation of the principle of effectiveness in order to ascertain whether that principle requires legal aid to be granted to legal persons. It is the **DEB** case where a preliminary ruling was motioned for by a court in **Germany**.⁵³¹ In this case the CJEU recast the question referred:

529 It reads as follows:

The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.

530 There is no CJEU case law in applying this Regulation; however, the court refers to it regarding jurisdiction in matters relating to maintenance obligations in the L.v. M case. See: 12 November 2014 CJEU judgment in case: No C-656/13 L.v. M, interveners R, K, para.35.

531 22 December 2010 CJEU judgment in case: No C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland.

*The question relates to the interpretation of the principle of effective judicial protection as enshrined in Article 47 of the Charter, in order to ascertain whether, in the context of a procedure for pursuing a claim seeking to establish State liability under EU law, that provision precludes a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment with respect to costs and under which a legal person does not qualify for legal aid even though it is unable to make that advance payment.*⁵³²

[551]

It follows from the judgment of the CJEU⁵³³ that:

- 551.1. the right to receive legal aid is not conceived primarily as social assistance, whereas in German law it does appear to be understood as such;
- 551.2. the assessment of the need to grant legal aid must be made on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been violated, rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid;
- 551.3. the principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the EU (hereafter: *Charter*),⁵³⁴ must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, dispensation of advance payment of the costs of proceedings and/or the assistance of a lawyer;
- 551.4. it is for the national court to ascertain:
 - ✓ *whether the conditions for granting legal aid constitute a limitation on the right of access to the courts, which undermines the very core of that right;*
 - ✓ *whether they pursue a legitimate aim;*
 - ✓ *whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it sought to achieve.*
- 551.5. The national court **must** take into consideration:
 - ✓ *the subject-matter of the litigation;*
 - ✓ *whether the applicant has a reasonable prospect of success;*
 - ✓ *the importance of what is at stake for the applicant in the proceedings;*
 - ✓ *the complexity of the applicable law and procedure;*
 - ✓ *the applicant's capacity to represent himself/herself effectively.*
- 551.6. In order to assess the proportionality, the national court **may** also take into account:
 - ✓ *the amount of the costs of the proceedings with respect to which advance payment must be made;*
 - ✓ *whether or not those costs might represent an insurmountable obstacle to access to the courts;*
 - ✓ *the form of the legal person in question;*
 - ✓ *whether the legal person is profit-making or non-profit-making;*
 - ✓ *the financial capacity of the partners or shareholders;*

532 Ibid., para. 33.

533 Ibid., paras. 41, 42, 59-62.

534 Charter of Fundamental Rights of the European Union. C83 Official Journal of the European Union, 2010, p. 89.

- ✓ *the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.*

- [552]** In **Germany** this case had been decided by the competent national court – the Higher Regional Court in Berlin (*Kammergericht Berlin*) – which had previously made the request for a preliminary ruling. The Higher Regional Court in Berlin rejected a complaint of *Deutsche Energiehandels- und Beratungsgesellschaft mbH* as being unfounded. Thus, the applicant had not received legal aid in Germany.
- [553]** Regarding the reasoning of the decision of the Higher Regional Court in Berlin (*Kammergericht Berlin*)⁵³⁵ we have to give a short analysis. According to Section 116(2) of the Code of Civil Procedure of Germany (*Zivilprozessordnung, ZPO*):
- Upon corresponding application being made, assistance with court costs shall be approved for parties: [...] 2. Who are a legal person or an organisation that has the capacity to be a party and that was established in Germany, in another Member State of the European Union, or in any other signatory state of the Agreement on the European Economic Area, and which have their registered seat there, if the costs cannot be funded by that party nor by the parties economically involved in the subject matter in dispute, and if any failure to bring an action or to defend against an action that has been brought would contradict the public interest. [...].*
- [554]** In this particular case the Higher Regional Court in Berlin had to verify if application of this national provision was compatible with Article 47 of the Charter. The Higher Regional Court found that the CJEU in its judgment has not decided that the national legal provisions ensured the right to receive legal aid to all legal persons. A domestic judge must ascertain and take into consideration some conditions established by the CJEU in its judgment in the **DEB** case. Nevertheless, it follows from the decision of the Higher Regional Court that this court has clearly verified only some of these conditions, for example:
- 554.1. the form of the legal person in question;
- 554.2. whether the legal person is profit-making or non-profit-making.
- [555]** The rest was the verification of the public interest.
- [556]** The Higher Regional Court applied the Legal Aid Directive only in order to motivate that even in this Directive not all legal persons can obtain legal aid in civil and commercial cross-border matters. The court made reference to Recital 17 of this Directive and to Article 6(3).
- [557]** The Researchers must note that this national decision did not show the verification of all the aspects the CJEU has mentioned in its judgment, such as: 1) whether the conditions for granting legal aid constituted a limitation on the right of access to court undermining the very core of that right; 2) whether they pursued a legitimate aim; and 3) whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim which it sought to achieve. All these questions must be clearly analyzed in the decision. Neither the fact that not all legal persons have a right to obtain legal aid, nor the mention of the public interest is enough for the reasoning of the decision.
- [558]** It is interesting that there are four references to the **DEB** case in adjudication of the administrative or criminal matters in courts of **Latvia**.⁵³⁶ Most of those cases have similar facts. Specifically, they concern the penalties imposed on the air carrier for carrying third-country persons to an EU

535 15 February 2011 KG Berlin, 9.Zivilsenat 9 W 50/08. Available at: www.juris.de.

536 See: 05 November 2014 Riga District Court case No 1-0362-14, 11 December 2014 Riga Regional Court No 104AA-0908-14 and 12 December 2014 Riga District Court No 1-0470-14, unpublished.

country without a valid visa. The carrier as applicant has appealed the administrative acts and referred *inter alia* to paras. 40⁵³⁷ and 28⁵³⁸ of the **DEB** case.⁵³⁹ But the court has not elaborated on the applicability of this CJEU case in each particular case.

9.4. Succession Regulation

- [559]** According to Article 84 of the Succession Regulation, it will be in force beginning 17 August 2015.⁵⁴⁰ It follows from the above-mentioned Article that the Succession Regulation cannot yet be applied in Member States. Therefore there is no CJEU case law or that of the national courts on this Regulation. Nevertheless, the Researchers would like to stress two important aspects of this Regulation that are included in the next sub-sections.
- [560]** Firstly, according to Recital 82 of the Regulation, the **U.K.** and **Ireland** are not taking part in the adoption of this Regulation and are not bound by it or subject to its application. According to Recital 83 of the Regulation, also Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- [561]** Contrary to other Regulations adopted in the area of civil justice, the Succession Regulation does not mention which Member States are considered “*Member States*” within the meaning of this Regulation (see: for example, Article 1(3) of the Brussels I Regulation). Therefore, some articles of the regulation seem to be problematic from the point of view of interpretation. For example, in Article 4 (“*General jurisdiction*”) the notion “*Member State*” must be understood only *inter partes*, as all Member States except the **U.K.**, Ireland and Denmark. However, in Article 20 the same notion of “*Member State*” must be interpreted *erga omnes* – as every Member State (including the **U.K.**, Ireland and Denmark).⁵⁴¹
- [562]** Secondly, during the time period as from adoption of the regulation until 1st January 2015, already four “*Corrigenda*”⁵⁴² have been made to this Regulation. It shows the problems of the quality of this legal act, which can also increase the number of preliminary ruling procedures in the future. Also the scope *ratione materiae* of this Succession Regulation is a new challenge in the civil justice area.

537 [...] the right to an effective remedy before a court, enshrined in Article 47 of the Charter, is to be found under Title VI of that Charter, relating to justice, in which other procedural principles are established which apply to both natural and legal persons.

538 As is apparent from well-established case-law on the principle of effectiveness, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

539 See: 20 August 2014 Riga Regional Court case: No 104AA-0786-14.

540 Except for Articles 77 and 78 (“*Information made available to the public*”; “*Information on contact details and procedures*”), which will apply from 16 November 2014, and Articles 79, 80 and 81 (“*Establishment and subsequent amendment of the list containing the information referred to in Article 3(2)*”; “*Establishment and subsequent amendment of the attestations and forms referred to in Articles 46, 59, 60, 61, 65 and 67*” “*Committee procedure*”), which will apply from 5 July 2012.

541 A. Bonomi, P. Wautelet (avec la collaboration d'I. Pretelli, A. Öztürk). Le droit européen des successions. Commentaire du Règlement n° 650/2012 du 4 juillet 2012. Bruylant, 2013, p. 30-33.

542 Berichtigung der Verordnung (EU) Nr. 650/2012 des Europäischen Parlaments und des Rates vom 4. Juli 2012 über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und Vollstreckung von Entscheidungen und die Annahme und Vollstreckung öffentlicher Urkunden in Erbsachen sowie zur Einführung eines Europäischen Nachlasszeugnisses. Amtsblatt der Europäischen Union L 363, 18.12.2014., S. 186 (in German language); Berichtigung der Verordnung (EU) Nr. 650/2012 des Europäischen Parlaments und des Rates vom 4. Juli 2012 über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und Vollstreckung von Entscheidungen und die Annahme und Vollstreckung öffentlicher Urkunden in Erbsachen sowie zur Einführung eines Europäischen Nachlasszeugnisses. Amtsblatt der Europäischen Union L 41, 12.2.2013., S. 16 (in German language); Corrigendum to Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. Official Journal of the European Union L 344, 14.12.2012., p. 3 (in all EU languages); Corrigendum to Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. Official Journal of the European Union L 60, 2.3.2013., p. 140 (in all EU languages).

9.5. Protection Measures Regulation

- [563]** The Protection Measures Regulation enhances recognition and enforcement of protection measures ordered in a Member State in civil matters. The regulation applies to protection measures ordered with a view to protecting a person where there exist serious grounds for considering that that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk.
- [564]** Article 22 of the Protection Measures Regulation determines its temporal scope. According to the second paragraph of the said article, the regulation applies from 11 January 2015. According to the third paragraph of the said article, the regulation shall apply to protection measures ordered on or after 11 January 2015, irrespective of when proceedings have been instituted. As the Protection Measures Regulation has been so far inapplicable, there is no CJEU case law interpreting the regulation. Obviously, there is also no national case law known to the Researchers on its application.

9.6. Conclusions and Suggestions

- [565]** The Succession Regulation, Protection Measures Regulation, Mediation Directive and Legal Aid Directive are all comparatively recent developments in the area of civil justice. They all deal with narrow segments of cross-border dispute resolution. This shows that EU law is rapidly expanding its reach within the area of civil justice. Simultaneously, EU legal instruments become all the more specialized.
- [566]** There are only a handful of CJEU judgments on these instruments. The Researchers have identified very few references to these judgments in the practice of the Member States studied in this Research. The Researchers have not identified a large body of case law in these Member States offering ground-breaking insights into application of these instruments. Thus, it is difficult to make comprehensive conclusions about application of the CJEU case law in regards to the foregoing instruments and even application of these instruments as such.
- [567]** It is, however, necessary to reiterate that these instruments are a legitimate and important part of EU legislation. Provided the preconditions for their application are satisfied, judges must apply them with the same meticulousness as the Brussels I Regulation or the Brussels IIbis Regulation. Up until now, fulfilments of this task is complicated by a lack of substantial guidance from the CJEU and sporadic academic literature. Further studies of these instruments are necessary in order to clarify their application.

PART II: PRACTICE OF NATIONAL ADMINISTRATIVE AUTHORITIES IN APPLICATION OF CJEU CASE LAW IN AREA OF CIVIL JUSTICE

- [568]** As the main objective of the Research is to analyse the influence and the practical application of CJEU case law in the area of civil justice on the national level, the main focus of the Research so far has been on national courts and on their experience with application of CJEU case law. However, the analysis would be incomplete if limited only to courts of Member States. Therefore the following part of the Research will address the practice of application of CJEU case law in the area of civil justice by national administrative authorities.
- [569]** However, at the very outset, a preliminary remark regarding the limited scope of the following part of the Research should be made. Most of the instruments in the area of civil justice are regulations which do not require major involvement of administrative authorities of the Member States to be applicable. Therefore, the Researchers have no doubts that the courts of Member States are major players in the application of CJEU case law in the area of civil justice, and administrative authorities play only a comparatively marginal role in this process, thus it seems justified to focus the main attention of the Research on courts instead of administrative authorities. Thus hereafter emphasis is put only on the selected and most important issues in the opinion of the Researchers.
- [570]** The following part of the Research is divided into two chapters. The first chapter provides an overview of national administrative authorities that are mentioned by the EU law instruments in the area of civil justice and thus are under a direct duty to take into account CJEU case law. Subsequently, the second chapter focuses on the influence of CJEU case law in the area of civil justice on amendments to national legislation.

1. Competent Administrative Authorities of Member States in Application of CJEU Case Law

1.1. Central Authorities

- [571]** Some of the regulations in the area of civil justice oblige Member States to designate a Central Authority to discharge the duties which are imposed by the particular regulation on such an authority.⁵⁴³ The choice of which institution is going to fulfil the role of the Central Authority is left to Member States, and each Member State thus has chosen its own approach.

⁵⁴³ Article 3 of the Service of Documents Regulation, Article 23 of the Small Claims Regulation, Article 3 of the Taking Evidence Regulation, Article 53 of the Brussels IIbis Regulation and Article 49 of the Maintenance Regulation.

- [572]** In **Hungary** the Ministry of Public Administration and Justice and specifically the Department of Private International Law is the Central Authority and body in assisting with the application of EU regulations in the area of civil justice, with one exception – the Ministry of Human Capacities is the Central Authority regarding all matters under the Brussels IIbis Regulation, except for child abduction cases, regarding which the Central Authority is the Ministry of Justice.
- [573]** Quite a similar approach is used in **Latvia** – the Ministry of Justice is designated as the Central Authority for all regulations in the area of civil justice, except the Maintenance Regulation, for which the functions of the Central Authority are discharged by the Administration of the Maintenance Guarantee Fund. In this Latvia can be considered an exception, as most Central Authorities designated by Member States were already designated under other Union legislation or international conventions in family matters. However, Latvia designated the Maintenance Guarantee Fund specifically for the purposes of the Maintenance Regulation, whereas the Ministry of Justice has been the Central Authority within the framework of other international conventions on family matters.⁵⁴⁴
- [574]** **Sweden** has chosen a different approach. It has designated different state bodies as competent authorities for different regulations. For example, the role of the Central Authority is entrusted with the County Administrative Board of Stockholm,⁵⁴⁵ Division for Criminal Cases and International Judicial Cooperation of Ministry of Justice⁵⁴⁶ and Swedish Social Insurance Agency.⁵⁴⁷
- [575]** The system gets more complicated in the **U.K.** and **Germany**, where, even though the U.K. is not a federal state like Germany, the Central Authorities vary in different parts of the state.⁵⁴⁸ In Germany, however, some issues are dealt with in a more centralized manner - the tasks of the Central Authority are performed in each Land by one of the bodies determined by the Land government,⁵⁴⁹ but for the purposes of regulations in family matters, the Federal Office of Justice is designated as the Central Authority.⁵⁵⁰
- [576]** Clearly, Member States are in the best position to determine which authority in their legal system should fulfil the duties of the Central Authority for each particular regulation. However, the CJEU in its case law has established some guidelines on the matter. In the **Health Service Executive** case,⁵⁵¹ it stated that the term “*authority*” designates, as a general rule, an authority governed by public law and that an authority which receives income from the decisions it makes cannot be considered to be a competent authority. The case originated in a request from the Irish Central Authority to the Central Authority for England and Wales on placement of a minor in a health care institution in the **U.K.** The answer, accepting to receive the child, was received directly from the health care institution.

544 Recovery of Maintenance in the EU and Worldwide Paul Beaumont, Burkhard Hess, Lara Walker, Stefanie Spancken Bloomsbury Publishing, 2014, p.403.

545 Regarding Service of Documents Regulation.

546 Regarding Taking Evidence Regulation and Brussels IIbis Regulation.

547 Regarding Maintenance Regulation.

548 For example, for the purposes of Service of Documents Regulation, there are four transmitting agencies in the U.K. In England and Wales, the transmitting agency is the Senior Master, for the Attention of the Foreign Process Department, Royal Courts of Justice. In Scotland - the Messengers-at-Arms. In Northern Ireland - the Master (Queen's Bench and Appeals), Royal Courts of Justice. In Gibraltar - the Register of the Supreme Court of Gibraltar.

549 Regarding Service of Documents Regulation and Taking Evidence Regulation.

550 Regarding Brussels IIbis Regulation and Maintenance Regulation.

551 26 April 2012 CJEU judgment in case: No C-92/12 PPU Health Service Executive v S.C. and A.C.

- [577] The CJEU ruled that such situation is not acceptable, as the health institution itself cannot be considered the Central Authority within the meaning of the Brussels IIbis Regulation. The Irish Central Authority received consent from the correct Central Authority only a couple of days after the judgment of the CJEU, and less than two months later a judgment was passed in the High Court of England and Wales allowing the minor to stay in the particular health care centre in England.⁵⁵²
- [578] In any case designation of the Central Authorities should be followed by proper training programs and procedures designed to ensure that these bodies have the required knowledge needed for application of particular regulations.⁵⁵³ This knowledge must include also knowledge on how to use the CJEU case law, as it must be taken into account when regulations are applied.⁵⁵⁴
- [579] However, so far there are only a few judgments of the CJEU regarding functioning of the Central Authorities. One of the reasons might be that the duties of the Central Authorities are formulated in very broad terms. Therefore, even those few cases of the CJEU that mention the duties of the Central Authorities do it only indirectly and *inter alia*.
- [580] For example, the CJEU in its judgment in the **A** case⁵⁵⁵ emphasized that a national court which has taken provisional or protective measures under Article 20 of the Brussels IIbis Regulation or which has declared on its own motion that it does not have jurisdiction may be required to inform the court of another Member State having jurisdiction in matters of parental responsibility. That information can be transferred also through the Central Authority. Thus, this judgment specified the duties of the Central Authority provided in the Brussels IIbis Regulation and must be taken into account by Central Authorities of Member States when fulfilling these duties.
- [581] A similar point of view on the overly broad and vague nature of the duties of the Central Authority under the Brussels IIbis Regulation was also mentioned by experts from the Ministry of Justice of **Hungary**. As a particular example they mentioned Article 55(e) of the Brussels IIbis Regulation, which states the duty of the Central Authority, upon request from the Central Authority of another Member State or from a holder of parental responsibility, to cooperate on specific cases to achieve purposes of this regulation. One of the subject matters of such duty is to "*facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end*".
- [582] Thus, the Central Authority is under the obligation to facilitate mediation, despite the fact that mediation, as the experience of Hungary proves, is a very ineffective tool in this situation. The core of ineffectiveness here lies in the involvement of the jurisdiction of courts from two Member States. There can be a situation where mediation ensures the deal between the parties in the first Member State and, as a result of this deal, the parties deprive themselves of the jurisdiction of the courts of this Member State (e.g., by confirming the place of residence of the child in another Member State). Then afterwards there are no obstacles for parties to resume dispute once more in the courts of this other Member State.⁵⁵⁶

552 15 June 2012 England and Wales High Court (Family Division) judgment in case: HSE Ireland v SF (A Minor) [2012] EWHC 1640 (Fam).

553 Study on the Application of Article 3(1)(c) and 3, and Articles 17 and 18 of The Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation Between The Member States in The Taking of Evidence in Civil or Commercial Matters. Available at: http://ec.europa.eu/justice/civil/files/final_report_1206_en.pdf.

554 Mikelsone G. The Binding Force of the Case Law of the Court of Justice of the European Union. Available at: <https://www3.mruni.eu/ojs/jurisprudence/article/view/966/922>.

555 2 April 2009 CJEU judgment in case: No C-523/07 A.

556 20 November 2014 interview with a representative of the Ministry of Justice of Hungary.

1.2. Transmitting and Receiving Agencies

- [583]** In addition to the Central Authorities, the Service of Documents Regulation imposes an obligation to designate special state institutions as transmitting and receiving agencies. A similar obligation for Member States arises from the Legal Aid Directive, where such bodies are called transmitting and receiving authorities. Such institutions also might be classified under administrative authorities that should apply EU law and CJEU case law in the area of civil justice and therefore will be briefly addressed by the Research.
- [584]** According to the Legal Aid Directive, Member States must designate transmitting and receiving authorities to send and to receive legal aid applications.⁵⁵⁷ Similar wording has been used in the Service of Documents Regulation, which obliges Member States to designate transmitting agencies, which are competent for the transmission of judicial or extrajudicial documents to be served in another Member State and receiving agencies - competent for the receipt of judicial or extrajudicial documents from another Member State.⁵⁵⁸
- [585]** In regard to these obligations, Member States again have different approaches. The most centralized one was used by **Latvia** (until January 1st 2015) – the Ministry of Justice was both the receiving and transmitting agency for the Service of Documents Regulation and Legal Aid Administration – the transmitting and receiving authority for legal aid applications. However, from the 1st of January 2015 in accordance with the Civil Procedure Law of Latvia courts of general jurisdiction officially become the receiving and transmitting agency for serving documents in **Latvia**.⁵⁵⁹ The main reason why these roles were at first entrusted to the Ministry of Justice was the unwillingness and lack of experience of courts to apply EU law, including case law, which was something unknown and uncustomary for them. Now when the courts are more used to application of EU law, this role can be transferred to the judiciary.
- [586]** Even more, experts from the Latvian Ministry of Justice explained that already before 2015 the request for transferring documents in practice was submitted to courts that later forwarded documents to the Ministry of Justice, which in turn made a *prima facie* check of the documents and then forwarded them further to the receiving agency in another Member State.⁵⁶⁰
- [587]** Other Member States have entrusted the duties of transmitting and receiving agencies to courts of general jurisdiction or to particular courts or departments of courts already some time ago. In **Sweden** the transmitting agencies are courts, enforcement authorities and other Swedish authorities that serve judicial and extrajudicial documents in civil or commercial matters. The County Administrative Board of Stockholm is the receiving agency and the Ministry of Justice the transmitting and receiving authority for legal aid applications. In **Hungary** the courts are the transmitting and receiving agency for the Service of Documents Regulation (with the exception that for extrajudicial documents the transmitting agency is the Minister of Justice). Regarding legal aid, the courts are the receiving authority, but the transmitting one is the Office of Justice.

557 Legal Aid Directive, Article 14(1).

558 Service of Documents Regulation, Article 2.

559 Civil Procedure Law of the Republic of Latvia, adopted 14 October 1998, in force as from 01 March 1999, published in Latvijas Vēstnesis [Herald of Latvia] No 326/330, 03 November 1998.

560 29 December 2014 interview with a representative of the Ministry of Justice of Latvia.

- [588]** In **Germany** all these tasks are carried out by the courts. It again gets more complicated in the **U.K.**, where the duties of the transmitting agency are carried out by different, mostly court-related bodies,⁵⁶¹ but the duties of receiving agency by courts. As for legal aid applications, both the receiving and transmitting agency is the same specific body in each part of the state.⁵⁶²
- [589]** The general problems in application of the CJEU case law in relation to the Service of Documents Regulation and Legal Aid Directive have been addressed previously by this Research.⁵⁶³ As regards the particular duties of the transmitting and receiving agencies and authorities in both those legal instruments, there are very few CJEU cases that address those duties in detail.
- [590]** One of the rare examples in this context is the **Roda Golf & Beach Resort** case.⁵⁶⁴ In this case the CJEU ruled that the concept of “*extrajudicial document*” should be given autonomous interpretation and that a document drawn up by a notary constitutes as such an extrajudicial document within the meaning of the Service of Documents Regulation.
- [591]** A judgment was passed contrary to the opinions of the **Latvian, German** and **Hungarian** governments submitted in this case. The governments were of the opinion that the content of the definition of an extrajudicial document must be determined according to the law of each Member State. Therefore, the transmitting and receiving agencies of these Member States had to reconsider their practice on what is considered to be an extrajudicial document in the context of the Service of Documents Regulation.
- [592]** Nonetheless, in **Germany** and **Hungary** already before the judgment in the **Roda Golf & Beach Resort** case it was accepted that extrajudicial documents are also documents without actual connection, either with legal proceedings in progress, or with the commencement of such proceedings.⁵⁶⁵ On the contrary, in **Latvia** this CJEU judgment changed the perception of the term “*extrajudicial document*”, because until the CJEU judgment it was presumed that in Latvia there were no “*extrajudicial documents*.”⁵⁶⁶

1.3. Administrative Authorities Equivalent to Courts

- [593]** Lastly, in the context of application of the CJEU case law in the area of civil justice by administrative authorities, short notice should be paid to certain ambiguities in relation to the term “*court*” used by several regulations in the area of civil justice.
- [594]** In some regulations the term “*court*” is used in a broader sense than in the colloquial meaning of this term. For example, Article 2(2) of the Maintenance Regulation prescribes that the term “*court*” should also encompass administrative authorities having competence in matters relating to maintenance obligations and guarantees of impartiality and the right of all parties to be heard. Such authorities are considered “*courts*”, if in addition to the foregoing requirements their decisions under the law of Member State where they are established are subject to appeal or review by a judicial authority and have a similar force and effect as a decision of a judicial authority on the same matter.

561 For the purposes of the Service of Documents Regulation, there are four transmitting agencies in the U.K. In England and Wales, the transmitting agency is the Senior Master, for the Attention of the Foreign Process Department, Royal Courts of Justice. In Scotland - the Messengers-at-Arms. In Northern Ireland - the Master (Queen’s Bench and Appeals), Royal Courts of Justice. In Gibraltar - the Registrar of the Supreme Court of Gibraltar.

562 Legal Services Commission - Central Complaints Handling Team, The Northern Ireland Legal Services Commission, The Scottish Legal Aid Board.

563 See: Part on the Service of Documents on p. 71 and the Legal Aid on p. 126 of this Research.

564 25 June 2009 CJEU judgment in case: No C-14/08 Roda Golf & Beach Resort.

565 Ibid., para. 52.

566 29 December 2014 interview with a representative of the Ministry of Justice of Latvia. In addition, this CJEU judgment also almost was cause for the amendments in Latvian laws – See: next part of this Research.

- [595]** Under Article 3(a) and Article 3(b) of the Brussels Ibis Regulation for the purposes of the regulation, the term “*court*” includes the Enforcement Authority (*Kronofogdemyndigheten*) in summary proceedings concerning orders to pay (*betalningsföreläggande*) and assistance (*händräckning*) in **Sweden**; the notaries (*közjegyző*) in summary proceedings concerning orders to pay (*fizetési meghagyásos eljárás*) in **Hungary**. In Sweden the Enforcement Authority (*Kronofogdemyndigheten*) is also considered a court for the purposes of the European Order for Payment Regulation.⁵⁶⁷
- [596]** In the **U.K.** there are two such administrative authorities in regards to the Maintenance Regulation. In England and Wales and Scotland it is the Child Maintenance and Enforcement Commission (CMEC). In Northern Ireland - the Department for Social Development Northern Ireland (DSDNI).
- [597]** In **Hungary** in a similar context, experts from the Hungarian Ministry of Justice pointed out the lack of a definition of the term “*court*”. They specifically referred to the Taking of Evidence Regulation, Article 1 of which states that “*this Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests*”. In many Member States term “*court*” is treated literally by excluding other public bodies that perform functions of the court. However, in **Hungary** there are several other bodies that in substance fulfill the function of the court, e.g., notaries, guardianship authorities.
- [598]** In the practice of **Hungary**, this has led to the following chain of events: notaries were sending the documents, the documents were returned, then the notaries sent them to the Hungarian Ministry of Justice, then the ministry sent the documents with added explanation of the situation to the Central Authority of the receiving Member State and then finally the Central Authority of that Member State was able to communicate the proceeding of documents. Although in general at the end the documents are sent, time delays and unnecessary additional work on the part of the Central Authority might take place.⁵⁶⁸

1.4. Conclusions and Suggestions

- [599]** The CJEU case law in the area of civil justice is applied by administrative authorities only very rarely. The main reason for this is that EU law instruments in this area mostly contain provisions in relation to national courts.
- [600]** The administrative authorities mostly affected by the CJEU case law in the area of civil justice are the authorities that Member States, as obliged by regulations in this area, have designated to discharge the functions of Central Authorities and transmitting and receiving agencies. However, the amount of the CJEU case law that influences these authorities is insignificant.
- [601]** Nonetheless, as recognized by representatives of the Ministry of Justice of **Hungary**, the duties and responsibilities of Central Authorities under several regulations are formulated in overly broad terms. Therefore, the Researchers hope that the CJEU case law in future will bring some clarity to this subject matter.

⁵⁶⁷ European Judicial Atlas in Civil Matters. Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/epo_courtsjurisd_en.jsp?countrySession=12&#statePage3

⁵⁶⁸ 20 November 2014 interview with a representative of the Ministry of Justice of Hungary.

2. Amendments to National Laws Arising from CJEU Case Law in Area of Civil Justice

2.1. Duty to Comply with EU Legal Requirements In General

- [602]** The duty to align national legal requirements with EU law is not only one of the preconditions for accession to EU. It also is an ever on-going process during which all Member States have the responsibility for the correct and timely application of all various EU law instruments. However, the methodology on how to ensure compliance with EU legal requirements on the national level varies from one Member State to another.
- [603]** Most Member States, e.g., **Latvia** and **Hungary**, have chosen a centralized model of EU law implementation by fixing one main responsible institution on the matter – in both states coordination and control of the transposition process of the EU legislation is carried out by the Ministry of Justice. Other ministries generally are only responsible for making the necessary draft laws that implement the EU legislation.⁵⁶⁹
- [604]** The situation is more complicated in other Member States, where the specifics of particular state organization come into play – it has been often mentioned that in federal or decentralized Member States, the shared character of competences in the transposition of EU law is a source of delays and distortion in the application of EU law.⁵⁷⁰
- [605]** In **Sweden** a decentralized system of EU law implementation is used. Although in general the Prime Minister's office is in charge of overseeing the implementation of EU law, every line ministry has a substantive degree of independence in the responsibilities of EU law transposition for EU acts that fall within its scope of competence. Also a large role in the implementation process might be played by other public authorities if they have general authorization to issue government regulations in that area. When more complicated or extensive directives are to be implemented, a working group with representatives of the concerned ministries and authorities to analyse the need to adopt measures at different levels are formed.⁵⁷¹
- [606]** Similarly, in **Germany** there is no single central body responsible for the implementation of EU legislation. The division of legislative competences between the federal level and the states concerns not only national matters, but EU matters as well.

2.2. Necessity for Amendments in National Law Arising from CJEU Case Law in Area of Civil Justice

- [607]** However, correct application of EU law and respective legal approximation in its broad meaning does not only involve the transposition of the provisions of EU law, but also entails the incorporation of the case law of the CJEU into national law.

569 13 October 2014 interview with representatives of the Ministry of Justice of Hungary and Latvia.

570 For comparative analyses, see, e.g., Comparative study by European Parliament on the transposition of EC law in the Member States. Available at: <http://www.euo.dk/upload/application/pdf/7bf97e2b/Final062007.pdf%3Fdownload%3D1>.

571 28 October 2014 interview with a representative of the Ministry of Justice of Sweden.

- [608]** The degree of the necessary amendments in national law and the methodology used varies greatly from case to case as well as from one Member State to another. Also, the area of civil justice itself as a main focus point of the Research has certain specifics regarding the impact of the CJEU case law on the national law-making process.
- [609]** Not all CJEU judgments require amendments to national laws,⁵⁷² especially in the area of civil justice. The Researchers have found several reasons for that.
- [610]** Firstly, the Commission gained rights to start infringement procedure against Member States under Article 258 of the TFEU from 1 December 2014 but only with respect to acts in the field of police cooperation and judicial cooperation in criminal matters.⁵⁷³ However, until now the Commission has not actively stimulated the Member States to amend their national laws in the area of civil justice.
- [611]** Secondly, the national courts must comply with EU law and the interpretations of it made by the CJEU, even if these rules are not implemented in national laws.
- [612]** Thirdly, regulations, which are the most used form of EU secondary law in the area of civil justice covered by the Research, in general do not require any additional measures of the national law.
- [613]** Fourthly, judgments might not require amendments to national law, because the procedural laws of Member States are constructed as making direct references to particular articles of regulations, meaning that national courts in applying particular national norms will apply the rules of regulations and the relevant CJEU case law automatically.
- [614]** Fifthly, in most cases in the area of civil justice CJEU judgments concern issues of interpretation of EU regulations; therefore soft law instruments might be sufficient tools in order to ensure proper functioning of the EU law provisions in national courts.
- [615]** As to the first point, it must be noted that in general, the Commission, by initiating infringement procedures pursuant to Article 258 of the TFEU, stimulates Member States to amend their national laws in conformity with the EU law, which also includes the findings of the CJEU.
- [616]** The need for legal amendments is clear in cases where a particular Member State is the defendant Member State, and the breach of EU law is recorded by the CJEU, but the decisions concerning other Member States might be relevant for that Member State as well, if the law of that Member State is similar to the challenged one.⁵⁷⁴ Even more, rather than in the preliminary ruling case, the CJEU judgment in the infringement procedure case includes more direct assessment on the compatibility of the national law with EU law, thus more directly stimulating amendments in national law.
- [617]** Almost all judgments of the CJEU in the area of civil justice so far have been in the cases of the preliminary rulings procedure, which usually avoid any direct assessments on conformity of the national law with EU law. Therefore it is harder to estimate the impact of CJEU case law than in cases of infringement procedure. Furthermore, the pressure on behalf of the Commission might be not so vivid.
- [618]** The next reason why Member States are not rushing to amend the national laws is the fact that the national courts are the ones responsible for application of the necessary provisions of EU law in situations when it is needed. Therefore, even if findings of a particular CJEU judgment have not been introduced in the legislation of a Member State, courts of this Member State are obliged to

572 Somssich R. The process and methodology of coordinating the transposition of EU law in Hungary. In: Varju M., Varnay E. (ed). *The Law of the European Union in Hungary: Institutions, Processes and the Law*. HVG-ORAC Publishing Ltd., 2014. p. 142.

573 Consolidated version of the Treaty on European Union. Protocol (No 36) on transitional provisions, Article 10(3). L 115, Official Journal of the European Union, 09.05.2008, p. 322–326.

574 Somssich R. The process and methodology of coordinating the transposition of EU law in Hungary. In: Varju M., Varnay E. (ed). *The Law of European Union in Hungary: Institutions, Processes and the Law*. HVG-ORAC Publishing Ltd., 2014, p. 143.

apply these findings if the need arises. Such situation can also arise when it has been found that the judgment of the CJEU requires amendments to national law, but these amendments have not been introduced yet.

- [619]** This situation can be illustrated by an example in **Hungary** in the field of service of documents, where at least one judgment of the CJEU has had a great effect on the practice of Hungarian courts. That is the judgment in the **Alder** case.⁵⁷⁵ In Hungary if the plaintiff or the defendant has no place of residence in Hungary, the court has to send a notice to that party in order to appoint a representative who is authorized to accept the service of documents and has a residency in Hungary. If the party fails to comply with this obligation, the court may not serve any other document in accordance with the Hungarian Code of Civil Procedure. In this case the Hungarian court has to apply a fictitious service method – it has to deem that these documents have been served to the party without actual service. In the judgment of the **Alder** case the CJEU stated that similar rules of the Polish Code of Civil procedure were contrary to the EU regulation on the service of documents. In Hungary the provision itself is still in the Code of Civil Procedure, but the judges, as entitled under EU law, are not applying it.⁵⁷⁶
- [620]** The next one of the previously mentioned reasons why it might not be necessary to introduce new national law amendments after the CJEU has given judgment is the fact that the area of civil justice is regulated mainly by regulations which, because of their directly applicable nature, do not require implementation in national laws. As was emphasized by the representative of the Ministry of Justice of **Latvia**, those occasions when the laws have been amended are very rare, especially in the field of civil justice, as most of the judgments have dealt with the interpretation of a particular clause or rule in a regulation. In these cases the Ministry relies on the notion that courts when applying regulations will take into account also the interpretation given by the CJEU.
- [621]** This leads to another reason of why there is no necessity to amend national law after some CJEU judgments – the courts are applying the CJEU case law automatically. As further explained by the representative of the Ministry of Justice of **Latvia**, the Civil Procedure Law, which contains the national procedure of the regulations in the area of civil justice, is amended very rarely, because it itself contains references to the particular Articles of these regulations. Thus, the respective Articles of regulations have to be applied together with the national law and, as the CJEU is giving a binding interpretation of those articles, the CJEU judgments must be applied with the Articles automatically.⁵⁷⁷
- [622]** It must be added that sometimes there is no need to use generally binding instruments to inform the courts or legal practitioners about a judgment of the CJEU, because certain soft law instruments can achieve the same purpose.
- [623]** For example, in **Latvia** in cases when there are major changes in the field of civil justice (whether on the EU or national level), the Ministry sometimes informs the courts about these changes with circulars. Until now there has been no circular devoted specifically to explanation of a particular CJEU judgment, however, the representative of the Ministry of Justice did not deny that in the event a judgment would introduce major changes in the existing understanding of application of EU law, such a circular might be created. For example, in the context of the courts of general jurisdiction becoming the transmitting and receiving agencies for the Service of Documents Regulation,⁵⁷⁸ the representative of the Ministry of Justice expressed that most likely the obligation to transmit documents signed by the notary public should be included in a circular to the courts.

575 9 December 2012 CJEU judgment in case: C-325/11 Alder.

576 20 November 2014 interview with a representative of the Ministry of Justice of Hungary.

577 29 December 2014 interview with a representative of the Ministry of Justice of Latvia.

578 See: p. 155 et seq.

That should be done to be sure that the courts are aware that the documents drawn by notary public are considered to be extrajudicial documents in the meaning of the Service of Documents Regulation.

2.3. Activities of National Administrative Authorities in Response to CJEU Case Law in Area of Civil Justice

- [624]** As usually amendments to laws in Member States are prepared by the executive branch, the process of evaluation of the need to amend national law arising from CJEU case law is carried out by the administrative authorities and Member States. The means of monitoring CJEU case law and the evaluation process afterwards might differ from state to state.
- [625]** For example, in **Latvia**, an IT system provides that the Ministry of Justice receives an e-mail whenever a new judgment of the CJEU is issued. After the e-mail is received, it is evaluated whether this particular judgment requires amendments to law.⁵⁷⁹ Additionally, the Civil Procedure Law itself contains references to the articles of regulations in the area of civil justice. Therefore, when a judgment is given about an interpretation of any of those articles, usually there is no need to change the law, as it already provides that the courts must apply these articles and the CJEU judgment must be applied automatically with these articles.
- [626]** To ensure that the new legislation adopted does not run counter to existing case law, in these kind of cases in **Latvia** as well as in **Hungary** the explanation provided for draft acts usually contain a summary of the relevant EU case law that have been taken into account.⁵⁸⁰
- [627]** A legal approximation proposal must be prepared by the ministry concerned, according to the general procedure applicable for the programming of transposition tasks. When a judgment concerning **Hungary** establishes that the Hungarian law is not compatible with EU law, the review of legislative tasks must be carried out promptly, whereas in cases in which the CJEU has not emphasized the non-compatibility of laws or in cases concerning other Member States, firstly it is examined whether the CJEU's interpretation would require any amendments.⁵⁸¹
- [628]** In certain cases the Hungarian legislator has gone further than required by the findings of the CJEU. For example, in the **Ynos** case⁵⁸² the CJEU refused to address the merits of the submission, because the case concerned a dispute which emerged before Hungary's accession to the EU. However, the Advocate General in his Opinion in the case⁵⁸³ did deal with the substantive issues of the case and found the provisions of the Hungarian Civil Code incompatible with EU law. Following this opinion, the Civil Code was subsequently amended in 2006.
- [629]** It is obvious that a national law amendment procedure might take some time. However, the Member States themselves express the opinion that they are trying to comply with the requirements of EU law as fast as possible.

579 29 December 2014 interview with a representative of the Ministry of Justice of Latvia.

580 For example, Act I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence.

581 Somssich R. The process and methodology of coordinating the transposition of EU law in Hungary. In: Varju M., Varnay E. (ed). *The Law of European Union in Hungary: Institutions, Processes and the Law*. HVG-ORAC Publishing Ltd., 2014, p. 144.

582 10 January 2006 CJEU judgment in case: No C-302/04 Ynos kft v János Varga.

583 22 September 2005 CJEU Advocate General Tizzano opinion in case: C-302/04 Ynos kft v János Varga.

- [630]** As, for example, according to the point of view of Hungarian academics, in **Hungary** serious delays in complying with CJEU judgments are not particularly common.⁵⁸⁴ However, the Researchers must note that it took 6 years after the Code of Private International Law⁵⁸⁵ was amended for it to be consistent with the **Garcia Avello** case.⁵⁸⁶
- [631]** Representatives of the Ministry of Justice of **Latvia** confirmed that although usually also in Latvia it takes approximately a month to decide whether a particular CJEU judgment requires any amendments in law, sometimes the law might be amended only a couple of years after the judgment is rendered.⁵⁸⁷ That might be the case with judgments which at first glance do not require to be transposed in national legislation, but the practice afterwards shows that this actually is needed.

2.4. Amendments to National Law Arising from CJEU Case Law: Practice in Area of Civil Justice

- [632]** Although there are several reasons Member States choose not to transpose the findings of the CJEU in their legal framework, there are several occasions when the national law should be amended, because of these findings.
- [633]** Firstly, those are occasions when EU law has been transposed in national law or the national law has been harmonized with EU law in a very detailed manner. For example, in **Latvia** the duties of the Administration of the Maintenance Guarantee Fund are set in detail in the Cabinet Regulations.⁵⁸⁸ If the CJEU would clarify any of those duties, it would almost certainly require the Cabinet Regulations to be amended.⁵⁸⁹
- [634]** Secondly, a CJEU judgment can contain detailed obligations to specify or provide some substantive or procedural rules in national legislation. In this case, if the legislation of a Member State does not already contain such rules, there is a slight possibility that some amendments to already existing law will be made in this state or a new one will be drafted.
- [635]** Thirdly, a duty of approximation may follow from cases where the CJEU clarifies the interpretation of a provision of EU law. This obligation becomes even more important when the interpretation of the CJEU goes beyond the text of EU norms on the basis of a purposive or contextual approach in legal interpretation.⁵⁹⁰

584 Somssich R. The process and methodology of coordinating the transposition of EU law in Hungary. In: Varju M., Varnay E. (ed). The Law of European Union in Hungary: Institutions, Processes and the Law. HVG-ORAC Publishing Ltd., 2014, p. 146

585 2 October 2003 CJEU judgment in case: No C-148/02 Garcia Avello.

586 The amendments in the Hungarian Code of Private International Law were introduced with the Act No. IX of 2009.

587 29 December 2014 interview with a representative of the Ministry of Justice of Latvia.

588 Cabinet Regulations on Procedure used by Administration of the Maintenance Guarantee Fund in Fulfilling the Duties of the Central Authority in Cross-border Maintenance cases, adopted 19 July 2011, in force as from 29 July 2011, published in Latvijas Vēstnesis [Herald of Latvia] No 117, 28 July 2011.

589 29 December 2014 interview with a representative of the Ministry of Justice of Latvia.

590 The findings of Somssich R. The process and methodology of coordinating the transposition of EU law in Hungary. In: Varju M., Varnay E. (ed). The Law of the European Union in Hungary: Institutions, Processes and the Law. HVG-ORAC Publishing Ltd., 2014, p. 146 were also expressed in 29 December 2014 interview with a representative of the Ministry of Justice of Latvia.

- [636]** Several laws of Member States covered by the Research have been amended, because of the above-mentioned reasons. For example, in **Latvia** it is the case of the quite recent judgment in the ***Eco Cosmetics and Raiffeisenbank St. Georgen*** case,⁵⁹¹ where the Ministry of Justice is planning to suggest amendments to the Civil Procedure Law to ensure that Latvian law provides the necessary safeguards for the European Order for Payment Regulation.⁵⁹²
- [637]** The judgment in the ***Roda Golf & Beach Resort*** case on interpretation of the term “*extrajudicial document*”, mentioned previously in the Research in the context of duties of transmitting and receiving agencies, also caused discussions on the necessity to implement this judgment in the national laws of **Latvia**. The Ministry of Justice was already prepared to initiate the amendment procedure.⁵⁹³ However, at the very last stage, after consultations with the Administration of Notaries Public, it was decided that the Notaries law will be interpreted systemically together with the Civil Procedure Law in a way that allows acts of notaries to be considered extrajudicial documents. Thus no amendments were made.
- [638]** Regarding this case **Latvia** tried to foresee other consequences brought by the judgment in the ***Roda Golf & Beach Resort*** case. During the above-mentioned considerations, the Administration of sworn bailiffs was asked by the Latvian Ministry of Justice whether they think that acts by bailiffs should be considered extrajudicial documents. However, this suggestion was struck down, mainly because of the costs it would entail.
- [639]** Also **Hungary** has amended its laws because of the findings of the CJEU in the area of civil justice, as a new development related to party autonomy resulted from the ***Garcia Avello*** case.⁵⁹⁴ In 2009 the Hungarian Code on Private International Law was amended in order to comply with the principle set forth in this judgment. The amendment was needed, as the Hungarian rules on the law governing the registration of a person's birth name did not allow, in the case of dual citizenship, the taking into account of the rules and customs of the Member State of the second citizenship relating to the name of persons.⁵⁹⁵ Consequently, the Hungarian Code of Private International Law now allows the application of the choice of law rule not only in contract law, but in the case of name bearing as well.⁵⁹⁶ The Hungarian Code of Private International Law is amended in a way that in Hungarian proceedings it allows the person concerned to choose the law of the Member State of his or her other citizenship and thus the rules applicable to surnames in that state.
- [640]** There is at least one particular example when a judgment by the CJEU required a law of the **U.K.** to be amended. In the ***Health Service Executive*** case⁵⁹⁷ the CJEU ruled on placement of a child in another Member State under Article 56 of the Brussels IIbis Regulation. the CJEU ruled that according to the said regulation “*a judgment of a court of a Member State which orders the compulsory placement of a child in a secure care institution situated in another Member State must, before its enforcement in the requested Member State, be declared to be enforceable in that Member State.*”⁵⁹⁸ Further, the CJEU emphasized that the decision on application of the declaration of enforceability must be made promptly, and the appeals brought against this decision must not unnecessarily delay the enforcement of that decision. Before this judgment, Rule 31.17 of the Family Procedure Rules provided that “*a registered order [could not] be enforced until the time limit for appeals ha[d]*”

591 4 September 2014 CJEU judgment in case: No C-119/13 Eco cosmetics and Raiffeisenbank St. Georgen.

592 29 December 2014 interview with a representative of the Ministry of Justice of Latvia.

593 Ibid.

594 2 October 2003 CJEU judgment in case: No C-148/02 Garcia Avello.

595 Somssich R. The process and methodology of coordinating the transposition of EU law in Hungary. In: Varju M., Varnay E. (ed). The Law of the European Union in Hungary: Institutions, Processes and the Law. HVG-ORAC Publishing Ltd., 2014, p. 143.

596 Burian L. The impact of the Rome I and Rome II Regulations on the national conflicts rules of the Member States with special regard to the central European countries. In: Central and Eastern European Countries after and before the Accession. Budapest: Faculty of Law, ELTE, 2011.

597 26 April 2012 CJEU judgment in case: No C-92/12 PPU Health Service Executive v S.C. and A.C.

598 Ibid., para. 147.

expired.”⁵⁹⁹ After the law was amended to comply with the **Health Service Executive**, case judgment Rule 31.17(1A) of the Family Procedure Rules provides that “[t]he court may enforce a judgment registered under rule 31.11 before the expiration of a period referred to in paragraph (1) where urgent enforcement of the judgment is necessary to secure the welfare of the child to whom the judgment relates.”⁶⁰⁰

[641] This case is an interesting example, as the preliminary ruling was requested by Ireland, but the amendments were made in the law of the **U.K.** However, it must be noted that the U.K. was involved in this case more than Member States usually are. Firstly, the questions referred to the CJEU and answers given to them concerned how the Brussels IIbis Regulation should be interpreted by the British courts, as these courts were the ones which would need to give the ruling in the case from which the CJEU case originated. Secondly, the CJEU requested the Government of the U.K. to provide the necessary information for it to decide the case.

[642] As a reaction to the **Prism Investments** case,⁶⁰¹ in **Germany** Article 55 and 56 of the Recognition and Enforcement Implementation Law (*Anerkennungs- und Vollstreckungsausführungsgesetz*)⁶⁰² have been amended (amendments in force since 26 February 2013).⁶⁰³ In the **Prism Investments** case the CJEU decided:

*No provision of the Brussels I Regulation permits the refusal or revocation of a declaration of enforceability of a judgment that has already been complied with because such a situation does not deprive that judgment of its enforceable nature, which is a characteristic specific to that judicial act. And, in so far as the enforcement procedure consists of a formal review of the documents submitted by the appellant, a plea raised in support of an appeal brought in accordance with Articles 43 or 44 of the Regulation, such as the appeal based on compliance with the judgment in question in the Member State of origin, would affect the characteristics of that procedure and would lengthen its duration, contrary to the objectives of efficiency and rapidity laid down in recital 17 in the preamble to that regulation.*⁶⁰⁴

[643] Now, if in **Germany** the judgment debtor wants to prove that the foreign judgment is not enforceable anymore, he must lodge a complaint against the enforcement procedure. Thus, the question about the enforceable nature of the foreign judgment cannot be decided within the exequatur proceedings.

2.5. Conclusions and Suggestions

[644] The Research confirms that the governments of respective Member States in general are slightly more ready to respond to CJEU judgments originating in cases of the infringement procedure against particular Member State pursuant to Article 258 of the TFEU than to the judgments in preliminary rulings procedure cases pursuant to Article 267 of the TFEU. Yet, as so far almost all judgments of the CJEU in the area of civil justice are in the preliminary rulings procedure cases,

599 Explanatory Memorandum to the Family Procedure (Amendment) (No2) Rules 2012. 2012 No 1462. Available at: http://www.legislation.gov.uk/ukxi/2012/1462/pdfs/uksiem_20121462_en.pdf.

600 Family Procedure Rules 2010 (Amendment No 2 Rules 2012). Available at: https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_31#IDAC5VKC.

601 13 October 2011 CJEU judgment in case No C-139/10 Prism Investments BV v. van der Meer.

602 Gesetz zur Ausführung zwischenstaatlicher Verträge und zur Durchführung von Abkommen der Europäischen Union auf dem Gebiet der Anerkennung und Vollstreckung in Zivil- und Handelssachen (Anerkennungs- und Vollstreckungsausführungsgesetz – AVAG). Available at: www.gesetze-im-internet.de.

603 OLG Stuttgart, 5 November 2013 5 W 13/13. Available at: www.unalex.eu.

604 13 October 2011 CJEU judgment in case No C-139/10 Prism Investments BV v. van der Meer, paras. 37, 42.

which increase the threat that without direct pressure of the Commission national governments might overlook those cases and might delay the adoption of amendments in the respective national laws.

[645] However, the necessity to amend the national laws due to CJEU case law indeed arises only in very few cases. The majority of EU legislation in the area of civil justice has a form of regulation, and national laws serve only as complementary legal instruments. Therefore, the judgments of the CJEU in this area give the interpretation as well as specify the content of directly applicable EU law, and in most cases do not obligatorily require a legislative response of any kind on the part of Member States.

[646] Research confirms that adequate digital solutions play an essential role in Member States' ability to acknowledge CJEU judgments and prepare a necessary response within national laws. The information system on transposition and implementation of EU law in **Latvia** (ESTAPIKS) can be mentioned as a good example in this field, as this system not only ensures that the Ministry of Justice is automatically informed of any developments in CJEU practice, but also automatically designates the responsible governmental body, which is charged to evaluate whether the particular judgment of the CJEU requires any amendments in national laws.

LIST OF ABBREVIATIONS

<i>Atlas</i>	European Judicial Atlas in Civil Matters
<i>Brussels Convention</i>	Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters
<i>Brussels Regulations</i>	Brussels I and Ibis Regulations
<i>Brussels Ibis Regulation</i>	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
<i>Brussels I Regulation</i>	Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation)
<i>Brussels IIbis Regulation</i>	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
<i>COMI</i>	Centre of the debtor's main interests (Article 3(1) of the Insolvency Regulation)
<i>Commission</i>	European Commission
<i>CMR</i>	United Nations Convention On the Contract for the International Carriage of Goods by Road (CMR)
<i>Charter</i>	Charter of Fundamental Rights of the European Union
<i>CJEU</i>	Court of Justice of the European Union
<i>EC</i>	European Community
<i>EC Treaty</i>	Treaty establishing the European Community
<i>ECHR</i>	European Court of Human Rights
<i>Et seq.</i>	Et sequens (Latin) ... and further on.
<i>EU</i>	European Union
<i>European Enforcement Order Regulation</i>	Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims
<i>European Orders for Payment Regulation</i>	Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure
<i>European Small Claims Regulation</i>	Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure
<i>Hague Convention</i>	Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

<i>Heidelberg Report</i>	Hess, B., Pfeiffer, T., Schlosser, P. Heidelberg Report on the Application of the Brussels I Regulation in 25 Member States (Study JLS/C4/2005/03)
<i>Insolvency Regulation</i>	Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings
<i>Joint Programme of Measures</i>	30 November 2000 — the EU Commission and the Council adopted the Joint Programme of Measures regarding the implementation of the principle of mutual recognition in civil and commercial matters
<i>Law Applicable to Divorce and Legal Separation Regulation</i>	Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation
<i>Legal Aid Directive</i>	Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes
<i>Maintenance Regulation</i>	Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
<i>Mediation Directive</i>	Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters
<i>Montreal Convention</i>	Montreal Convention for the Unification of Certain Rules for International Carriage by Air
<i>New York Convention</i>	1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
<i>Para. or ¶</i>	Paragraph
<i>Protection Measures Regulation</i>	Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters
<i>Research</i>	Research “ <i>The Court of Justice of the European Union and the impact of its case law in the area of civil justice on national judicial and administrative authorities</i> ”
<i>Researchers</i>	Dr. iur. Inga Kačevska Dr.iur. Baiba Rudevskā Dr.iur. Arnis Buka PhD student Mārtiņš Dambergs PhD student Aleksandrs Fillers
<i>Rome Convention</i>	Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980
<i>Rome Regulations</i>	Rome I, II and III Regulations
<i>Rome I Regulation</i>	Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations
<i>Rome II Regulation</i>	Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations
<i>Rome III Regulation</i>	Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

<i>Service of Documents Regulation</i>	Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000
<i>Succession Regulation</i>	Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession
<i>Survey</i>	Survey conducted by the Researchers within this Research
<i>Taking of Evidence Regulation</i>	Council Regulation No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters
<i>TFEU</i>	Treaty on the Functioning of the European Union
<i>Treaty of Lisbon</i>	Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community
<i>The U.K.</i>	United Kingdom

ANNEX: CJEU CASE-LAW ON CROSS-BORDER CIVIL COOPERATION

Chronological Table

for Research *The Court of Justice of the European Union and the impact of its case law in the area of civil justice on national judicial and administrative authorities*"

1. Brussels I Regulation

[Brussels Convention incl.]

BC – the Brussels Convention; BR – Brussels I Regulation

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1.	06.10.1976	<i>Tessili</i>	12/76	[1976] p. 01473	Germany	BC Art. 5(1)	[184]
2.	06.10.1976	<i>De Bloos</i>	14/76	[1976] p. 01497	Belgium	BC Art. 5(1)	[213]
3.	14.10.1976	<i>L.T.U.</i>	29/76	[1976] p. 01541	Germany	BC Art. 1(1)	[173], [189]
4.	30.11.1976	<i>Bier</i>	21/76	[1976] p. 01735	The Netherlands	BC Art. 5(3)	
5.	30.11.1976	<i>De Wolf</i>	42/76	[1976] p. 01759	The Netherlands	BC Art. 26; 31	
6.	14.12.1976	<i>Estasis Salotti</i>	24/76	[1976] p. 01831	Germany	BC Art. 17	
7.	14.12.1976	<i>Segoura</i>	25/76	[1976] p. 01851	Germany	BC Art. 17	
8.	14.07.1977	<i>Bavaria Fluggesellschaft und Germanair</i>	Joined cases: 9/77 and 10/77	[1977] p. 01517	Germany	BC Art. 1(1); 55; 56	
9.	22.11.1977	<i>Industrial Diamond Supplies</i>	43/77	[1977] p. 02175	Belgium	BC Art. 38	[416]
10.	14.12.1977	<i>Sanders</i>	73/77	[1977] p. 02383	The Netherlands	BC Art. 1(1)	

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
11.	21.06.1978	<i>Bertrand</i>	150/77	[1978] p. 01431	France	BC Art. 13	
12.	09.11.1978	<i>Meeth</i>	23/78	[1978] p. 02133	Germany	BC Art. 17	
13.	22.11.1978	<i>Somafer</i>	33/78	[1978] p. 02183	Germany	BC Art. 5(5)	
14.	22.02.1979	<i>Gourdain</i>	133/78	[1979] p. 00733	Germany	BC Art. 1(2)	
15.	27.03.1979	<i>De Cavel I</i>	143/78	[1979] p. 01055	Germany	BC Art. 1(2); 24	
16.	13.11.1979	<i>Sanicentral</i>	25/79	[1979] p. 03423	France	BC Art. 17; 54	
17.	17.01.1980	<i>Zelger</i>	56/79	[1980] p. 00089	Germany	BC Art. 17; 5(1)	
18.	06.03.1980	<i>De Cavel II</i>	120/79	[1980] p. 00731	Germany	BC Art. 1(2); 5(2); 24	
19.	06.05.1980	<i>Porta Leasing</i>	784/79	[1980] p. 01517	Germany	BC 1968 Protocol Art. I	
20.	21.05.1980	<i>Denilauler</i>	125/79	[1980] p. 01553	Germany	BC Art. 27(2); Art. 46(2); Art. 47(1)	[236]
21.	16.12.1980	<i>Niederlande</i>	814/79	[1980] p. 03807	The Netherlands	BC Art. 1(1)	[186], [189]
22.	18.03.1981	<i>Blanckaert, Willems</i>	139/80	[1981] p. 00819	Germany	BC Art. 5(5)	
23.	26.05.1981	<i>Rinkau</i>	157/80	[1981] p. 00339	The Netherlands	BC 1968 Protocol Art. II	
24.	16.06.1981	<i>Klomps</i>	166/80	[1981] p. 01593	The Netherlands	BC Art. 27(2); Art. 52	[523], [532]
25.	24.06.1981	<i>Elefanten Schuh</i>	150/80	[1981] p. 01671	Belgium	BC Art. 17; 18, 22	
26.	22.10.1981	<i>Rohr</i>	27/81	[1981] p. 00669	France	BC Art. 18	
27.	04.03.1982	<i>Effer</i>	38/81	[1982] p. 0018	Germany	BC Art. 5(1)	
28.	31.03.1982.	<i>G.H.W.</i>	25/81	[1982] p. 01189	The Netherlands	BC Art. 1(2); 18-24	
29.	26.05.1982	<i>Ivenel</i>	133/81	[1982] p. 01891	France	BC Art. 5(1)	
30.	15.07.1982	<i>Pendy Plastic</i>	228/81	[1982] p. 02723	Germany	BC Art. 27(2); 20(3)	

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
31.	22.03.1983	<i>Peters</i>	34/82	[1983] p. 00987	The Netherlands	BC Art. 5(1)	[181]
32.	14.07.1983	<i>Gerling</i>	201/82	[1983] p. 02503	Italy	BC Art. 17.-18	
33.	15.11.1983	<i>Duijnstee</i>	288/82	[1983] p. 03663	The Netherlands	BC Art. 16(4); 19	
34.	07.06.1984	<i>Zelger</i>	129/83	[1984] p. 02397	Germany	BC Art. 21; 54(1)	[184]
35.	19.06.1984	<i>Tilly Russ</i>	71/83	[1984] p. 02417	Belgium	BC Art. 17	
36.	12.07.1984	<i>Firma P.</i>	178/83	[1984] p. 00705	Germany	BC Art. 40(2)	
37.	27.11.1984	<i>Brennero</i>	258/83	[1984] p. 03971	Germany	BC Art. 37; 38(2)	
38.	15.01.1985	<i>Rösler</i>	241/83	[1985] p. 00099	Germany	BC Art. 16(1)	
39.	07.03.1985	<i>Spitzley v. Sommer</i>	48/84	[1985] p. 00787	Germany	BC Art. 17-18	
40.	11.06.1985	<i>Debaecker</i>	49/84	[1985] p. 01779	The Netherlands	BC Art. 27(2)	
41.	02.07.1985	<i>Deutsche Genossenschaftsbank</i>	148/84	[1985] p. 00755	France	BC Art. 36	
42.	04.07.1985	<i>Autoteile</i>	220/84	[1985] p. 02267	Germany	BC Art. 16(5)	
43.	11.07.1985	<i>Berghoefer</i>	221/84	[1985] p. 02699	Germany	BC Art. 17	
44.	03.10.1985	<i>Capelloni et Aquilini</i>	119/84	[1985] p. 03147	Italy	BC Art. 36-39	
45.	24.06.1986	<i>Anterist</i>	22/85	[1986] p. 01951	Germany	BC Art. 17	
46.	10.07.1986	<i>Carron</i>	198/85	[1986] p. 02437	Belgium	BC Art. 33	
47.	11.11.1986	<i>Iveco Fiat</i>	313/85	[1986] p. 03337	Belgium	BC Art. 17	
48.	15.01.1987	<i>Shenavai</i>	266/85	[1987] p. 00239	Germany	BC Art. 5(1)	
49.	08.12.1987	<i>Gubisch</i>	144/86	[1987] p. 04861	Italy	BC Art. 21	
50.	09.12.1987	<i>Parfums Rothschild</i>	218/86	[1987] p. 04905	Germany	BC Art. 5(5)	
51.	04.02.1988	<i>Hoffmann</i>	145/86	[1988] p. 00645	The Netherlands	BC Art. 26; 27(3); 31-36	

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
52.	08.03.1988	<i>Arcado</i>	9/87	[1988] p. 01539	Belgium	BC Art. 5(1)	
53.	06.07.1988	<i>Scherrens</i>	158/87	[1988] p. 03791	The Netherlands	BC Art. 16(1)	
54.	27.09.1988	<i>Kalfelis</i>	189/87	[1988] p. 05565	Germany	BC Art. 5(1); (3); 6(1)	[170]
55.	15.02.1989	<i>Six Constructions</i>	32/88	[1989] p. 00341	France	BC Art. 5(1)	
56.	10.01.1990	<i>(Reichert I)</i>	C-115/88	[1990] p. I-00027	France	BC Art. 16(1)	
57.	11.01.1990	<i>Dumez</i>	C-220/88	[1990] p. I-00049	France	BC Art. 5(3)	[287], [289]
58.	15.05.1990	<i>Zeehaghe</i>	C-365/88	[1990] p. I-01845	The Netherlands	BC Art. 5(1); 6(2)	
59.	03.07.1990	<i>Lancray</i>	C-305/88	[1990] p. I-02725	Germany	BC Art. 27(2)	
60.	27.06.1991	<i>Overseas Union Insurance</i>	C-351/89	[1991] p. I-03317	Germany	BC Art. 7; 21	
61.	25.07.1991	<i>Marc Rich</i>	C-190/89	[1991] p. I-03855	Germany	BC Art. 1(2)	[224], [242], [250]
62.	04.10.1991	<i>Van Dalfsen</i>	C-183/90	[1991] p. I-04743	The Netherlands	BC Art. 37.-38.	[523]
63.	26.02.1992	<i>Hacker v. Euro-Relais</i>	C-280/90	[1992] p. I-01111	Germany	BC Art. 16(1)	
64.	10.03.1992	<i>Powell Duffryn</i>	C-214/89	[1992] p. I-01745	Germany	BC Art. 17	
65.	26.03.1992	<i>Reichert II</i>	C-261/90	[1992] p. I-02149	France	BC Art. 5(3);16(5); 24	
66.	17.06.1992	<i>Jakob Handte</i>	C-26/91	[1992] p. I-03967	France	BC Art. 5(1)	
67.	12.11.1992	<i>Minalnet</i>	C-123/91	[1992] p. I-05661	Germany	BC Art. 27(2)	
68.	19.01.1993	<i>Shearson Lehman Hutton</i>	C-89/91	[1993] p. I-00139	Germany	BC Art. 13	
69.	21.04.1993	<i>Volker Sonntag</i>	C-172/91	[1993] p. I-01963	Germany	BC Art. 1(1); 5(4); 27(2); 37(2)	
70.	13.07.1993	<i>Mulox</i>	C-125/92	[1993] p. I-04075	France	BC Art. 5(1)	
71.	20.01.1994	<i>Owens Bank</i>	C-129/92	[1994] p. I-00117	Germany	BC Art. 21; 22; 23	
72.	17.05.1994	<i>Webb</i>	C-294/92	[1994] p. I-01717	Germany	BC Art. 16(1)	

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
73.	02.06.1994.	<i>Solo Kleinmotoren</i>	C-414/92	[1994] p. I-02237	Germany	BC Art.25; 27(3); 51	
74.	09.06.1994	<i>Lieber</i>	C-292/93	[1994] p. I-02535	Germany	BC Art. 16(1)	
75.	29.06.1994	<i>Custom Made Commercial</i>	C-288/92	[1994] p. I-02913	Germany	BC Art. 5(1)	
76.	15.09.1994	<i>Brenner and Holler</i>	C-318/93	[1994] p. I-04275	Germany	BC Art. 4;13;14	
77.	06.12.1994	<i>Ship Tatry</i>	C-406/92	[1994] p. I-05439	Germany	BC Art. 21; 22; 57	
78.	07.03.1995	<i>Fiona Shevill</i>	C-68/93	[1995] p. I-00415	Germany	BC Art. 5(3)	
79.	06.04.1995	<i>Lloyd's Register of Shipping</i>	C-439/93	[1995] p. I-00961	France	BC Art. 5(5)	
80.	13.07.1995	<i>Danvaern Production</i>	C-341/93	[1995] p. I-02053	Denmark	BC Art. 6(3)	
81.	13.07.1995	<i>Hengst Import</i>	C-474/93	[1995] p. I-02113	The Netherlands	BC Art. 27(2)	
82.	11.08.1995	<i>SISRO</i>	C-432/93	[1995] p. I-02269	Germany	BC Art. 37(2); 38(1)	[416]
83.	19.09.1995	<i>Marinari</i>	C-364/93	[1995] p. I-02719	Italy	BC Art. 5(3)	
84.	14.03.1996	<i>Van der Linden</i>	C-275/94	[1996] p. I-01393	Belgium	BC Art. 47(1)	
85.	10.10.1996	<i>Hendrikman</i>	C-78/95	[1996] p. I-04943	The Netherlands	BC Art. 27(2)	
86.	09.01.1997	<i>Rutten</i>	C-383/95	[1997] p. I-00057	The Netherlands	BC Art. 5(1)	
87.	20.02.1997	<i>MSG</i>	C-106/95	[1997] p. I-00911	Germany	BC Art. 5(1); 17	
88.	27.02.1997	<i>Van den Boogaard</i>	C-220/95	[1997] p. I-01147	The Netherlands	BC Art. 1 (1); 2 (1)	
89.	20.03.1997	<i>Farrell</i>	C-295/95	[1997] p. I-01683	Ireland	BC Art. 5 (2)	
90.	03.07.1997	<i>Benincasa</i>	C-269/95	[1997] p. I-03767	Germany	BC Art. 13; 14; 17	
91.	19.05.1998	<i>Drouot assurances SA</i>	C-351/96	[1998] p. I-03075	France	BC Art. 21	
92.	27.10.1998	<i>Réunion européenne</i>	C-51/97	[1998] p. I-06511	France	BC Art. 5 (2) (3); 6(1)	
93.	17.11.1998	<i>Van Uden Maritime</i>	C-391/95	[1998] p. I-07091	The Netherlands	BC Art. 5(1); 24	[226], [227], [229], [236], [250]

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
94.	16.03.1999	<i>Castelletti</i>	C-159/97	[1999] p. I-01597	Italy	BC Art. 17	
95.	27.04.1999	<i>Mietz</i>	C-99/96	[1999] p. I-02277	Germany	BC Art.13(1);(3); 24;28(2)	
96.	29.04.1999	<i>Coursier</i>	C-267/97	[1999] p. I-02543	Luxemburg	BC Art. 31(1)	
97.	17.06.1999	<i>Unibank</i>	C-260/97	[1999] p. I-03715	Germany	BC Art. 50	
98.	28.09.1999	<i>GIE Groupe Concorde</i>	C-440/97	[1999] p. I-06307	France	BC Art. 5(1)	
99.	05.10.1999	<i>Leathertex</i>	C-420/97	[1999] p. I-06747	Belgium	BC Art. 2; 5(1)	
100.	27.01.2000	<i>Dansommer</i>	C-8/98	[2000] p. I-00393	Germany	BC Art. 16(1)	
101.	28.03.2000	<i>Krombach</i>	C-7/98	[2000] p. I-01935	Germany	BC Art. 27(1)	[416], [476]
102.	11.05.2000	<i>Renault</i>	C-38/98	[2000] p. I-02973	Italy	BC Art. 27 (1); 29; 34	[476]
103.	13.06.2000	<i>Group Josi Reinsurance Company</i>	C-412/98	[2000] p. I-05925	France	BC Art. 7.-12	
104.	09.11.2000	<i>Coreck Maritime</i>	C-387/98	[2000] p. I-09337	The Netherlands	BC Art. 17	
105.	05.04.2001	<i>Richard Gaillard</i>	C-518/99	[2001] p. I-02771	Belgium	BC Art. 16(1)	
106.	19.02.2002	<i>Besix</i>	C-256/00	[2002] p. I-01699	Belgium	BC Art. 2; 5(1)	[276], [277], [278], [279]
107.	27.02.2002	<i>Weber</i>	C-37/00	[2002] p. I-02013	The Netherlands	BC Art. 5(1)	
108.	06.06.2002	<i>Italian Leather</i>	C-80/00	[2002] p. I-04995	Germany	BC Art. 27(3)	
109.	11.07.2002	<i>Rudolf Gabriel</i>	C-96/00	[2002] p. I-06367	Austria	BC Art. 13(1)	
110.	17.09.2002	<i>Fonderie Officine Meccaniche Tacconi</i>	C-334/00	[2002] p. I-07357	Italy	BC Art. 5(1);(3)	
111.	01.10.2002	<i>Henkel</i>	C-167/00	[2002] p. I-08111	Austria	BC Art. 5(3)	[189]
112.	14.11.2002	<i>Gemeente Steenberghe</i>	C-271/00	[2002] p. I-10489	Belgium	BC Art. 1(1)	[189]
113.	10.04.2003	<i>Pugliese</i>	C-437/00	[2003] p. I-03573	Germany	BC Art. 5(1)	

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
114.	08.05.2003	<i>Gantner Electronic</i>	C-111/01	[2003] p. I-04207	Austria	BC Art. 21	
115.	15.05.2003	<i>Préservatrice foncière Tiard</i>	C-266/01	[2003] p. I-04867	The Netherlands	BC Art. 1(1)	[189]
116.	09.12.2003	<i>Gasser</i>	C-116/02	[2003] p. I-14693	Austria	BC Art. 17; 21	
117.	15.01.2004	<i>Freistaat Bayern</i>	C-433/01	[2004] p. I-00981	Germany	BC Art. 5(2)	
118.	05.02.2004	<i>DFDS Torline</i>	C-18/02	[2004] p. I-01417	Denmark	BC Art. 5(3)	
119.	05.02.2004	<i>Frahuil</i>	C-265/02	[2004] p. I-01543	Italy	BC Art. 1(1); 5(1)	
120.	27.04.2004	<i>Turner</i>	C-159/02	[2004] p. I-03565	Germany	(<i>anti-suit injunction</i>)	
121.	10.06.2004	<i>Kronhofer v. Maier</i>	C-168/02	[2004] p. I-06009	Austria	BC Art. 5(3)	
122.	14.10.2004	<i>Maersk Olie</i>	C-39/02	[2004] p. I-09657	Denmark	BC Art.21; 25; 27(2)	
123.	28.10.2004	<i>Nürnberger Allgemeine Versicherungs</i>	C-148/03	[2004] p. I-00327	Germany	BC Art. 57	
124.	20.01.2005	<i>Gruber</i>	C-464/01	[2005] p. I-00439	Austria	BC Art. 13	
125.	20.01.2005	<i>Engler</i>	C-27/02	[2005] p. I-00481	Austria	BC Art. 5(1)	
126.	01.03.2005	<i>Owusu</i>	C-281/02	[2005] p. I-01383	Germany	BC Art. 2	
127.	28.04.2005	<i>Paul Dairy Industries</i>	C-104/03	[2005] p. I-03481	The Netherlands	BC Art. 24	[341]
128.	12.05.2005.	<i>Société financière et industrielle de Peloux</i>	C-112/02	[2004] p. I-03369	Germany	BC Art. 12	
129.	26.05.2005	<i>GIE Réunion européenne</i>	C-77/04	[2005] p. I-04509	France	BC Art. 6(2)	
130.	13.10.2005	<i>Scania Finance France</i>	C-522/03	[2005] p. I-08639	Germany	BC Art. 27(2)	
131.	13.10.2005	<i>Klein v. Rhodos Management Ltd.</i>	C-73/04	[2005] p. I-08667	Germany	BC Art. 16(1)	
132.	16.02.2006	<i>Verdoliva</i>	C-3/05	[2006] p. I-01579	Italy	BC Art. 36	
133.	18.05.2006.	<i>Land Oberösterreich</i>	C-343/04	[2006] p. I-04557	Austria	BC Art. 16(1)	[189]

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
134.	13.07.2006	<i>Gesellschaft für Antriebstechnik (GAT)</i>	C-4/03	[2006] p. I-06509	Germany	BC Art. 16(4)	
135.	13.07.2006	<i>Roche Nederland</i>	C-539/03	[2006] p. I-06535	The Netherlands	BC Art. 6(1); 16(4)	
136.	13.07.2006	<i>Reisch Montage</i>	C-103/05	[2006] p. I-06827	Austria	BC Art. 6(1)	
137.	14.12.2006	<i>ASML Netherlands</i>	C-283/05	[2006] p. I-12041	Austria	BR Art. 34(2)	[510]
138.	15.02.2007	<i>Lechouritou</i>	C-292/05	[2007] p. I-01519	Greece	BC Art. 1(1)	[189]
139.	03.05.2007	<i>Color Drack</i>	C-386/05	[2007] p. I-03699	Austria	BR Art. 5(1)	[271], [277]
140.	11.10.2007	<i>Freepport</i>	C-98/06	[2007] p. I-08319	Sweden	BR Art. 6(1)	
141.	13.12.2007	<i>FT.B.O. v. Odenbreit</i>	C-463/06	[2007] p. I-11321	Germany	BR Art. 9; 11	
142.	22.05.2008	<i>GlaxoSmithKline</i>	C-462/06	[2008] p. I-03965	France	BR Art. 6(1)	
143.	02.10.2008	<i>Hassett</i>	C-372/07	[2008] p. I-07403	Ireland	BR Art. 22(2)	
144.	10.02.2009	<i>West Tankers</i>	C-185/07	[2009] p. I-00663	Germany	BR Art. 1(2)	[238], [239], [241], [242] [244]- [246], [249], [249], [250], [252]
145.	12.02.2009	<i>Seagon</i>	C-339/07	[2009] p. I-00767	Germany	BR Art. 1(2)	
146.	02.04.2009	<i>Gambazzi</i>	C-394/07	[2009] p. I-02563	Italy	BC Art. 27(1)	
147.	23.04.2009	<i>Falco</i>	C-533/07	[2009] p. I-03327	Austria	BR Art. 5(1)	
148.	23.04.2009	<i>Draka</i>	C-167/08	[2009] p. I-03477	Belgium	BR Art. 43	
149.	28.04.2009	<i>Apostolides</i>	C-420/07	[2009] p. I-0357	Germany	BC Art.16(1); 34(1); (2); 35(1)	[97], [188], [189], [476], [523]
150.	14.05.2009	<i>Ilsinger</i>	C-180/06	[2009] p. I-03961	Austria	BR 15	
151.	02.07.2009	<i>S.C.T. Industri AB v. Alpenblume</i>	C-111/08	[2009] p. I-05655	Sweden	BR Art. 1(2) (b)	[117]

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
152.	09.07.2009	<i>Rehder v. Air Baltic Corporation</i>	C-204/08	[2009] p. I-06073	Germany	BR 5(1) (b), Reg. 261/2004 Art. 5(1)(c); 7(1) (a); Montreal Conv.	[265], [267], [269], [271], [272], [277]
153.	16.07.2009	<i>Zuid Chemie</i>	C-189/08	[2009] p. I-06917	The Netherlands	BR Art. 5(3)	
154.	10.09.2009.	<i>German Graphics Graphische Maschinen</i>	C-292/08	[2009] p. I-08421	The Netherlands	BR Art. 1(2)	
155.	17.09.2009	<i>Vorarlberger Gebietskrankenkasse</i>	C-347/08	[2009] p. I-08661	Austria	BR Art. 9	
156.	15.02.2010	<i>Car Trim</i>	C-381/08	[2010] p. I-01255	Germany	BR Art. 5(1) (b)	[97], [265]
157.	11.03.2010	<i>Wood Floor Solutions</i>	C-19/09	[2010] p. I-02121	Austria	BR Art. (1) (1);(a),(b)	[265], [277]
158.	04.05.2010	<i>TNT Express Nederland</i>	C-533/08	[2010] p. 04107	The Netherlands	BR Art. 71; CMR Conv.	
159.	20.05.2010	<i>Vienna Insurance Group</i>	C-111/09	[2010] p. I-04545	Czech Republic	BR Art. 24	
160.	07.12.2010	<i>Hotel Alpenhof</i>	C-144/09	[not published yet]	Austria	BR Art. 15(1) (c)	
161.	12.05.2011	<i>Berliner Verkehrsbetriebe</i>	C-144/10	[2011] p. I-03961	Germany	BR Art. 22 (2); 27	
162.	09.06.2011	<i>Electrosteel</i>	C-87/10	[2011] p. I-04987	Italy	BR Art. 5(1) (b),Incoterms	
163.	13.10.2011	<i>Prism Investment</i>	C-139/10	[2011] p. I-09511	The Netherlands	BR Art. 38; 45	[527], [642]
164.	18.10.2011	<i>Realchemie</i>	C-406/09	[2011] p. I-09773	The Netherlands	BR Art. 1	[188], [189]
165.	25.10.2011	<i>Martinez; eDate Advertising</i>	C-509/09; C-161/10	[2011] p. I-10269	Germany; France	BR Art. 5(3)	[96], [281]
166.	17.11.2011	<i>Hypoteční banka</i>	C-327/10	[2011] p. I-11543	Czech Republic	BR Art. 16(2); 59	
167.	12.05.2011.	<i>JPMorgan Chase Bank</i>	C-54/11	[not published yet]	Germany	BR Art. 22(2); 25	
168.	01.12.2011	<i>Painer</i>	C-145/10	[2011] p. I-12533	Austria	BR Art. 6(1)	
169.	19.04.2012	<i>Wintersteiger</i>	C-523/10	Electronic	Austria	BR Art. 5(3)	

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
170.	15.03.2012	<i>Cornelius de Visser</i>	C-292/10	Electronic	Germany	BR Art. 4(1); 5(3)	[281]
171.	21.06.2012	<i>Wolf Naturprodukte</i>	C-514/10	Electronic	Czech Republic	BR Art. 66(2)	
172.	06.09.2012	<i>Trade Agency</i>	C-619/10	[2012] p. I-00000	Latvia	BR Art. 34(1); (2)	[106], [110], [474]-[476], [507]-[520], [528], [529]
173.	06.09.2012	<i>Mühlleitner</i>	C-190/11	[not published yet]	Austria	BR Art. 15(1) (c)	
174.	15.11.2012	<i>Gothaer Allgemeine Versicherung</i>	C-456/11	[not published yet]	Germany	BR Art. 23; 33	[97]
175.	07.02.2013	<i>Refcomp</i>	C-543/10	[not published yet]	France	BR Art. 23	
176.	14.03.2013	<i>Feichter</i>	C-419/11	[not published yet]	Czech Republic	BR Art. 5(1) (a); 15(1)	
177.	11.04.2013	<i>Land Berlin</i>	C-645/11	[not published yet]	Germany	BR Art. 1(1); 6(1)	
178.	16.05.2013	<i>Melzer</i>	C-228/11	[not published yet]	Germany	BR Art. 5(3)	[281]
179.	18.06.2013	<i>ÖFAB</i>	C-147/12	[not published yet]	Sweden	BR Art. 5(3)	[117], [281], [282], [285]
180.	12.09.2013	<i>Sunico</i>	C-49/12	[not published yet]	Denmark	BR Art. 6; 1(1)	[188], [189]
181.	26.09.2013	<i>Salzgitter</i>	C-157/12	[not published yet]	Germany	BR Art. 34(3); (4)	
182.	03.10.2013	<i>Pinckney</i>	C-170/12	[not published yet]	France	BR Art. 5(3)	
183.	03.10.2013	<i>Schneider</i>	C-386/12	[not published yet]	Bulgaria	BR Art. 22(1)	
184.	17.10.2013	<i>Emrek v. Sabranovic</i>	C-218/12	[not published yet]	Germany	BR Art. 15(1) (c)	

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
185.	17.10.2013	<i>OTP Bank</i>	C-519/12	[not published yet]	Hungary	BR Art. 5(1) (a)	[98], [128], [282], [285]
186.	14.11.2013	<i>Maletic</i>	C-478/12	[not published yet]	Austria	BR Art. 16(1)	
187.	14.11.2013	<i>Krejci Lager</i>	C-469/12	[not published yet]	Austria	BC Art 5(1), BR Art 3(1), 5, 22	[274]
188.	19.12.2013	<i>Nipponkoa Insurance</i>	C-452/12	[not published yet]	Germany	BR Art.27; 33; 31; 71	
189.	19.12.2013	<i>Corman-Collins SA</i>	C-9/12	[not published yet]	Belgium	BR Art. 2; 5(1)	[274]
190.	16.01.2014	<i>Kainz</i>	C-45/13	[not published yet]	Austria	BR Art. 5(3)	[373], [375]
191.	27.02.2014	<i>Cartier Parfums</i>	C-1/13	[not published yet]	France	BR Art. 24; 27(2)	
192.	13.03.2014	<i>Brogstter</i>	C-548/12	[not published yet]	Germany	BR Art. 5(1);(3)	[281]
193.	03.04.2014	<i>Hi Hotel</i>	C-387/12	[not published yet]	Germany	BR Art. 5(3)	[281]
194.	03.04.2014	<i>Weber</i>	C-438/12	[not published yet]	Germany	BR Art. 22(1); 27(1); 28(1)	[175]
195.	05.06.2014	<i>Coty Germany</i>	C-360/12	[not published yet]	Germany	BR Art. 5(3)	[281]
196.	01.09.2014	<i>A v. B</i>	C-112/13	[not published yet]	Austria	BR Art. 24	
197.	11.09.2014	<i>Hejduk</i>	C-441/13	[not published yet]	Austria	BR Art. 5(3)	
198.	05.06.2014	<i>Gramsci Shipping</i>	C-350/13	[not published yet]	Latvia	BR Art. 34(1)	[107], [110]
199.	23.10.2014	<i>flyLAL</i>	C-302/13	[not published yet]	Latvia	BR Art. 1(1); 22 (2); 34(1); 35(1)	[108], [186], [188], [189], [220], [520]

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
200.		<i>Gazprom OAO</i>	C-536/13	[case in progress]	Lithuania	(anti – suit injunction]	[31], [217], [250], [295]

2. European Enforcement Order Regulation

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1.	15.03.2012	<i>Cornelius de Visser</i>	C-292/10	Electronic	Germany	Art. 6(1); BR 5(3); 4(1); 26(2); Reg. 1393/2007 Art.1(1); (2), 19; 23(1); Direc. 2000/31 Art.3(1); (2)	[44], [96], [490], [496], [497]
2.	05.12.2013	<i>Vapenik</i>	C-508/12	[not published yet]	Austria	Art. 6(1)(d)	[490]

3. European Order for Payment Regulation

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1.	14.06.2012	<i>Banco Espanol de Crédito</i>	C-618/10	[2012] p. I-00000	Spain	Scope	[63], [490], [494], [495], [504]
2.	13.12.2012	<i>Szyrocka</i>	C-215/11	[2012] p. I-00000	Poland	Art. 4; 7; 9	[490]
3.	21.03.2013	<i>Novontech</i>	C-324/12	[2013] p. I-00000	Austria	Art. 20	[490]
4.	13.06.2013	<i>Sportwetten</i>	C-144/12	[not published yet]	Austria	Art. 6(1)	[490]
5.	04.09.2014	<i>Eco Cosmetics</i>	C-119/13; C-120/13	[not published yet]	Germany	Art. 16.-20	[490], [499], [500], [636]

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
6	27.02.2014	<i>Flight Refund</i>	C-94/14	[case in progress]	Hungary		[128], [161], [216], [490]

4. Taking of Evidence Regulation

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1.	17.02.2011	<i>Werynski</i>	C-283/09	[2011] p. I-00601	Poland	Art. 14; 18	[328], [329]
2.	06.09.2012	<i>Lippens</i>	C-170/11	Electronic	The Netherlands	Art. 1(1)	[326], [328], [330], [335]
3.	21.02.2013	<i>ProRail NV</i>	C-332/11	[not published yet]	Belgium	Art. 1;17	[328], [330], [334], [335], [339], [340]

5. Service of Documents Regulation

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1.	08.11.2005	<i>Leffler</i>	C-443/03	[2005] p. I-09611	The Netherlands	Art. 8(1)	[305], [310]
2.	09.02.2006.	<i>Plumex</i>	C-473/04	[2006] p. I-01417	Belgium	Art. 4.-11; 14	[310]
3.	08.05.2008	<i>Weiss</i>	C-14/07	[2008] p. I-03367	Germany	Art. 8(1)	[44], [306], [310], [315]-[317], [319], [321]
4.	25.06.2009	<i>Roda Golf</i>	C-14/08	[2009] p. I-05439	Spain	Scope of application	[310], [590], [592], [637], [638]
5.	15.03.2012	<i>Cornelius de Visser</i>	C-292/10	Electronic	Germany	Art.1(1); (2); 19; 23(1), Reg. 805/2004 Art.6(1); BR Art.5(3); 4(1); 26(2); Direct. 2000/31 Art.3(1);(2)	[44], [96], [302], [310], [321]

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
6.	19.12.2012	<i>Alder</i>	C-325/11	[not published yet]	Poland	Art. 1(1)	[310], [619]

6. Brussels IIbis Regulation

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1.	27.11.2007	«C»	C-435/06	[2007] p. I-10141	Finland	Art. 1(1)	
2	29.11.2007	«Lopez»	C-68/07	[2007] p. I-10403	Sweden	Art. 3, 6,7	[459]
3	11.07.2008	<i>Rinau</i>	C-195/08 PPU	[2008] p. I-05271	Lithuania	Art. 11(8); 31; 40-42	
4	02.04.2009	«A»	C-523/07	[2009] p. I-02805	Finland	Art. 1(1); 8(1); 20	[446], [580]
5	16.07.2009	<i>Hadadi</i>	C-168/08	[2009] p. I-06871	France	Art.3(1)(b); 64(4)	[458]
6	23.12.2009	<i>Detiček</i>	C-403/09	[2009] p. I-12193	Slovenia	Art. 20	
7	01.07.2010	<i>Povse</i>	C-211/10 PPU	[2010] p. I-06673	Austria	Art. 10(b); 11(8); 47(2)	
8	15.07.2010	<i>Purrucker (I)</i>	C-256/09	[2010] p. I-07353	Germany	Art.21	[461], [466], [467], [471]
9	05.10.2010	<i>J.McB</i>	C-400/10 PPU	[2010] p. I-08965	Ireland	Art. 2(9); (11); 11	
10	09.11.2010	<i>Purrucker (II)</i>	C-296/10 PPU	[2010] p. I-11163	Germany	Art. 19(2)	[466]
11	22.12.2010	<i>Zarraga</i>	C-491/10 PPU	[2010] p. I-14247	Germany	Art. 42	[338]
12	22.12.2010	<i>Mercredi</i>	C-497/10 PPU	[2010] p. I-14309	U.K.	Art. 8; 10;13	[52], [53], [97], [441]-[453], [478], [479]
13	26.04.2012	<i>Health Service Executive</i>	C-92/12PPU	Electronic	Ireland	Art.2,8(1), 21, 23, 33, 34, 55, 56	[576], [640]
14	01.10.2014	«E» v. «B»	C-436/13	[not published yet]	U.K.	Art. 12(3)	

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
15	09.10.2014	«C» v. «M»	C-376/14 PPU	[not published yet]	Ireland	Art. 2(11); 11	
16	12.11.2014	«L» v. «M»	C-656/13	[not published yet]	Czech Republic	Art. 12(3)	

7. Insolvency Regulation

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1	17.03.2005	<i>Commission</i>	C-294/02	[2005] p. I-02175	EC	Art.4(2)(f), 40	
2	17.01.2006	<i>Staubitz-Schreiber</i>	C-1/04	[2006] p. I-00701	Germany	Art.3(1)	
3	02.05.2006	<i>Eurofood IFSC Ltd.</i>	C-341/04	[2006] p. I-03813	Ireland	Art.3(1), 16(1), 26	[393]-[396], [399], [400]
4	12.02.2009	<i>Seagon Deko-Marty</i>	C-339 /07	[2009] p. I-00767	Germany	Art.3(1), BR 1(2)(b)	[49], [389], [412]-[416], [418]-[422], [428]
5	10.09.2009	<i>German Graphics Graphische Maschinen GmbH</i>	C-292/08	[2009] p. I-08421	Netherlands	Art.7(1), 25(2)	
6	21.01.2010	<i>MG Probud Gdynia</i>	C-444/07	[2010] p. I-00417	Poland	Art. 3; 4; 16; 17; 25 26	[415]
7	20.10.2011	<i>Interedil</i>	C-396/09	[2011] p. I-09915	Italy	Art. 3(1); (2)	[400], [402], [407], [408], [410]
8	17.11.2011	<i>Procureur-generaal</i>	C-112/10	[2011] p. I-11525	Belgium	Art. 3(4)(a); (b)	
9	15.12.2011	<i>Rastelli</i>	C-191/10	[2011] p. I-13209	France	Art. 3; 4	
10	19.04.2012	<i>F-Tex</i>	C-213/10	Electronic	Lithuania	Art.3(1); BR Art.1(1);2(b)	
11	05.06.2012	<i>ERSTE Bank Hungary Nyrt</i>	C-527/10	Electronic	Hungary	Temporal Scope BR Art 5(1)	[128], [387]

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
12	22.11.2012	<i>Bank Handlowy</i>	C-116/11	[not published yet]	Poland	Art. 4(2) (j); 27	
13	19.09.2013	<i>Van Breggenhout</i>	C-251/12	[not published yet]	Belgium	Art. 24(1)	
14	16.01.2014	<i>Schmid</i>	C-328/12	[not published yet]	Germany	Art. 3(1)	[49], [421]-[425], [428]
15	04.09.2014	<i>Burgo Group</i>	C-327/13	[not published yet]	Belgium	Art. 3(2); 29(b)	
16	04.09.2014	<i>Nickel & Goeldner Spedition</i>	C-157/13	[not published yet]	Lithuania	Art. 3(1); BR Art. 5(1) (2) (b); 71; CMR Conv.	
17	04.12.2014	«H»	C-295/13	[not published yet]	Germany	Art.3(1)	
18		<i>Lutz</i>	C-557/13	[case in progress]	Germany	Art.13, 14	

8. Rome I

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1	6.10.2009	<i>Intercontainer Interfrigo (ICF)</i>	C-133/08	[2009] p. I-09687	Netherland	1980 Rome Conv.Art.4(1), (4), (5)	[355], [364], [365]
2	15.03.2011	<i>Koelzsch</i>	C-29/10	[2011] p. I-01595	Luxemburg	1980 Rome Conv.6(2)(a)	[355], [361] [362]
3	15.12.2011	<i>Jan Voogsgeerd</i>	C-384/10	[2011] p. I-13275	Belgium	1980 Rome Conv.6(2)	[355]
4	12.09.2013	<i>Schlecker</i>	C-64/12	[not published yet]	The Netherlands	1980 Rome Conv Art. 6(2)	[355]
5	17.10.2013	<i>Unamar</i>	C-184/12	[not published yet]	Belgium	1980 Rome Conv. Art. 3; 7(2)	[355]
6	23.10.2014	<i>Haeger & Schmidt GmbH</i>	C-305/13	[not published yet]	France	1980 Rome Conv. Art.4(2);(4)	[355]

9. Rome II

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1.	17.11.2011	<i>Homawoo</i>	C-412/10	[2011] p. I-11603	U.K.	Art. 31; 32	[135], [368], [370]

10. Legal Aid Directive

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1.	22.12.2010	<i>DEB</i>	C-279/09	[2010] p. I-13849	Germany	Art. 3(1); Art. 47 of Charter	[550], [551], [554], [558]
2.	28.11.2013.	<i>Sociedade Agricola</i>	C-258/13	[not published yet]	Portugal	Art. 3(1); Art. 47 of Charter	

11. Mediation Directive

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1.	27.06.2013	<i>Di Donna</i>	C-492/11	[not published yet]	Italy	Art. 1 (1); 3(a); 5(2); 7(1)	[538]

12. Maintenance Regulation

No	Date of Judgment	Case	Case No.	Reports of Cases No.	Country	Interpreted norm	Reference in Research (para.)
1.	18.12.2014	<i>Sophia Marie</i>	C-400/13, C-408/13	[not published yet]	Germany	Art.1(1), 3, 4, 5	[472]

- Annex may not include all case law. The case name is shorten; it does not indicate the defendant's name in the main proceedings.

