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Habitual residence in cross-border family relationships – an Overview

Children and Family Law Seminar, Civil Dept., Family Law Unit, Uni Mail, 12 April 2019,

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Dear Professors, Dear Colleagues,

I wish to thank Professor Cottier and Professor Hanson for this kind invitation. I would also like to express my deep gratitude to the joint team of the Family Law Unit and the Interfaculty Centre of Children's Rights, in particular Johanna Muheim and Christelle Molima for their precious support.

I am very thankful to Dr Nigel Cantwell for taking the time to attend this event and I look forward to his important feedback. I am very honoured by the presence of all those who are here today.

I. Background:

The operation of habitual residence in International Family Law is topical with regard to the determination of international jurisdiction, referring to international competence and applicable law. It is a factual notion introduced by the Hague Conference on Private International Law, intentionally without an international definition being provided. The reason of such '*vacuum legis*' is that habitual residence, as a prevailing connecting factor specifically in the field of child protection, should respond to the better proximity between the beneficiary of the Treaties (i.e. Hague Child Protection Conventions and EU Parental Responsibility Regulation) and the State authorities internationally competent. Increasing international mobility, cross-cultural marriages, migration fluxes may involve children establishing attachments with more than one Country. Therefore other notions, connecting factors, such as *domicile* that is corroborated by an 'artificial or technical definition' requiring a 'permanent intent', and *nationality* that may face remoteness between the child and the State, could hardly assess proximity. Especially in a rapidly evolving context where the 'international settlement' of a child, according to his/her wish, or that of his/her parent/s, in one given Country should be assessable in a particular moment in time so that he or she could access justice in that Country. Access to justice means in the case of cross-border family conflicts as to guarantee parental responsibility and visitation to a child, to allow him/her a harmonious development within a suitable family environment, a parent-child relationship, as far as possible, and that all decisions should be taken in the child's best interests. The principle of proximity should reflect the access to justice in a State that is close to protect the child's interests.²

The Oxford dictionary defines the term 'habitual' as « *something done regularly, constantly or as a habit* ». The Cambridge dictionary defines the term 'residence' as « *the place of staying or living* ». Duhaime's Law dictionary concludes that in accordance with case law from UK, US and Canada taken as references, the term 'habitual residence' refers to « *a place of settled dwelling which constitutes a person's ordinary residence* ». The issue here lies in the existence of 'quasi-definitions' of habitual residence mentioned not only in the dictionaries referred to as basic cultural information but also in some of the national civil codes, private international law acts or even habitual residence acts. This may be considered as contrary³ to what was

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² Brussels II bis, recital 12: « *The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility* ».

³ P. LAGARDE, Explanatory Report on the 1996 Hague Child Protection Convention, § 40: « *The discussion bore only on the desirability of inserting into the text of the Convention, a provision defining, for its purposes, the concept of habitual*

meant within the Hague, notably the entire absence of 'legislative reference' in favour of a pure 'judicial anamnesis'.

The following show evidence of national quasi-definitions or legislative references may better illustrate the current overlapping of habitual residence interpretation as a national connecting factor – '*intra-country habitual residence*' as opposed to the Hague interpretation as an international connecting factor – '*inter-country habitual residence*'. In Switzerland, the PILA/LDIP, article 20.1b defines 'habitual residence' as the place where a: « *natural person has his place of habitual residence in the State in which he lives for an extended period of time, even if this time period is limited from the outset* ». The Manitoba province of Canada defines 'habitual residence' in the domicile and habitual residence act as the place « *in the state and a subdivision thereof in which that person's principal home is situated and in which that person intends to reside [...]. The habitual residence of a child is the state and subdivision thereof where the child normally and usually resides* ». The Serbian Private International Law Act defines 'habitual residence' as the place where: « *1. a person has the centre of his/her vital interests and where that person habitually resides, even in the absence of registration by the competent authority and independent of a residence or establishment permit; 2. [...] regard will be had to all the circumstances of personal or professional nature that show durable connections with the specific State or indicate an intention to create such connections* ». The Russian civil code defines 'habitual residence' as: « *the place, where the citizen resides permanently or most of the time, shall be recognized as the place of his residence* ». This short *tour d'horizon* of 'quasi-definitions' defining habitual residence shows the incongruence, discrepancy, of the operation of habitual residence as a rule determining international jurisdiction and as a rule determining national jurisdiction.

The wish of the Hague States was clearly not to define habitual residence in favour of a whole decentralisation of the legislative power towards the scrutiny of judges. At the national level, multiple attempts to define habitual residence exist. One potential reason for such fragmentation dealing with the operation of habitual residence may lie in the fact that national legislations refer to a wide range of family issues or civil matters where a 'quasi-definition' of habitual residence is required, while habitual residence within the Hague was conceived mainly for matters involving children. This explanation is in my view inaccurate for two main reasons:

1. Habitual residence was initially envisaged in the Hague Convention on Civil Procedure, 14 November of 1896, not dealing with issues pertaining to children.
2. Habitual residence has increasingly been adopted in Hague Conventions and EU Regulations applicable to Adults, notably the Hague Convention on the international protection of Adults of 2000, the EU Regulations on matrimonial regimes of 2016 (*EIF* 2019), Successions of 2012 and Maintenance of 2009. Prior to these instruments, habitual residence applied also in the Hague Convention on the law applicable to matrimonial property regimes of 1978; and in the Hague Convention Concerning the International Administration of the Estates of Deceased Persons of 1973.

Although habitual residence does not represent the main connecting factor consistently in all of the said Treaties, its operation as a general rule determining general jurisdiction (in absence of choice of forum or choice of law) is affirmed: *habitual residence as a rule determining international jurisdiction is in fact prevalent or considered at least as a primary alternative rule over other connecting factors (in absence of choice of forum or choice of law) for both international competence and applicable law.*

Fragmentation lies in the operation and role of habitual residence as a rule determining international jurisdiction and, reversely, as a rule determining national jurisdiction. While dealing with the determination of *international jurisdiction*, habitual residence has to be interpreted 'depending on the circumstances' of

residence. A positive definition had been proposed by the International Union of Latin Notaries (Work. Doc. No 41), but it went against the Conference's tradition and received no support ».

each specific and isolated case – no international definition is provided in any of the mentioned fields of family law, expressly intended at the Hague, in favour of its ‘factual origins’. A ‘quasi-definition’ is, instead, provided in some national laws, influencing the factual determination of habitual residence, therefore of *national jurisdiction*. Fragmentation also refers to the ‘components’ determining habitual residence – reference may vary depending on the circumstances of the case, granting different weight to various components, notably: the *durability or regularity of the stay, centre of vital interests, centre of personal affairs, intention, nationality, socio-economic conditions, parental capacities, schooling, language skills, entourage, integration, parent-child relationship*; sometimes *mere presence* (especially in the case of *unaccompanied minors*)⁴ or *parental prospects* (especially in the case of *newborns*) may suffice.

These components arose from the scrutiny of the judge, notably from the Court of Justice of the European Union. It is clear that national ‘quasi-definitions’ may not include all these components and national judicial anamnesis of an ‘intra-country’ or an ‘intercountry’ habitual residence may refer to additional factors other than the ones mentioned in the national legislative reference.⁵ In this regard, this research aims to propose:

1. A better harmonisation of such components and advocates for their uniform assessment (providing primary relevance to *key components*);
2. A uniform and harmonised operation of habitual residence towards consistency in international family law as to the determination of international jurisdiction (ensuring that habitual residence reflects proximity);
3. To reduce judicial fragmentation from regional and national courts by referring to ‘key components’ through a legislative approach (i.e. *Protocol, General Comment*), excluding a too technical or artificial international definition of habitual residence.

Habitual residence as a rule determining *national jurisdiction* may also play an ‘alternative role’. Notably the Swiss PILA/LDIP and UK conflict of law rules consider the notion of domicile as a primary alternative connecting factor, although habitual residence may often apply in absence of domicile.

The above proposals aim to support a better and predictable determination of habitual residence when it comes into operation within national legal systems, although as a secondary alternative rule.

II. Practical case:

⁴ Regulation N° 604/2013 (Dublin III) establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), art. 2 (j): « *‘unaccompanied minor’ means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member States* ».

⁵ S. OTHENIN-GIRARD, commentaire ATF 5A_809/2012 [8 janvier 2013], 14: « *On ne peut que se réjouir de constater que le Tribunal fédéral n’hésite pas à citer la jurisprudence de la Cour de justice de l’Union européenne [...]. Une forme de convergence entre la notion de résidence des droits nationaux, des conventions de La Haye et des règlements européens utilisant le critère de la résidence habituelle nous paraît souhaitable, dans un but d’harmonie, pour autant qu’aucune différence fonctionnelle n’y fasse obstacle; une telle harmonisation est de nature à réduire les conflits et à simplifier la compréhension et le fonctionnement du système, dans les relations avec les pays de l’UE notamment, situations auxquelles des parties seront fréquemment confrontées en Suisse* ».

Jean-Philippe Smet (Johnny Hallyday) is a French national who settled in California for eleven years with his fourth spouse, Laetitia, and their two adopted children (adoption occurred in France), Jade and Joy of Vietnamese nationality respectively of 13 and 9 years old. During the years preceding his death, Mr Smet travelled and lived in the Caribbean, in different States of US, in Switzerland (Gstaad) and, ultimately, in France, Nanterre, where he received medical services in relation to his lung cancer, which is also the place of death and funeral. Mr Smet held assets (movables and immovables) in California, Switzerland, France and the Caribbean, as well as conspicuous royalties deriving from his songs. Laetitia is the beneficiary of Mr Smet's entire estate in favour of whom a trust was set up under the law of California. Jade and Joy are already mentioned as beneficiaries in Mr Smet's *Will* (although their access to Mr Smet's estate is subject to their mother's death, and supposing that she will not have additional children) concluded under the law of California (which does not provide reserved share), where all the beneficiaries are settled. The two adoptees are enrolled in a French school in California. David Hallyday and Laura Smet, the first two adult children of Mr Smet, have been expressly excluded from his *Will* and are currently filing a suit in France to recover their assets under French law (which provides reserved share). The French Court has temporarily frozen Mr Smet's assets in France (mainly royalties and immovables) until it decides to retain or decline competence over the case. In the meantime, the Superior Court of California seised of the matter by the Bank of America (administrator of the trust organised by Mr Smet before his death in favour of Ms Laetitia Smet) has rejected the transfer of French assets to the American trust until the French Court issues a decision concerning the succession competence.

A. Habitual residence at the time of death and related assessment in accordance with the Succession Regulation of 2012

The question of habitual residence, notably Mr Smet's *habitual residence at the time of death* is relevant. The French Court will have to apply the indicative components given by the EU Succession Regulation of 2012 (relevant by its universal applicability), recitals 23-24 to determine whether Mr Smet's habitual residence was in France at the time of death. Conducive elements for the French Court may be the *duration and regularity of his presence, conditions and reasons for that presence, which should reveal a close and stable connection with France or that a close and stable connection was maintained with the State of origin* by virtue of the *centre of his family interests and the location of his social life. Nationality and the location of main assets* may orient the determination when the beneficiary is often travelling in different States without 'settling permanently' in any of them – in absence of choice of court and/or choice of law, the applicable law should be the one of the State of habitual residence (recital 25; art. 21.2) unless (but this is a clear exception and not a subsidiary connecting factor) the deceased was *manifestly more closely connected with another State*, notably the one prior to the consequent move to a (new) habitual residence, 'fairly recently' before his death.

B. Duration and regularity of presence

Mr Smet was 'permanently settled' in California, based on *duration and regularity of presence*. The conditions of that 'settlement' were the presence of his current family, in particular his wife and their two adoptees, but also because US was his main place of working activities as well as fiscal residence – Mr Smet was preparing and recording his songs as well as planning his tours from US (Los Angeles).⁶ In spite of Mr Smet's travels (for both leisure and work), from the evidence it appears clear that his intention had been to live in

⁶ RTL: documented interview of Mr Smet : « *c'est ici (US) que je répète avec mes musiciens, que j'enregistre mes disques, que je prépare mes tournées et mes spectacles* ».

California since 2010, and more definitively in 2013,⁷ to conduct a simple family life⁸ with his spouse and their two adoptees, Jade and Joy, who were enrolled at school there. There was then a clear intention to ‘settle permanently’ in California – in accordance with recital 24, *settlement* should exclude the nationality and location of main assets as ‘decisive habitual residence components’ applicable only in absence of ‘settlement’ in any of the States where Mr Smet travelled. The only reason for Mr Smet’s presence in France is the consequent move for medical reasons which ended in his death. This may also lead to the conclusion that Mr Smet was more closely connected with the US, notably California.

C. Family interests and social life

The centre of his family interests and social life is difficult to assess in the case of a world-famous idol, and the analysis should be separated. If we consider that the wish of Mr Smet was to leave his assets to his spouse, subsequently in favour of his adoptees, who are all currently living in California (except for the period of Mr Smet’s funeral), we should conclude that the interests of his ‘current’ family are located in the US. Thus, in addition to conjectural elements determining the testator’s intent⁹ as that could be the language of his last *Will* under the law of California¹⁰ as well as the establishment of a ‘family trust’ under the same law administered by Bank of America domiciled in the US. The question of social life proves complex. It appears that Mr Smet was known more in France than anywhere else. Therefore, in my view, this element could be used to assess habitual residence in both States (considering that he was quite well-known also in the US), but cannot be deemed decisive as it would be aleatory in such circumstances.

D. Familial habitual residence

Two other elements could be relevant, notably the adoption of Jade and Joy which took place in France and the French school in California to which they are enrolled. Children’s habitual residence can sometimes be relevant to assess the deceased’s habitual residence, notably if the beneficiary prefers that the ‘opening of the succession’ takes place in a State other than the surviving spouse and children’s habitual residence – ‘familial habitual residence’. This is true in particular if the intention of the deceased is to disinherit his children who may face an ‘instable economic situation’. However, in this case it appears clear that the intention of Mr Smet was to avoid an instable economic situation of his two minor children (as opposed to his adult children who are indeed financially stable)¹¹ and that although adoption took place in France, the family moved straight after to California. The question of the ‘French’ school, might not be relevant in this case as the location is still California and the entourage of Jade and Joy could be multicultural composed of French and American speaking people, typical of international expats (more or less famous).

E. Physical presence

The question of physical presence refers to Switzerland and the Caribbean where Mr Smet lived temporarily. This period of time, not corroborated by other components, except for a potential first *Will* created under

⁷ RTL: « Fasciné par les États-Unis dès son plus jeune âge, le rockeur a, très tôt, multiplié les allers et retours avant de s’installer à Los Angeles une partie de l’année au début des années 2010 puis définitivement en 2013 ».

⁸ RTL: « L’Amérique fait partie de ma culture. De plus, ici, je suis tranquille : je peux sortir dans la rue, mes filles vont à l’école normalement. C’est un endroit où je peux me ressourcer, penser et écouter la musique américaine ».

⁹ S. J. TARBOE, *Interpreting a Testator’s Intent from the Language of Her Will: A Descriptive Linguistics Approach*, Wash. U. L. Q., Vol. 80, 2002, p. 1389.

¹⁰ Bilan: « Ni le Point ni RTL ne reproduisent in extenso le document en question. Selon eux, il a été rédigé en anglais en juillet 2014 à Los Angeles, devant notaire ».

¹¹ Bilan: « Je ne prends expressément aucune disposition dans ce testament ou dans aucun autre document à l’intention de mes enfants David Smet et Laura Smet, auxquels j’ai déjà fait des donations par le passé ».

Swiss law and the presence of minor assets, seems to exclude Mr Smet's 'settlement' and the establishment of habitual residence in either place.

F. Habitual residence in a third State: concurrent jurisdiction

The Succession Regulation (article 10.1a) provides that even though the deceased's habitual residence is not in a Member State, the State of nationality and location of assets has nevertheless jurisdiction over the succession as a whole. This rule might be controversial because it is based upon a coordination process between two States. In the case of California and France, this coordination has already happened in the past: notably a *professio iuris* in favour of the law of California, according to which 'reserved share' is absent, is not contrary to the French public order if children are not in a situation of *precarité économique*.¹² Therefore there should not be any issue of jurisdiction once the last habitual residence of Mr Smet is determined – the courts of California have already stayed proceedings in favour of the French Courts until they decide on the determination of habitual residence.

In addition, just as a matter of clarification in the event the law of California will apply: in the case of choice of law, the law of California (Probate Code, section 21101-21103) does not apply by virtue of connecting factors to cross-border inheritance issues but it does apply in accordance with the intent of the 'maker' (by referring to the deceased) through choice of law and unless contrary to the rights of the surviving spouse to community and quasi-community property, or any public policy of California.¹³

G. Precedent « installation ancienne et durable »

The French Court of Cassation has already established the following with regard to the applicable law of California in the famous 'Jarre case': « *Et attendu qu'après avoir énoncé que la loi applicable à la succession de Maurice X... est celle de l'Etat de Californie, qui ne connaît pas la réserve, l'arrêt relève, par motifs propres, que le dernier domicile du défunt est situé dans l'Etat de Californie, que ses unions, à compter de 1965, ont été contractées aux Etats-Unis, où son installation était ancienne et durable et, par motifs adoptés, que les parties ne soutiennent pas se trouver dans une situation de précarité économique ou de besoin; que la cour d'appel en a exactement déduit qu'il n'y avait pas lieu d'écarter la loi californienne au profit de la loi française; que le moyen n'est pas fondé* ». Reference to a *past and durable settlement* may be adopted in the 'Hallyday case', which should lean towards California.

III. Selected topics:

A. Concurrent habitual residence

The question of fragmentation brings some practical issues with regard to the 'effectiveness' of habitual residence and its components.

The first issue refers to the case of two coexistent habitual residences or concurrent habitual residence. Practice¹⁴ shows that it is possible for a child to establish 'attachments', bonds, with more than one country (rarely more than two). However, some considerations arise:

¹² Paris High Court (TGI), Court of Appeal, and Court of Cassation – Decision issued on 2 December 2014, 11 May 2016 and 26 September 2017, Case no. 10/05228, 14/26247 and 1005.

¹³ In the Court of Appeal of the State of California (Second Appellate District), *Summer Tompkins Walker v. Debra B. Ryker and Kristine McDivitt Tompkins, as Trustees* [28 September 2018].

¹⁴ ATF 5A_1021/2017.

- Practice refers particularly to joint custody in the case of *newborns* or infants whose habitual residence may be affected by their prospective parental intentions – *often conflicting intentions*.
- Practice excludes simultaneous habitual residences, but it highlights the possibility of ‘alternative’ residences only in absence of specific components that could not be conducive to assess the term ‘habitual’.
- When the 1980 Hague Convention on International Child Abduction comes into operation, the coexistence of two habitual residences may circumvent and elude the scope of the said Convention, which is to ensure the child return to his/her habitual residence prior to wrongful removal or retention, resulting in the ineffectiveness of the Convention.
- Such coexistence may entail ‘forum shopping’ whereby one parent, by knowing that the child is equally considered habitual resident in two countries, will retain child presence in one State (potentially that corresponding to the parental nationality) in order to freeze competence therein.

The case of *concurrent habitual residence* should be interpreted in such a way that the *effectiveness of habitual residence* should be first assessed through specific ‘key components’ in order to conclude (or exclude) that there is enough *relevance, grounds and weight* to consider two States each of which as ‘fora’ of habitual residence. Reversely to consider one State as ‘principal habitual residence’ and the other one as ‘secondary’ or ‘temporary’ (habitual) residence. In other words, the coexistence of two habitual residences should be considered as the exception. The ‘umbrella principle’ should be first to assess the available forum at the beneficiary’s habitual residence or ‘principal (habitual) residence’. Notably in the case of children ‘key components’ should be *schooling, durability of the stay from birth until parental separation, language skills, entourage, level of present and future integration*. The *prospective parental intentions* should be interpreted only in the child’s best interests ensuring the parent-child relationship with both parents, as far as possible. In the event of the unavailability of the ‘general forum’ at the principal habitual residence, then the competence could be retained at the ‘secondary (habitual) residence’ or ‘temporary (habitual) residence’.

The 1996 Hague Child Protection Convention provides two alternative solutions:

1. *Jurisdiction on physical presence* (article 6.2) which refers to children whose habitual residence cannot be established – physical presence replaces (does not exclude) habitual residence.
2. *Concurrent jurisdiction* (article 11-12) relating to urgent and provisional jurisdiction at the place of child’s presence whenever the ‘general forum’ at the child’s habitual residence is not available.

The same is for Brussels IIa, article 13.1 and 20, and the Hague Convention on the international protection of adults, articles 6.2 and 10-11.

The Swiss PILA/LDIP provides the forum of necessity in article 85.3 whenever a Swiss national establishing habitual residence in a third State cannot access justice in that place (i.e. *the implementation of protective measures*).¹⁵

¹⁵ 5A_795/2016 : § 6.1: « L’art. 85 al. 3 LDIP dispose que les autorités judiciaires ou administratives suisses sont en outre compétentes lorsque la protection d’une personne ou de ses biens l’exige. Il s’agit d’une compétence subsidiaire, comparable au for de nécessité. Elle permet à l’autorité du lieu d’origine d’intervenir, en cas de besoin, pour protéger un ressortissant suisse établi à l’étranger, même si la mesure risque de ne pas être reconnue dans le pays de la résidence habituelle, y compris dans les situations ne présentant pas un caractère d’urgence. Cette disposition permet ainsi aux autorités suisses de prendre des mesures à l’égard d’enfants domiciliés à l’étranger qui ont besoin de protection, lorsque les autorités de l’État de leur résidence habituelle négligent de le faire. Il s’agit, au premier chef, de personnes qui ont leur résidence habituelle dans un État non contractant et sont de nationalité suisse. La lacune de protection à l’égard de mineurs dont la résidence habituelle ne se situerait pas dans un État contractant de la CLaH96 ou de la CLaH61 peut ainsi être résolue [...] ».

Another potential derogation to the operation of habitual residence would be the ‘transfer of jurisdiction’, provided in all the said Treaties, in favour of ‘more appropriate fora’ based on the child’s or adult’s best interests above all.

In the case of adults, the coexistence of two habitual residences could be a true reality especially in the case of expats having established a significant cross-border connection with more than one country: either by virtue of more than one *family home*, or *personal abode*, or *economic and social relations*. The Succession Regulation tries to deal with the issue of adults travelling in more than one State without settling permanently by granting significant weight to the *nationality* and *presence of main assets* of the deceased (recital 24) – a question which arises is whether the term ‘settling permanently’ is appropriate: as in both international and national operation of habitual residence the ‘permanent nature’ or ‘permanent intent’ represent a prerogative more compatible with the determination of domicile as opposed to habitual residence. Here, as for children, the assessment of an ‘effective’ or ‘principal habitual residence’ identifying the term ‘habitual’ through specific ‘key components’, should be relied on and it is advised in this research.

B. Absence of habitual residence

In the absence of habitual residence, ‘physical presence’ may operate as an alternative connecting factor. This is the particular case of unaccompanied minors or children not establishing sufficient grounds for jurisdiction at the time of access to justice (access to justice refers for instance to *the implementation of protective measures*). The 1996 Child Protection Convention, article 6, provides a forum at the ‘place of physical presence’. The same is for Brussels IIa, article 13, and the 2000 Hague Adults Protection Convention, article 6.

The absence of habitual residence at the seisin does not impair the beneficiary’s right to establish habitual residence in the future. However, in the specific case of the deceased, the absence of habitual residence could lead to controversial results, contrary to the predictability and certainty of Private International Law. Two illustrative cases are the following:

1. At death, the original attempt and wish of the deceased to plan his/her estate and predict international jurisdiction at the place of his/her habitual residence may not be respected (in absence of either choice of forum or choice of law) whereby the EU rules may reversely grant:
 - *international competence* in favour of the State of the nationality or wherein the main assets are located (Succession Regulation, recital 24).
 - *applicable law* in favour of a State with which the deceased was *manifestly more closely connected* (Succession Regulation, recital 25 and article 21.2) – this is a so called ‘exception clause’ which rarely applies under national laws.¹⁶
2. In the event of absence of habitual residence due to the impossibility of providing its determination, the effects arising out of the ‘opening of the succession’ towards the beneficiaries of the estate might differ, notably concerning the applicability of a ‘reserved share’ (just to cite Johnny Halliday’s case: California does not provide ‘reserved share’ and France does)¹⁷, or the applicability of inheritance taxes as well as clawback.¹⁸

C. Inter-field operation of habitual residence and ‘Familial habitual residence’

¹⁶ A. BONOMI/ P. WAUTELET, Commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012, second ed., Bruylant, 2016, p. 314.

¹⁷ Civil Code, article 912.

¹⁸ Under the law of England and Wales clawback does not apply.

The scope of the operation of habitual residence is likely to be the same in the whole area of family law, notably that of assessing and reflecting proximity in the beneficiary's interests. However, the components of habitual residence may vary depending on children and adults' contexts. In the case of adults, some 'specific child-oriented components' will not apply (i.e. schooling) and the interpretation of some 'child-oriented' components will apply differently, so reformulated as 'adult-oriented components'.

Careful consideration shall be given to the following components¹⁹. Notably:

1. the durability of the stay that could refer generally to 183 days corresponding to fiscal residence²⁰:
(i) for successions contexts this would be relevant only if death occurs during a working period or if death occurs, based on evidence, while the deceased has regularly chosen to reside for 183 days in one given State (*temporary absence such as holiday, temporary visits including medical, training, educational periods, occasional affairs not supported by additional elements shall be excluded*); (ii) for other contexts such as divorce or matrimonial regimes this rule could apply as provided in the Russian civil code, sec. 20.1, or at least considered a valuable element as according to the Canadian, Australian or New Zealand law).
2. Present and future social life (meaning integration) based on the previous, or present, working environment: « *centre de vie* ».
3. Intentions based on (personal or patrimonial) interests and affairs (i.e. *family home, presence of immovables, celebration of marriage, investments of any type with the purpose to settle therein*).
4. Family environment, presence of spouses and children in relation to their complementary integration.
5. An additional element that may render adults' habitual residence easier to determine, compared to that of children, is that their right to be heard (except for cases involving succession) cannot be opposed for immaturity of opinion given their age, including for incapable adults.²¹

The Succession Regulation provides some guidance, a 'quasi-definition' which represents a step forward in the methodology applicable to assess habitual residence. The Brussels Ila Regulation already referred in its recital 12 to a potential 'orienting definition', although somewhat short.²² The Succession Regulation is the first Treaty that attempts to indicate the specific components of habitual residence, mentioned in recitals 23-24.²³ However, the indication of an assessment dealing with « *the circumstances of the life of the deceased during the years preceding his death* » may lead to controversial and unpredictable results. In fact, an adult may have established important attachments in different Countries during that period of time whose length

¹⁹ 5A_68/2017, § 2.3: « [...] il faut une certaine intégration dans le (nouveau) lieu de séjour; que sont des indices en la matière la constitution d'un cercle d'amis, un intérêt pour la vie politique et une participation à la vie sociale du lieu, l'existence en celui-ci de relations familiales et professionnelles, la connaissance de la langue [...] »; JO v GO and Others [2013] EWHC 3932 (COP): « *habitual residence is in essence a question of fact to be determined having regard to all the circumstances of the particular case. Habitual residence can in principle be lost and another habitual residence acquired on the same day* ».

²⁰ A. BONOMI/ P. WAUTELET, p. 311: « *Enfin, la résidence habituelle coïncide souvent avec le domicile fiscal, critère généralement retenu tant dans les lois fiscales nationales que dans les conventions de double imposition afin de déterminer l'assujettissement à l'impôt sur les successions. Cela favorise le traitement unitaire des aspects civils et fiscaux de la succession* ».

²¹ European Court of Human Rights, H.F. v. Slovakia December 2003, N. 54797/00.

²² Brussels Ila, recital 12: « *The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility* ».

²³ B. HESS/ C. MARIOTTINI/ C. CAMARA, Parlement Européen, 2012, p. 10: « *the place where a person has been registered to live; the place where a work permit is issued; the place of physical presence; the centre of interest of family and social life; the place where the deceased's main assets are located; the place where the deceased's creditors are located; the place where all or the majority of the heirs live. All these factors can be relevant, nonetheless none of them is decisive* ».

appears excessively extended and ambiguously imprecise. In addition to that, *nationality* and *presence of assets* may be 'key elements' in directing the determination of habitual residence in one State 'disempowering' the support of additional factors – the issue of bi-nationals and people owning various multi-national estates remaining unresolved.²⁴

In the case of an adult surrounded by family, importance should be addressed to the 'beneficiaries' of the matrimonial regimes or estate. Especially in the case of minor children or infants, where the criterion of *precarité économique*²⁵ should be considered towards ensuring their right to property²⁶ and wealth as well as their harmonious development, all being fundamental rights enshrined in the Human Rights protective legal framework. Generally, in order to determine habitual residence in succession contexts, it might be useful to consider an overall family assessment – *familial habitual residence* – to determine the 'family attachments' with a given State as provided in the Succession Regulation.²⁷

D. Moment freezing the determination of habitual residence

The question of the moment according to which habitual residence shall be determined is relevant.

In issues relating to children, Brussels IIa gives significant guidance (absent in the 1996 Hague Convention) by mentioning in article 8.1 that competence is frozen in the State where the child is habitually resident at the *time of seisin*. The '*formula*' is completed by introducing the principle of *continuing jurisdiction* (similarly considered in the US Uniform Child Custody Jurisdiction and Enforcement Act) which retains competence – *for three months and for modification of access rights and return orders in the context of international child abduction* – in favour of the same State until the child has changed habitual residence.

In the Swiss Private PILA, article 59.1b, the moment to determine competence in divorce matters refers (in case domicile is not available) to a *one-year period of residence* in Switzerland, which denotes habitual residence.²⁸

In the case of adults, instead, a controversial example is given by the Matrimonial regimes' Regulation where in presence of a choice of forum (which may refer to choice of law) or choice of law provided in a prenuptial agreement, spouses may refer to the competence or law of their habitual residence *at the time of the agreement* (article 22.1a). However their habitual residence might have changed *at the time of the dispute* relating to the managing and liquidation of their assets rendering their previous choice ambiguous (in absence of proximity). An additional example concerns absence of choice of law where the determination of the applicable law refers to the *first common habitual residence after the conclusion of the marriage* (article 26.1), while the assessment dealing with the determination of competence refers to the *common habitual residence at the seisin* (in absence of concentrated jurisdiction pursuant to article 4, 5). The Matrimonial

²⁴ Succession Regulation: « *Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances* ».

²⁵ Cour de Cassation, chambre civile 1, N° de pourvoi: 16-13151 : « *Mais attendu qu'une loi étrangère désignée par la règle de conflit qui ignore la réserve héréditaire n'est pas en soi contraire à l'ordre public international français et ne peut être écartée que si son application concrète, au cas d'espèce, conduit à une situation incompatible avec les principes du droit français considérés comme essentiels; [...] Et attendu qu'après avoir énoncé que la loi normalement applicable à la succession est celle de l'Etat de Californie, qui ne connaît pas la réserve héréditaire, l'arrêt relève qu'il n'est pas soutenu que l'application de cette loi laisserait l'un ou l'autre des conjoints Y..., tous majeurs au jour du décès de leur père, dans une situation de précarité économique ou de besoin, [...]* ».

²⁶ Article 1, Protocol 1 to the European Convention on Human Rights.

²⁷ Recital 24: « *[...] depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located [...]* ».

²⁸ B. DUTOIT, Commentaire de la loi fédérale du 18 décembre 1987, art. 59.

regimes' Regulation does not advocate, as opposed to the Succession Regulation, for *coincidence or parallelism between forum and ius*. Reversely, the said Regulation provides 'concentrated jurisdiction' (article 4, 5) ensuring that the forum of succession, or divorce, is also competent over matrimonial regimes. In spite of the innovation brought by the Regulation, an incongruence is noted in this respect: the Succession Regulation referring to the law of the deceased's habitual residence *at the time of death* (Succession Regulation, article 21.1) is incongruent with the principle of the 'spouses' first common habitual residence' reiterated above in the Matrimonial regimes' Regulation.²⁹

The importance to correctly assess habitual residence at a particular moment in time, through specific components, responds to a question of ensuring better predictability.

IV. Conclusion:

This research deals with the selected topics mentioned above from an international perspective in support of Treaties. It advocates for the importance of providing uniformity in the components while determining habitual residence, and therefore favouring a harmonised operation of habitual residence.

The question of the determination of habitual residence may be affected depending on:

1. *The particular moment, field of family law* (adults or children).
2. *International competence / national competence*.
3. *Applicable law*. The question of applicable law is complex, especially in cases involving adults: the weight given to habitual residence may change in presence or absence of (i) a choice of forum – which often refers to the existing choice of law (i.e. Matrimonial regimes and Successions); (ii) a choice of law. Nonetheless, the general rule, or primary alternative rule, is that of habitual residence in the whole area of international family law in absence of party autonomy.³⁰

The research approach applied to face such selected issues refers to the comparative analysis of international and national case law in order to assess the typology of components adopted under the scrutiny of the national or regional judge (i.e. CJUE), and it advocates for better predictability and certainty of law as to the determination of habitual residence. The assessment of clear 'key components' (and secondary components) aims to guarantee uniformity³¹ dealing with the operation of habitual residence as an international rule determining international jurisdiction – an 'intercountry habitual residence'. Moreover, it proposes to determine the *effectiveness* of habitual residence in favour of the proximity between the beneficiary of the Treaties (beneficiary of international justice) and the State entitled to protect the beneficiary's interests by virtue of a significant and realistic nexus³² – 'effective habitual residence'.

This research deals with innovative challenges such as the international protection of adults, unaccompanied minors, surrogacy, right to property on behalf of children, scenarios involving international civil servants.

Thank you very much for your attention and I look forward to receiving your very constructive feedback.

²⁹ A. BONOMI/ P. WAUTELET, p. 311.

³⁰ M. ZHANG, Habitual Residence v. Domicile: A Challenge Facing American Conflict Of Laws, *Maine Law Review*, Vol. 70, No. 2, 2018, p. 162.

³¹ *Ibid.*

³² *Ibid.*