



Présentation / Intervention

2022

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How to cite

BUMBACA, Vito. Habitual Residence in International Family Law - Way Forward. In: Lecture, Private Law Research Centre, Moscow. Moscou. 2022.

This publication URL: <https://archive-ouverte.unige.ch/unige:158918>

Habitual Residence in International Family Law

Lecture, 14 February 2022
Private Law Research Centre, Moscow

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Introductory remarks

- **International (unified) Family Law**
 - **Various fields, often interconnected (proceedings)**
 - **Child protection and parental responsibility (terminology)**
 - Includes ‘protective measures’ and parental authority
 - Hague Child Protection Convention 1996, article 3: “*attribution, exercise, termination or restriction of parental responsibility*”, etc.
 - EU Brussels IIA Regulation, preamble, § 5: “*this Regulation covers all decisions on parental responsibility, including measures for the protection of the child*” **to be read with article 1 § 2**: “*rights of custody and rights of access ..*” - **custody (and access) jurisdiction of child’s HR (article 8)**, but continuing jurisdiction art. 9 (art. 5 HC-96)
 - HC-96 ratified by 53 CS, including the Russian Federation
 - Civil abduction is a strictly related matter (to custody and access)
 - Hague Child Protection Convention 1980, preamble: “*Desiring to protect children internationally from the harmful effects of their wrongful removal or retention*” - **prompt return to child’s HR**
 - Ratified by 101 CS, including the Russian Federation
 - **Adoption**
 - **Habitual Residence of adoptive parents and adoptee (art. 2)**
 - Hague Convention 1993 (ratified by 104 CS, not Russia)
 - No EU Regulation on Adoption

Introductory remarks

- **International (unified) Family Law**
 - **Various fields, often interconnected (proceedings)**
 - **Matrimonial and Partnership (Property) Regimes**
 - Includes liquidation of the ‘regime’ pre- and post- divorce/ separation, and for the purposes of succession
 - New EU Regulations 2016 (eif 2019), applicable to 18 MS
 - Hague Convention 1978 ratified by three States, but law applicable *erga omnes* (**art. 2**); important case law arising from French Courts:
 - **Cour de cassation, civile, Chambre civile 1, 14 mai 2014, 12-29.922:** *Moroccan couple who entered into marriage in Morocco (2001), and divorced in France (2007), the former wife filed for liquidation before the French courts: Moroccan applicable law common nation.*
 - *The Appeal Court considered as relevant for the determination of the spouses’ **first common habitual residence** the following elements: the husband’s professional life; family evidence that both intended to live in France (being also their daughter’s place of birth); and the request and the granting of a residency permit for both spouses; other elements were excluded such as temporary absences for holiday and work, conjugal domicile*
 - **Succession**
 - Hague Conventions 1973 and 1989 (poorly or not at all ratified)
 - EU Regulation 2012, applicable to 25 MS - **recitals 23-24 HR**
 - **Habitual Residence as a general rule** (*arts. 4 juris. and 21 appl. law*)

Introductory remarks

- **International (unified) Family Law**
 - **Various fields, often interconnected (proceedings)**
 - **Marriage and Divorce (no unified instrument on partnership)**
 - Marriage: includes celebration and recognition of marriage
 - Hague Convention 1978 (ratified by 3 CS), article 3 § 1:
 - substantive requirements (law of one spouse's HR is alternative)
 - Divorce: includes legal separation
 - EU Brussels IIA Regulation, article 3: **spouse(s) HR largely applied**
 - EU Divorce Regulation 2010 on applicable law articles 5 and 8:
 - Spouses' common HR (also as an alternative by choice of law)
 - Hague Convention 1970, art. 2, recognition (**petition./ respond. HR**)
 - **Maintenance**
 - In particular: Hague Convention and Protocol 2007 (1956, 1973)
 - Hague Convention: Cooperation and Recovery (i.e. CAs important), **reference to habitual residence** (i.e. arts. 18 and 20) for *modification of previous decision and as a basis for recognition*
 - Hague Protocol: **general rule on applicable law** (art. 3 **creditor's HR**)
 - EU Regulation 2009, art. 3 (jurisdiction only): **creditor/debtor HR**
 - **Asylum (absence of HR)**
 - **art. 6, HC-1996**: physical presence of the child (**Dublin III**)

Introductory remarks

- **International Family Law (work in progress)**
 - **Fields that are not (yet) unified**
 - **Surrogacy**
 - Includes issues relating to child and parental status
 - No EU instrument (but discussions are ongoing)
 - HccH Project on a Protocol for the recognition of foreign judicial decisions on legal parentage arising from ISAs
 - HR is recommended as connecting factor determining indirect jurisdiction: **child's place of birth plus surrogate mother's HR**
 - another proposed element is intended parents' HR when they are recognised as such in the child's place of birth
 - German Federal Court of Justice (*Bundesgerichtshof*)
 - **BGH, Mar. 20, 2019, Docket No. XII ZB 530/17**: *German intended parents and a surrogate child born in Ukraine. The child was brought to Germany. The German civil registry filed suit before the German District Court to register the Ukrainian surrogate mother as the legal mother. Fed. Court: **child's HR in Germany to determine applicable law** - 'centre of their lives' (parent-centered approach)*
 - Infants: assess the parents' **integration in social and family environ.**
 - **Legal parentage or parent-child relationship**
 - HccH Project on the recognition of foreign judicial decisions on legal parentage
 - No EU instrument

Introductory remarks

- **Connecting factors (why their use?)**
 - **Cross-border movements (family, work, asylum)**
 - **Traditional proximity (for int. jurisdiction and applicable law)**
 - **Domicile and Nationality**
 - Domicile is a domestic **legal concept** applying to a transnational dimension
 - I.e. Brussels IIA, art. 3 §1 lit. b; Succession Regulation art. 44: domicile is determined by **internal law**
 - CH: SPILA, article 20; domicile requires **intent on a permanent basis** (ATF 5A_659/2011: no need of habitual character or physical presence at the relevant time) - a person may not have a domicile
 - UK: domicile of origin, domicile of choice, and domicile of dependence; domicile requires **intent on a factual and indefinite basis**, (Agulian and Another v. Cyganik [2006] EWCA Civ 129: place of living is not enough) - a person should have at least one domicile
 - Nationality may not realistically apply to cross-border cases
 - Dual nationals (*on the rise*): conflict of nationalities (**ICJ landmark judgment “Liechtenstein v. Guatemala [6 April 1955]”**) - *dual citizen of Germany and Liechtenstein, Mr Nottebohm, who resided in Guatemala (1905-1943) ... the exercise of protection by more than one State may legally lead to a conflict of ‘contradictory’ assertions*
 - **No effective link**: nationality does not always mean personal proximity - i.e. absence of language skills, social integration
 - **Statelessness**: HR is becoming determinant (Georgia PIL, art. 12, 22)

Introductory remarks

- **Connecting factors (why their use?)**
 - **Cross-border movements (family, work, asylum)**
 - **Personal proximity: integration, ‘best interests’, access to just.**
 - Proximity from the **child’s viewpoint** (Brussels IIA, recital 12)
 - Best interests founded on fact-based proximity: better just. access
 - Proximity from the **incapacitated adult’s viewpoint** (Hague Convention 2000 on the Protection of Adults, ratified by 13 CS, not the Russian Federation)
 - Convention refers to adult’s interests (important UNCRPD analysis)
 - Proximity from the **spouses’ viewpoint**
 - EU Property Regimes Regulations, recital 35: “***genuine connecting factor between (both) the parties and the jurisdiction***”
 - Proximity from the **family’s viewpoint**
 - i.e. Maintenance: **Cour d’appel de Lyon, du 29 juin 2004, 2004/00094 - notion of family residence** (*‘résidence de la famille’*)
 - US “Home State” similar to HR with different minor rules
 - UCCJEA 1997, sec. 102: ‘time-based factor’, **six-month period rule**
 - **Asylum: no integration, urgency**
 - state of arrival - ‘international responsibility’ (i.e. Dublin III)
 - **physical presence** (temporary connecting factor)
 - But: *BVerwG 10 C 50 07 [26 February 2009]* ‘stateless life focus’

International Child Protection

- **How to determine habitual residence?**
 - **Tracing personal proximity: fact-based inquiry**
 - **Comparative case law**
 - Analogous ‘family’ situations
 - **US SC, *Monasky v. Taglieri*, 2020**
 - **Newborn’s HR** may be strictly linked to that of his/ her parents, in particular the ‘primary carer’s’ (*parent-centered approach*, unless abuse); as opposed to the situation of an **adolescent** whose HR should be his/ her own (*child-centered approach*): US CA, 2017 *Blackledge v. Grigorievna* **4-year old child maturity**
 - US Appellate Court refers to CJEU and national cases that present slightly different findings: the fact-based inquiry for the child’s HR in an abduction case may not be analogous for the determination of a child’s HR in a custody case; the tracing time (**seisin, prior to wrongful removal/ retention**) and the parent-child relationship (**domestic abuse, child’s stable environment**) for the ‘**BID**’ may differ ; but indeed abduction and custody are interconnected and in both contexts child’s HR should be guided by proximity with BI
 - Factors, which should be decisive
 - **CJEU, Judgment of 28.6.2018 - C-512/17**
 - *a child was born in Belgium to a Belgian father and a Polish mother. The child and the mother relocated to Poland, notwithstanding the existence of a ne exeat order. CJEU: i.e. ‘child's habitual residence is at the place where the child lived from birth until parental separation.’*

International Adult Protection

- **How to determine habitual residence?**
 - **Tracing personal proximity: fact-based inquiry**
 - **Comparative case law**
 - Analogous ‘family’ situations (**very similar to child cases**)
 - **English Local Authority v. SW and Another [2014] EWCOP 43**
 - *Scottish lady relocated to supported accommodation in England. Mother and stepfather moved her back to Scotland with lack of appropriate care. Local authorities in England file jurisdiction action: Her habitual residence was in England (**stable home and protection environment**); reference was also made to Brussels IIA in that it applies to both adults and children (**BID?**)*
 - **ATF 5A_68/2017**
 - *Adult, living and working in Switzerland, moves to Czech Rep., although he was maintaining links with CH (domicile of his daughters). Swiss authorities take guardianship measure: His habitual residence was in Switzerland (**place of personal relationships compatible with his state of mind**)*
 - Factors, which should be decisive
 - **Circumstantially-based determination (no EU Regulation)**
 - *‘Soziale Integration/ Daseinsmittelpunkt’, ‘Tatsächlichen Lebensmittelpunkt’ (LG Augsburg, 5. Zivilkammer, 30.01.2018 - 054 T 161/18): Adult’s personal integration*
 - Any assessment should consider the **Adult’s own state of mind**

Divorce and Maintenance

- **How to determine habitual residence?**
 - **Tracing personal proximity: fact-based inquiry**
 - **Comparative case law**
 - Analogous ‘family’ situations (**strong interconnection with child custody too, therefore ‘family residence’ is important**)
 - **Tribunale Rimini (IT) [13.04.2015], No. IT-807**
 - *Chinese couple living in Italy with three minor daughters. Mother filed an action before the Italian Tribunal of Rimini for legal separation, sole custody and maintenance obligation: Court concluded for Italian jurisdiction and applicable law based on an overall analysis of the ‘family habitual residence’*
 - **CJEU first ever ruling on Adult’s HR in divorce proceedings**
 - **C-289/21**: Spouse should hold one HR only; priority was given to the **spouse’s professional ties (France)** over the *place of marital life and children’s HR* (Ireland) - then why not HR in other fields?
 - Factors, which should be decisive
 - **CJEU, M P A v. L C D N M T (C-501/20) – ongoing case**
 - *Couple, she Spanish, he Portuguese, was married at the Spanish Embassy in Guinea Bissau. They lived around five years in Guinea Bissau with their children before moving to Togo. Three years following their arrival, de facto separation occurred: CJEU excludes domestic provisions to determine HR as this would otherwise clash with it being **an autonomous concept** - account should be given to ¹⁰ **spouses’ regular presence & settled purpose***

International Successions

- **How to determine habitual residence?**
 - **Tracing personal proximity: fact-based inquiry**
 - **Comparative case law**
 - Analogous ‘family’ situations
 - **‘Johnny Hallyday case’**
 - *French courts excluded family home and adopted children’s HR in California: HR in France based on, inter alia **French lifestyle***
 - **Cour de cassation, Première ch. civile, No. 497 [29 mai 2019]**
 - French-US citizen died in New York. Deceased’s daughter argued for French jurisdiction by virtue of her father’s habitual residence in Paris: HR in New York based on, inter alia **deceased’s actual family life** (i.e. *family members and principal estate in New York*)
 - Factors, which should be decisive
 - **E.E. & K.-D. E. [16 July 2020] C-80/19**
 - *Lithuanian mother and her son moved to Germany. Prior to her death in Germany, she drew up a testament in Lithuania, naming her son as her sole heir. Lithuanian notary refused competence over an apartment in Lithuania: **CJEU held deceased’s HR is where her family and social integration show proximity**; the deceased should have one habitual residence only*
 - Succession Regulation provides, for the first time ever, elements of interpretation in recitals 23-24: **nationality and location of assets may be elements for HR determination** (but multiple nationalities and assets?) ¹¹

Property Regimes

- **How to determine habitual residence?**
 - **Tracing personal proximity: fact-based inquiry**
 - **Comparative case law**
 - Analogous ‘family’ situations (**strong interconnection with divorce and successions too: ‘family residence’ is important**)
 - **EWHC, Chai v. Peng & Others [2017] 792 (Fam)**
 - *The husband was a Malaysian national and domiciliary. The wife was Australian and Canadian, habitually resident in the UK. Couple purchased a house in England, where they separated. She remained in England, he moved to Malaysia. She filed a divorce petition before the English courts. He filed for divorce before the Malaysian courts: UK courts retained jurisdiction based on wife’s HR (i.e. ‘conjugal home’ where children’s rooms were located)*
 - **Cour de cassation, civile, Chambre civile 1, 2012, 12-16.633**
 - *Tri-national couple, Syrian-Greek-French, got married in Syria. Husband filed for divorce and for the determination of their property regime before French courts: spouses’ HR in France (i.e. common settled purpose and children’s place of birth in France)*
 - Factors, which should be decisive
 - **Not yet any judgment on HR under EU Regulations**
 - Court of Appeal of Palma de Mallorca [2019] No. 59: *German-Russian couple got married in Russia and quickly moved to Spain. Spanish divorce judge seised for regime (HR: life roots by settled economic purpose)* - judge referred to art. 26 EU Regulations

Current Issues

- **Absence of habitual residence or two HRs**
 - **How to solve such situations?**
 - **Absence**
 - Particularly succession and child protection
 - **Cour de Justice de Genève, Arrêt DAS/139/2020**
 - *French citizen died in Germany. His domicile was registered in Switzerland. No spouse or children. Brother and sister challenged the succession in Switzerland: Court maintained that the deceased did not hold an HR (nomadic life) - but from EU viewpoint nationality and location of assets may determine HR (EU Succession Regulation)*
 - **NH v. AH, 30 July 2015, High Court of Justice Family Division**
 - *15 year-old son lived in Switzerland, with alternating stays in Zimbabwe, Germany and Australia. Following a dispute with his mother, the child moved to England: UK courts concluded on absence of habitual residence at the time of the hearing under art. 6(2) (nomadic lifestyle), so jurisdiction based on physical ('mere') presence - but what about continuing protection of refugees moving from one State to another? (art. 15.2 of HC-1996, 'substantial connection')*
 - Considerations
 - Rare but increasing situation (**i.e. vulnerable migration**)
 - Legal certainty and predictability require modern connecting factors
 - **Physical presence** is an essential element to determine HR (i.e. CJEU rulings OL v. PQ 2017, UD v. XB 2018), so point of departure to trace 'potential/prospective acclimatization' that is not yet habitual

Current Issues

- **Absence of habitual residence or two HRs**
 - **How to solve such situations?**
 - **Two HRs**
 - Specifically ‘alternate’ and ‘concurrent’ HR
 - **Concurrent (simultaneous)**
 - Concurrent HR is generally excluded (slides 10,11: succession/divorce)
 - In matter of child protection it is also excluded (**Swiss case 5A_877/2020: Belgian-Swiss couple, Belgian domiciliary. Following separation, he lives in France, she lives in Switzerland. Dispute about child’s HR: Swiss Federal Court stated that simultaneous HR is against HC-1980 (instrument is **ineffective**); but indeed **possible to establish two alternate life-settled places** as custody may also be alternated - only if child’s life is regularly conducted in both places (no concurrent HR for commuters, including adults)**)
 - **Alternate**
 - A child may change habitual residence quite easily and rapidly (**Swiss case 5A_21/2019: Belgian-Russian unmarried couple living in Switzerland, where a child was born. Following separation, the mother moves with the child to Russia: Swiss Federal Court maintained that the child’s HR was established in Russia 10 days after their relocation**)
 - But change should be fact-based from the child’s viewpoint at the time of the seisin (i.e. **Z (A Child: Hague Convention app., 2020: Child who was born and lived most of his life with both parents in Australia, was allegedly wrongfully retained by the mother in the UK: Child’s HR in the UK - nursery friends and close extended family** (no parental intent)

Current Issues

- **HR and asylum**

- **Is it asylum ‘responsibility’ affecting HR ‘jurisdiction’?**
 - **In particular, but not only, child abduction**
 - **Swiss case ATF 5A_121/2018**
 - *Child born in Greece, aged 6 months at the moment of the ‘lawful relocation’ with the mother (Iranian refugee) to Finland, then to Switzerland: Swiss Federal Court stated that HR is in Greece (where the father, also refugee, was living), disregarding the period of time spent in Switzerland - i.e. **the child was holding permit in Greece***
 - **CJEU ruling, A v. B, C-262/21**
 - *Child born in Sweden, aged one year at the moment of the alleged ‘wrongful relocation’ to Finland on the basis of Dublin III transfer rules (**asylum previously filed by the couple in Finland**). Father filed for child return to Sweden: CJEU stated that child should remain in Finland regardless of his HR established in Sweden (**namely for custody**)*
 - **US Court of Appeal (2nd cir.), Mota v. Castillo, 2012**
 - *Child entered illegally and lived with her father in the US: No HR in the US by reason of, inter alia **lack of acclimatization and uncertain immigration status** - return order to Mexico*
 - **Cour de cassation, civile, Chambre civile 1, 23 novembre 2016**
 - *Turkish couple got married in Turkey and then escaped to France where they obtained asylum. French Cassat. seised for their regime: **Centre of financial and economic interests** not influenced by refugee status*

Way Forward

- **How to provide an HR unified inquiry?**
 - **Handbook, Protocol**
 - **EU-Hcch**
 - Fragmented operation among various instruments (EU Reg., HCs)
 - **CJEU guidance**: important also for HCs and inter-EU cases
 - Handbook would be easier to adopt and implement, but the decision depends on Hcch 'Special Commission' agenda
 - It should rely on joint EU-Hcch activity, including other actors (i.e. **COE, UNCRC, UNCRPD**, and 'accredited' NGOs such as '*ISS*')
 - **Considerations**
 - '*Family HR*' in interconnected proceedings
 - Comparative case law in analogous situations (also in non-CS)
 - Swiss PILA, art. 85, extending HCs application to non-CS
 - In principle also extending HR interpretation under HCs
 - **General Comment (or Recommendation)**
 - **Role of the UNCRC** (for children but also for parent-child rel.)
 - Habitual Residence determination entails impact on **child's fundamental rights** (i.e. access to justice, family life and personal relationships with both parents, best interests, property rights, right to inheritance, special protection, right to be heard)
 - Possible intervention of the Committee holding '*quasi-judicial power*' (third protocol): **greater uniformity in non-CS**

Way Forward

- **How to better support HR unified inquiry?**
 - **New mechanisms**
 - **Transfer of jurisdiction (Coordination)**
 - For the moment provided in Brussels IIA/ HC-1996 (US practice shows that transfer is also performed in intra-US cases '**Matter of J.D.S. NY Slip Op 20303' Decided on October 1, 2020: New York Surrogate's Court declined jurisdiction and transferred it to the courts of North Carolina based on, inter alia, incapacitated daughter's wish**)
 - Collaborative approach between jud. authorities of States A and B
 - '**BID**' is fundamental in exercising the transfer (*art. 15.1 BIIA*)
 - A further development would be to encourage and allow both courts to **jointly determine HR** - in international family law broadly
 - **Intercountry assessments (NGOs or similar)**
 - In and Out-of-Convention framework
 - Collaborative approach between NGOs (i.e. ISS) and other auth.
 - **Holistic approach**: multidisciplinary approach useful to determine **child's social and family environment** for his/ her development
 - Locates jurisdiction on a **child-friendly basis** (other fields?)
 - Courts are attentive to **child welfare assessments** (*K and T, [2021] EWHC 1525 (Fam)*), but no obligation
 - I.e. HC-96, art. 32: **report on the situation of the child**

Way Forward

- **Human Rights impact on HR**

- **BID**

- **Role of the Strasbourg Court**

- In particular child abduction, but interconnected proceedings
 - **Michnea v. Romania [7 October 2020] Application no. 10395/19**
 - A child was born in Italy. The mother and the child moved to Romania without the father's consent
 - The father filed an application for return under the HC-1980 before the Italian authorities
 - The mother filed for divorce and custody in Romania. Courts pronounced the divorce and awarded sole parental responsibility to the mother, fixing the child's habitual residence in Romania
 - **Strasbourg Court** maintained that in all decisions concerning children, their **best interests are paramount**, including in the framework of HC-1980 and Brussels IIA
 - BID should be located within article 8 ECHR: child's HR was in Italy at the relevant time (prior to wrongful removal), where the child was living with both parents (**CJEU C-512/17**)
 - **Decisive factors**: child's place of birth; place of living after birth; civil status registration and access to health insurance; effective parental life as a family prior to the child's birth; child's integration in a family and social environment - HR should not be glossed with domicile!